

**BEFORE THE
CALIFORNIA AIR RESOURCES BOARD**

Association of Irrigated Residents, California)
 Communities Against Toxics, California)
 Environmental Rights Alliance, Center for)
 Community Action and Environmental Justice,)
 Center on Race, Poverty & the Environment,)
 Coalition for a Safe Environment, El Quinto Sol)
 de America, Fresno Metro Ministry, Global)
 Community Monitor, Grayson Neighborhood)
 Council, Greenaction for Health and)
 Environmental Justice, Pacoima Beautiful,)
 Physicians for Social Responsibility, Society)
 for Positive Action, Inc., Tri-Valley CARES,)
 West County Toxics Coalition, Bradley)
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Commenters,)

TO)

California Air Resources Board, Mary Nichols,)
 Chair, Daniel Sperling, Dorene D’Adamo,)
 Barbara Riordan, John Balmes, M.D., Lydia)
 Kennard, Sandra Berg, Ron Roberts, John Telles,)
 M.D., Ronald Loveridge)

COMMENTS REGARDING
 ARB’S FAILURE TO ABIDE BY
 THE LAW IN ITS PROPOSED
 AB 32 SCOPING PLAN AND
 FUNCTIONAL EQUIVALENT
 CALIFORNIA ENVIRONMENTAL
 QUALITY ACT DOCUMENT

December 10, 2008

Dear Chairman Nichols and Members of the Board:

The Center on Race, Poverty & the Environment (“CRPE”) submits these comments regarding the AB 32 Proposed Scoping Plan and Functional Equivalent Document (“FED”) under the California Environmental Quality Act on behalf of itself and the above-captioned organizations and individuals. It is significant that the vast majority of signatories – including Martha Dina Arguello, Dr. Henry Clark, Luke W. Cole, Caroline Farrell, Chione Flegal, Tom Frantz, Margaret Gordon, Marlene Grossman, Shabaka Heru, Angela Johnson-Meszaros, Jesse N. Marquez, Rosenda Mataka and Jane Williams – are members or alternate members of the ARB’s AB 32 Environmental Justice Advisory Committee, although they file these comments as individuals and not as committee members.

CRPE represents a number of low-income communities and communities of color throughout California, primarily in the central San Joaquin Valley. Today, these communities bear a disproportionate share of California’s environmental and public health burdens. If this pattern remains unaltered, these communities will also disproportionately suffer the impacts of both climate change and California’s response to climate change. ARB has missed an important opportunity to analyze the environmental and environmental justice impacts of its policy choices for implementing the Global Warming Solutions Action of 2006 (“AB 32”), in violation of State law.

This letter is divided into three parts. The first part outlines ARB’s failure to comply with the requirement of Health and Safety Code §§ 38500 et seq. The second part of the letter opposes ARB’s environmental analysis in the Functional Equivalent Document (FED) pursuant to the California Environmental Quality Act (CEQA), Public Resource Code §§ 21000 et seq. and its guidelines, 14 CCR §§ 15000 et seq. (CEQA Guidelines). In the third section, we lodge a complaint based on procedural irregularities at the ARB hearing on November 20, 2008, as the ARB failed to meaningfully include the public at that hearing.

I. ARB’S PROPOSED SCOPING PLAN VIOLATES AB 32.

The Legislature recognized the significant impacts borne by environmental justice communities when it passed the California Global Warming Solutions Act of 2006 (“AB 32”). AB 32 specifically recognizes that certain “regions of the state . . . have the most significant exposure to air pollutants, including but not limited to, communities with minority populations, communities with low-income populations or both.”¹

To address these impacts, ARB is directed to (1) “evaluate the total potential costs and total potential economic and noneconomic benefits of the plan for reducing greenhouse gases to California’s economy, environment, and public health;” (2) conduct workshops “in regions of the state that have the most significant exposure to air pollutants, including, but not limited to,

¹ Health & Safety Code § 38501(h).

communities with minority populations, communities with low-income populations, or both;” (3) “ensure that activities undertaken to comply with [AB 32] do not disproportionately impact low-income communities;” (4) “direct public and private investment toward the most disadvantaged communities in California;” (5) “consider the potential for direct, indirect, and cumulative emission impacts from [market-based compliance mechanisms], including localized impacts in communities that are already adversely impacted by air pollution;” (6) “design any market-based compliance mechanism to prevent any increase in the emissions of toxic air contaminants or criteria air pollutants;” (7) “maximize additional environmental and economic benefits for California;” and; (8) “to convene an environmental justice advisory committee...to advise it in developing the scoping plan... and any other pertinent matter in implementing.”²

The Legislature’s directives for the AB 32 implementation program require that ARB “design emission reduction measures to meet the statewide emissions limits for greenhouse gases in a manner that minimizes costs and maximizes benefits for California’s economy, improves and modernizes California’s energy infrastructure and maintains electric system reliability, maximizes additional environmental and economic co-benefits for California, and complements the state’s efforts to improve air quality.”³ The Proposed Scoping Plan falls short of this mandate.

A. THE PLAN SHOULD INCLUDE POLICIES FOR ADDRESSING IMPACTS ON ENVIRONMENTAL JUSTICE COMMUNITIES.

The Plan states that “many of the measures aimed at reducing global warming pollutants also provide co-benefits to public health and California’s natural resources.”⁴ However, AB 32 requires that ARB *maximize* co-benefits to California. **The Plan should, but does not, address strategies for maximizing public health co-benefits in environmental justice communities.** By requiring ARB to consult with members of environmental justice communities during the planning process, the Legislature created an opportunity for the state to work with these communities to craft global warming solutions in a manner that would allow California to avoid disproportionate impacts.

The Plan provides no framework for addressing the distributional impacts of localized pollution. Instead, ARB relies on the general claim that reducing greenhouse gas emissions will benefit disproportionately impacted communities in the same way that it will benefit all Californians.⁵

The Plan paints a bright future for California through implementation of the Plan. The

² Recommendations and Comments for the Environmental Justice Advisory Committee on the Implementation of the Global Warming Solutions Act of 2006 (AB 32) on the Draft Scoping Plan, October 2008, p.5, *citing* H&S Code § 38561(d); H&S Code § 38561(g); H&S Code § 38562(b)(2); H&S Code § 38565; H&S Code § 38570(b)(1); H&S Code § 38570(b)(2); H&S Code § 38570(b)(3); H&S Code § 38591(a).

³ H&S Code § 38501(h).

⁴ Proposed Scoping Plan (“PSP”) at 87.

⁵ *See e.g.*, PSP at ES-10.

Plan also states that impacts on disproportionately impacted communities was a key factor that helped to guide development of the Plan.⁶ However, this is disingenuous as ARB's answer is that any action to mitigate climate change will benefit these communities.⁷ ARB analysis "indicated that implementing the Proposed Scoping Plan will result in a reduction of 15 tons per day of combustion generated soot (PM 2.5) and 61 tons per day of oxides of nitrogen (precursors to smog)."⁸ Yet, the plan also acknowledges that under the current program design, ARB cannot predict where these reductions will occur. ARB deliberately ignores the distributional impacts of elevated pollution levels and instead chooses to engage in a planning process that puts some peoples' health last on the list of priorities. A new future for California deserves a new type of process in which environmental justice issues are addressed head on.

During the regulatory design phase, AB 32 requires ARB to "ensure that activities undertaken to comply with the regulations do not disproportionately impact" environmental justice communities.⁹ The Scoping Plan must address existing disparities and provide policy solutions for avoiding further disparate impacts. ARB must evaluate all greenhouse gas emissions reduction strategies, especially pollution trading, not only for their efficacy in reducing air pollution, but also for their effect on achieving environmental justice. The Plan states that ARB intends to do this analysis only later during the regulatory stage.¹⁰ However, this approach means that ARB has not presented a Plan that maximizes environmental and public health co-benefits for all Californians.

ARB's own policy mandates that ARB consider and address impacts on environmental justice communities during the planning phase. ARB's *Policies and Actions for Environmental Justice* state that ARB is "committed to making the achievement of environmental justice and integral part of its activities."¹¹ The first policy statement is: "It shall be the ARB's policy to integrate environmental justice into all of our programs, policies and regulations. As an organization, we will make environmental justice considerations a standard practice in the way we do business."¹²

Specific actions to implement this policy include the inclusion of "an explicit discussion of whether proposed major programs, policies and regulations treat fairly people of all races, cultures, geographic areas, and income levels, especially low income and minority communities."¹³ According to its own Policy, ARB should have made achievement of

⁶ PSP at ES-7.

⁷ PSP at ES-10.

⁸ PSP at ES-11.

⁹ H&S Code § 38562(b)(2).

¹⁰ *See e.g.*, PSP at 106.

¹¹ California Air Resources Board, *Policies and Actions for Environmental Justice* ("Policy"), approved December 13, 2001, at 1.

¹² *Id.* at 3.

¹³ *Id.*

environmental justice an integral part of the Proposed Scoping Plan.

If ARB had conducted an explicit discussion of environmental justice in the Plan, it may have realized that some of the solutions proposed in the plan may have severe unintended consequences for certain communities. For example, the Plan calls for an increase in composting and incentives for the use of compost.¹⁴ Increased composting will mean more outside waste is dumped in the San Joaquin Valley unless ARB acts to protect Valley communities. Large-scale composting facilities in the state have negatively impacted communities that house them. In communities such as Arvin, Wasco and Hinkley, CRPE has seen that without regulation outlining practices and Best Available Control Technology, these facilities increase local air pollution and odors. To address these issues, ARB should require that waste be treated near where it is generated, so that it cannot be trucked long distances to be dumped in Valley communities. ARB should also require that large-scale composting facilities be enclosed to capture their dangerous emissions and should ban land application of sewage sludge.

Another solution with potential unintended consequences is the low carbon fuel standard. The goal of the low carbon fuel standard is to maintain or reduce criteria pollutants and toxic air emissions while reducing the carbon intensity of transportation fuels at least 10% by 2020. One fuel under consideration is corn-based ethanol. In response, ethanol plants are springing up in California. These plants have been located in low income communities of color such as Wasco, Hanford, Keyes and Madera. The plants not only increase local air pollution through their operation, they also lead to a significant increase in rail and truck traffic with consequent additional pollution.

The Plan should include, at bare minimum, a preliminary discussion of policy options for addressing existing disparities. To address environmental justice issues at the community level, ARB policy states that ARB will: 1) work closely with local air districts and other local agencies to “improve siting and mitigation practices;”¹⁵ 2) “develop narrowly tailored remedies to reduce emissions, exposures and health risks” at the community level;¹⁶ and 3) assess, consider, and reduce cumulative emissions, exposures, and health risks when developing and implementing our programs.¹⁷ ARB has committed to “look for new opportunities to reduce cumulative health risk in all communities and to achieve emissions reductions where such reductions are shown to benefit public health”¹⁸ ARB must be proactive in searching for environmental justice remedies and ARB’s policy recognizes this need.

¹⁴ PSP at 62.

¹⁵ ARB Policy at 1.

¹⁶ *Id.* at 2.

¹⁷ *Id.* at 9.

¹⁸ *Id.*

B. THE PLAN SHOULD REFLECT A THOROUGH ANALYSIS OF OTHER GREENHOUSE GAS EMISSIONS REDUCTION PROGRAMS

ARB violated Health & Safety Code § 38561(c) by failing to “consider all relevant information pertaining to greenhouse gas emissions reduction programs in other states, localities and nations.” Although the Plan states that ARB reviewed programs from other localities, it does not reflect that a thorough consideration and analysis of the failures of earlier cap and trade programs. It is imperative that ARB’s plan “incorporate lessons from the experience of the few programs that have historical records of performance.”¹⁹

A thorough review of other programs would reveal that cap and trade programs have failed to both reduce greenhouse gas emissions and have exacerbated local pollution. They have also failed as a mechanism for imposing a meaningful price on carbon. In Los Angeles, pollution trading caused more pollution in Latino communities near oil refineries. In Europe, the greenhouse gas trading system caused *increased* emissions of greenhouse gases. In the Northeastern Regional Greenhouse Gas Initiative, allowances were overallocated and during recent market contractions, the price of carbon recently fell so low that a floor price of \$1.86 was imposed.²⁰ Such nominal costs will be passed on to consumers without providing much incentive for technological innovation or energy diversification.

The plan does not address or consider the merits and pitfalls of existing cap and trade programs and presents no evidence that the system ARB proposes will avoid these pitfalls. Rather, ARB’s proposal is predicated on the unfounded belief that the cap and trade program will operate in exactly the same manner as proposed. ARB has not taken this meaningful opportunity to build safeguards into California’s system that would ensure that greenhouse gas emissions reductions will actually happen by 2020, and will happen in a manner that is equitable to all Californians.

C. THE PLAN MUST ACHIEVE THE MAXIMUM TECHNOLOGICALLY FEASIBLE AND COST EFFECTIVE REDUCTIONS.

AB 32 specifically requires ARB to design the Scoping Plan to achieve the maximum technologically feasible and cost effective reductions.²¹ Cost effectiveness is defined as the “cost per unit of reduced emissions of greenhouse gases adjusted for its global warming potential.”²² The statute sets no floor or ceiling, suggesting that technologies with high greenhouse gas emissions reduction potential can be cost effective even if slightly more costly. We are in accord

¹⁹ Lesley K. McAllister, *Beyond Playing "Banker": The Role of the Regulatory Agency in Emissions Trading*, 59 Admin. L. Rev. 269, 272 (2007).

²⁰ See “Are We Saving the World Yet? RGGI Starts and So Does the Spin,” available at <http://ejmatters.org>, September 30, 2008.

²¹ H & S Code § 38561(a).

²² H&S Code § 38505(d).

with ARB's view that a proper cost-effectiveness approach must "provide flexibility to pursue measures that simultaneously achieve policy objectives other than greenhouse gas emissions reduction" – such as energy diversity and public health benefits.²³ However, the Plan does not explain how technologically feasible measures were screened out of the Plan. **The Scoping Plan should, but does not, identify and set forth a comprehensive review of existing and feasible technologies and strategies for greenhouse gas emissions reductions.** Once the maximum technologically feasible reductions have been identified, ARB can then move forward with analyzing the cost effectiveness of each measure.

ARB should conduct economic modeling for each technologically feasible measure. The Plan should also present a cost analysis that is specific to the different sectors of California's economy. The Plan does not analyze the differences in greenhouse gas emission reduction costs between different sectors and regions of the state to provide reliable predictions about where reductions are most likely to occur voluntarily and where more targeted measures will be required in order to ensure that reductions are made and equity is achieved.

In determining cost effectiveness, ARB should focus on maximizing the public health benefits of the Plan. In the San Joaquin Valley alone, \$5.7 billion is spent annually on health care costs because of poor air quality.²⁴ 1,292 valley residents die each year from long-term exposure to PM2.5. Improving public health will lead to significant benefits for Californians.

D. THE PLAN FAILS TO MEET AB 32 CRITERIA FOR MARKET BASED COMPLIANCE MECHANISMS.

AB 32 requires ARB to "consider all relevant information pertaining to greenhouse gas emissions reduction programs," and to "design emissions reduction measures . . . in a manner that . . . maximizes additional environmental and economic co-benefits for California."²⁵ Specifically, before including market based compliance mechanisms ARB must: (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 (3) maximize additional environmental and economic benefits for California, as appropriate."²⁶ ARB has not yet addressed any of these requirements.

The Plan proposes a cap and trade program to generate the most emissions reductions of any measure in the plan and nearly all emissions reductions in the industrial sector. The Plan

²³ See PSP at 84.

²⁴ Jane Hall and Victor Brajer, *The Benefits of Meeting Federal Clean Air Standards in the South Coast and San Joaquin Valley Air Basins*, November 2008.

²⁵ H&S Code §§ 38561(c) and 38501(h).

²⁶ H&S Code § 38570(b).

frequently refers to the “certainty” provided by the proposed cap and trade program.²⁷ ARB has concluded that “reducing greenhouse gas emissions from the wide variety of sources can best be accomplished through a cap and trade program.”²⁸ Unfortunately, ARB has not shown that the cap and trade program will meet the directives of AB 32. Nothing in the Plan demonstrates that the cap and trade program will deliver the “maximum technologically feasible and cost effective” greenhouse gas emission reductions, or maximize environmental co-benefits for all of California, especially environmental justice communities.²⁹ ARB also cannot show how the cap and trade program will lead to energy diversification and will not create localized air pollution impacts.

We agree with ARB that a comprehensive package of measures is necessary to meet California’s greenhouse gas emissions goal. The Plan references EJAC’s comments in support of an approach that “includes a price on carbon along with complementary measures” and states that the EJAC recognizes “the importance of mutually supportive policies.”³⁰ While the EJAC comments state that a multi-pronged approach is necessary, and putting a price on carbon is a critical element of that approach, it is disingenuous to suggest that EJAC comments provide any support for a cap and trade program. Instead, the EJAC noted that pollution trading creates environmentally unjust outcomes and urged ARB not to implement a trading program in California.³¹ We, and the EJAC, are clear: trading programs do not work. They have not worked in the past, and they will not work in the future. They are a poor choice by the ARB.

1. Cap and Trade Programs do not Deliver Geographic or Procedural Equity or Emissions Reductions.

The Scoping Plan is evidence of the favorable political landscape for cap and trade programs. However, cap and trade models are not successful prophylactic measures in that they have proven to be ineffective tools for phasing out carbon use. Pollution trading makes for ineffective air quality policy in at least four ways. First, due to overallocation 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.³² The Plan merely asserts with no evidence that the cap and trade program does not provide facilities with incentives to increase their emissions.³³ However, 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 reduce their emissions, and continue to emit business as usual, this does not maximize co-benefits or prevent localized

²⁷ PSP at ES-4, 2, 18, 34.

²⁸ PSP at 15.

²⁹ See H&S Code §§ 38561(a) and 38501(h).

³⁰ PSP at 19.

³¹ EJAC Comments at p.11-13, 18-19.

³² See Richard Toshiyuki Drury, *Pollution Trading and Environmental Injustice: Los Angeles’ Failed Experiment in Air Quality Policy*, 9 Duke Env’tl. L. & Pol’y F. 231, 275 (1999).

³³ PSP Appendix (“PSP App.”) at H-18.

impacts.

Second, because the cap and trade program offers emitters flexibility in how they reduce greenhouse gases to comply with the program, there is a risk of undesirable side effects. For example, emitters could choose to adopt a measure that reduces GHGs but increases air pollution. Also, pollution trading can actually stifle technological innovation, as regulated sources seek “cheap fixes rather than innovative and enduring solutions.”³⁴

Third, pollution trading decreases public participation in environmental decision-making.³⁵ Pollution trading occurs without any public oversight or public understanding of actions taken to reduce GHG emissions. A community could fight for years for a stronger permit to limit pollution from a particular factory, and then that factory could simply buy credits allowing it to increase its emissions.

Finally, pollution trading often does not result in emissions reductions because of increased difficulty monitoring and enforcing emission reductions. ARB has provided no information in this Plan on how it will reliably monitor emissions of all capped sources during the cap and trade program to ensure that allowances surrendered are equal to the source’s actual emissions. While the Acid Rain program is touted as a successful cap and trade program,³⁶ it only covered one sector, power plants, thus making “data tracking and compliance determination” easier. In programs with greater heterogeneity such as the multi-sector cap proposed in the Plan, tracking noncompliance becomes a greater problem.³⁷ While the Acid Rain program is mythologized as the one successful trading program, it also resulted in *increased* air pollution at 42% of the covered facilities, meaning there were localized air pollution impacts of the type that AB 32 prohibits. Further, the German approach of direct regulation had greater percentage reductions in SO₂ emissions over a two-year period than the U.S. approach of trading did over a 10-year period.

Further, by using a market mechanism that allows trading out of state, ARB is allowing the new jobs that will be created by investment in green technology to be created in places like Arizona, rather than in California. This directly violates AB 32's requirement that ARB “direct public and private investment toward the most disadvantaged communities in California.”³⁸ 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.³⁹

ARB should not allow trading in overburdened communities. Because industrial

³⁴ Drury, *supra*, at 276-277.

³⁵ *Id.* at 278-279.

³⁶ PSP App. C at C-11.

³⁷ *See* McAllister, *supra*, at 273.

³⁸ H&S Code § 38565.

³⁹ H&S Code § 38562(d)(1).

polluters in California are predominantly located in and also tend to cluster in low income neighborhoods and communities of color, ARB must take measures that will *prevent* these sources from increasing pollution. The unrestricted trading envisioned by the Plan seriously threatens to further overburden such communities.⁴⁰

2. ARB Should Maximize Co-Benefits Through Direct Emission Reduction Measures and Performance Standards.

A direct emission reduction is defined as “a greenhouse gas emission reduction action made by a greenhouse gas emission source at that source.”⁴¹ Instead of relying on trading, ARB should instead focus on its commitment to “partner with local air districts to develop and effectively enforce . . . source specific requirements on industrial sources.”⁴² By requiring emissions reductions at the source, ARB will provide certainty about where emissions reductions will occur and thus ensure that environmental justice communities will get an equitable share of the co-benefits of reducing greenhouse gas emissions. Direct regulations and performance standards are effective tools to spur technological innovation and can overcome non-price market barriers preventing cost-effective efficiency improvements and other investments. In addition, direct emission reduction measures can provide targeted co-benefits and ensure an appropriate level of GHG and co-pollutant reductions.

3. ARB Should Impose Targeted Emissions Reduction Measures Because the Location of Greenhouse Gas Emissions Sources and the Location of Emissions Reductions Matter.

Due to its reliance on a cap and trade program, ARB cannot anticipate where emissions reductions will occur. “Table H-12 [*sic*, referring to Table H-9] does not include the criteria pollutant co-benefits of additional GHG reductions that would be achieved from the recommended cap-and-trade regulation because we cannot predict in which sectors they would be achieved.”⁴³ Because ARB cannot predict where emissions reductions and criteria pollutant co-benefits will occur, it does not appear that the program is *designed to prevent* localized impacts. The Plan states that ARB will perform an analysis of “any potential localized impacts” at the regulatory phase. However, as the guiding document, the Plan should discuss and analyze the proposed policies to determine their likely impact on low income communities and communities of color.

ARB should implement public health safeguards by requiring a higher percentage of direct emissions reductions. ARB’s analysis concludes, “[a]ir pollution levels are regional in nature Similarly, health impacts estimates reflect local pollution and population patterns. As a result, it

⁴⁰ See Drury, *supra*, at 284.

⁴¹ H&S Code § 38505(e).

⁴² PSP at 111.

⁴³ PSP App. at H-109; *see also* PSP at 88.

is appropriate to analyze the co-benefits on a regional basis.”⁴⁴ This level of analysis misses the often very localized environmental justice co-benefits of reducing toxic and criteria air pollution. By requiring direct emissions reductions, ARB can target those facilities whose emissions have greater percentages of co-pollutants with serious health impacts. While not considered greenhouse gases, co-pollutants such as black carbon (soot) and ozone precursors also contribute significantly to global warming.⁴⁵ According to NRDC, “addressing soot and smog in conjunction with AB 32 is a win-win strategy.”⁴⁶

To maximize the environmental co-benefits of global warming regulations, **ARB should include strategies to specifically target those facilities with the highest PM and other co-pollutant emissions.** ARB should address the health risks posed to environmental justice communities based on disproportionate exposure to nitrogen oxides (NOx) and particulate matter (PM) and target facilities whose emissions contain higher percentages of these and other co-pollutants. Even if these sources do not increase emissions, it is unacceptable for their emissions to remain static while reductions are made elsewhere through the purchase of allowances or offsets. ARB should require a higher percentage of direct emissions reductions from such facilities in order to maximize public health benefits of the Plan.

In support of a multi-pronged approach, the Plan outlines how “emissions and energy use from most of the sectors covered by a cap-and-trade program would also be governed by other regulatory measures and enforceable policies, including performance standards, efficiency programs, and direct regulations. All measures that otherwise apply to capped sectors would contribute to achieving the cap by reducing their need to obtain allowances.”⁴⁷ Yet, ARB inexplicably has proposed very few direct emissions reduction requirements on facilities in the industrial sector.⁴⁸

The Plan states that “based on the review of emission reduction opportunities conducted for the Scoping Plan . . . significant reduction opportunities exist in the industrial sector that are more readily achieved through market mechanisms than through direct measures.”⁴⁹ ARB claims this is so because “the types of reductions that were being evaluated are likely to be undertaken by facilities covered by the cap-and-trade program in the locations where they are most cost effective.”⁵⁰ Here, ARB considers the location of reductions, but only in relation to cost-

⁴⁴ PSP App. at H-109.

⁴⁵ Diane Bailey, *et al.*, *Improving Air Quality and Health by Reducing Global Warming Pollution in California*, June 2008, available at <http://www.nrdc.org/globalWarming/boosting/contents.asp>, at p. 4.

⁴⁶ The Natural Resources Defense Council study, *Improving Air Quality and Health by Reducing Global Warming Pollution in California*, analyzes potential co-benefits from global warming regulations in terms of health costs/impacts. The study covered large or “dirty” power plants, petroleum refineries and cement kilns.

⁴⁷ PSP App. H at H-18.

⁴⁸ Emissions reduction measures for the Industrial Sector are forecasted to reduce a mere 1.4 MMTCO₂e. PSP at 17.

⁴⁹ PSP App. C at C-17.

⁵⁰ *Id.*

effectiveness. ARB should acknowledge that location also matters in terms of localized air pollution and its significant public health impacts. According to NRDC:

Our analysis shows the potential for significant health benefits from measures to reduce global warming pollutants. However, the location of these benefits is just as important as the magnitude of the benefits, especially given that many of California's communities of color and low-income communities have been and continue to be disproportionately impacted by pollution. Health benefits from cleaner car and truck measures will be most pronounced near freeways, freight facilities and high traffic corridors. Communities near stationary sources, such as power plants, would be expected to benefit from reduced emissions from these sources.⁵¹

The Plan states that ARB cannot predict where emissions reductions will occur within the capped sources. Yet,

economic models exist that allow agencies to accurately predict which facilities are likely to purchase pollution credits, thereby increasing or continuing their pollution, by comparing control costs across regulated source categories. Facilities with low costs of control are likely to comply with control requirements and generate pollution credits, while facilities with high costs of control are likely to purchase pollution credits. The model results can be mapped to determine where pollution is likely to increase, and whether low income communities of color are adversely impacted.⁵²

Although carbon dioxide emissions do not typically have localized impacts, populations living within 6 miles of industrial facilities disproportionately bear the health impacts of co-pollutant emissions, such as particulates. 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 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.⁵³

ARB must specifically target those industrial facilities whose emissions have significant environmental and health impacts. Upgrading highly polluting power plants holds potential for tremendous co-benefits. For example, in 2005, just five old (pre-1980) power plants in California

⁵¹ Bailey, *supra*, at 10.

⁵² Drury, *supra*, at 284.

⁵³ Manuel Pastor, Presentation, *Environmental Justice & Climate Change: Potential Impacts of AB 32* (October 2008).

contributed to more than one quarter of the total NOx emissions from all power plants in the state.⁵⁴

An analysis of particulate matter emissions from industrial facilities shows that certain facilities drive the pattern of environmental injustice in California. BP's Carson Refinery alone contributes 3.17% of the PM emissions attributed to people of color in California.⁵⁵ The impact of these emissions is felt primarily in the local area around the facility. There are significant public health co-benefits available through targeted emissions reductions requirements for such facilities.

E. THE PLAN SHOULD INCLUDE MANDATORY DIRECT EMISSION REDUCTION MEASURES FOR THE INDUSTRIAL AND AGRICULTURAL SECTORS.

ARB must identify measures to reduce global warming pollution and provide air quality and health co-benefits in highly polluting sectors for which there are currently few specific measures, such as petroleum refining, oil and gas extraction, and agriculture. In doing so, ARB must take into account the global warming benefits of reducing ozone, smog and soot when adopting global warming emissions reduction measures.⁵⁶

1. ARB Should Include Mandatory Emission Reduction Measures for the Agricultural Sector.

The agriculture sector, predominantly located in the Central Valley, contributes 6% of California's greenhouse gas emissions. Methane emissions from livestock waste account for 54% of the state's methane inventory and 3% of the total greenhouse gas emissions in the state.⁵⁷ Methane has a global warming potential over 23 times that of carbon dioxide. Despite the fact that cost effective technologies that would significantly decrease methane and VOC emissions at large confined animal facilities are already available and in use at many facilities in California and around the country, the Plan imposes no mandatory control measures on these emissions.

ARB chooses not to regulate agriculture, and instead allows it to be a source of offsets for the cap and trade program.⁵⁸ However, ARB should not allow cross-pollutant trading. Trading credits generated from the installation of methane digesters to power plants and other industrial fuel-combustion facilities could increase pollution and adversely impact public health in the communities around such industrial facilities because the pollutants from a dairy lagoon are

⁵⁴ Bailey, *supra*, at 9.

⁵⁵ Pastor, *supra*.

⁵⁶ Bailey, *supra*, at 14.

⁵⁷ PSP at 11.

⁵⁸ Offsets are available from "activities not otherwise regulated, covered under an emissions cap or resulting from government incentives." *See* PSP at 36.

different from the more toxic combustion pollution created by power plants and industrial facilities.

Currently available technologies and strategies include: (1) anaerobic digesters; (2) biogas recovery and barn enclosure; (3) reformulation of ruminant diets to reduce enteric fermentation and some methane emissions; (4) burning animal waste for fuel.⁵⁹ Organic farming also has the potential to reduce GHG emissions and sequester carbon. Raising cattle for beef organically on grass, in contrast to fattening confined cattle on concentrated feed, may emit 40 percent less GHGs and consume 85 percent less energy than conventionally produced beef.⁶⁰ To maximize reductions in the Proposed Scoping Plan, these and other agricultural emissions control measures should be made mandatory (thereby making them unavailable for use as offsets).

Globally, the farm animal sector is the single largest anthropogenic user of land, and a significant contributor to global warming and ground level ozone.

While transportation and the burning of fossil fuels have typically been regarded as the chief contributors to GHG emissions and climate change, a November 2006 report, *Livestock's Long Shadow: Environmental Issues and Options*, by the Food and Agriculture Organization ("FAO") of the United Nations highlighted the farm animal production sector's substantial role. Identifying it as 'a major threat to the environment,' the FAO found that the animal agriculture sector emits 18%, or nearly one-fifth, of human-induced GHG emissions, more than cars, SUVs and other vehicles."⁶¹

Agricultural emissions will continue to increase as consumption demand for meat, eggs and dairy increases. By 2050, global farm animal production is expected to double from present levels. The impacts of meat, egg and milk production encompass not only the direct rearing and slaughtering of animals, but also grain and fertilizer production for animal feed, waste storage and disposal, water use, and energy expenditures on farms and in transporting feed and finished animal products, among other key impacts of the production process as a whole. "Mitigating and preventing the environmental harms caused by this sector requires immediate and substantial changes in regulation, production practices, and consumption patterns."⁶²

ARB has the opportunity to move California to the forefront by setting an example of how other regions can address agricultural contributions to global warming. AB 32 authorizes ARB to set a de minimis threshold for exemptions.⁶³ ARB should not exempt an entire sector whose emissions are significant.

⁵⁹ Koneswaran, Gowri and Nierenberg, Danielle, *Global Farm Animal Production and Global Warming: Impacting and Mitigating Climate Change*, January 31, 2008.

⁶⁰ *Id.* at 17.

⁶¹ *Id.* at 16.

⁶² *Id.* at 17 (emphasis added).

⁶³ H&S Code § 38561(e).

ARB's failure to regulate agriculture is another example of the ARB taking action that has a disparate impact on the basis of race, a violation of Title VI of the Civil Rights Act of 1964 and its implementing regulations, 40 C.F.R. Section 7. The consequences of ARB's policies over the past two decades are that the Latino residents of the southern San Joaquin Valley breathe the most-polluted air in the United States. Latino farmworker towns like Arvin, Lamont and Weedpatch consistently have the highest number of ozone exceedances in the U.S. Because the ARB is here deciding not to regulate agricultural greenhouse gas emissions, these residents will not receive the co-benefits that the ARB is allowing for other, non-agricultural areas of the state. They thus face a double-whammy from the ARB: the worst air, and the fewest co-benefits. This is discriminatory impact.

2. ARB Should Include Direct Emission Reduction Measures for the Industrial Sector.

Industrial sources account for roughly 20 percent of the total global warming pollution emitted in California.⁶⁴ Power plants, cement plants, and petroleum refineries known to emit significant quantities of global warming pollution as well as significant levels of co-pollutants, are located in areas of the state that would greatly benefit from reduced emissions from these specific facilities. **To maximize co-benefits, greenhouse gas emissions should be addressed on a facility-by-facility basis and ARB should require all reasonably available control technology.**

ARB has proposed an energy audit for industrial facilities.⁶⁵ To dovetail with the audit, ARB should impose emissions performance standards for municipal and investor-owned municipalities. ARB must also consider the impacts of new facilities, including new ethanol and natural gas plants.

While new power plants are expected to be cleaner than many existing facilities, those utilizing fossil fuel combustion will emit harmful particulates that have impacts at the local level. As a result, from a local perspective, the benefit from reducing particulates depends on where those reductions occur. There is the risk that new ethanol and natural gas combined-cycle plants will be sited in communities already burdened with higher-than-average levels of pollution. In those instances, the increases in particulate emissions can have serious public health consequences. For example, the South Coast Air Quality Management District found very significant health impacts from a proposed new natural gas power plant in Vernon, CA, including a potential increase in annual premature mortality of up to four to 12 people. Therefore, while new ethanol and natural gas combined-cycle plants have the potential to provide valuable co-benefits on a regional

⁶⁴ Bailey, *supra*, at 10.

⁶⁵ PSP at 54.

level, preventing inadvertent injustices at the local level requires prudent siting and planning.⁶⁶

II. ARB'S FUNCTIONAL EQUIVALENT DOCUMENT VIOLATES THE CALIFORNIA ENVIRONMENTAL QUALITY ACT.

This part is divided into two sections. The first section discusses ARB's failure to comply with CEQA in general terms. The second section of the letter details the specific violations in the order presented in Appendix J of the Scoping Plan.

A. GENERALLY, ARB'S ENVIRONMENTAL ANALYSIS FAILED TO COMPLY WITH CEQA.

ARB describes its environmental analysis as a programmatic Functional Equivalent Document (FED). However, the FED violated CEQA in three main ways: (1) by failing to comply with the requirements for a programmatic review; (2) by failing to analyze the direct, indirect and cumulative impacts of the proposed Scoping Plan; and (3) by failing to adequately analyze alternatives to the proposed Scoping Plan.

1. The ARB failed to comply with the requirements for programmatic review.

ARB discussed possible impacts from the proposed Scoping Plan in the form of a FED in lieu of an Environmental Impact Report, pursuant to Public Resources Code § 21080.5. This section exempts regulatory programs certified by the California Resources Secretary from specific CEQA substantive and procedural requirements associated with environmental impact reports.⁶⁷ The California Secretary of Resources has certified ARB's regulatory program which involves the adoption of plans for the protection and enhancement of ambient air quality in California.⁶⁸ CEQA requires that a certified regulatory program preparing a functional equivalent document include "a description of the proposed activity with alternatives to the activity, mitigation measures to minimize any significant adverse effect on the environment of the activity."⁶⁹ Moreover, "an agency operation pursuant to a certified regulatory program must comply with all of CEQA's other requirements."⁷⁰

In order to comply with CEQA, ARB prepared what it describes as a programmatic FED and ARB plans to tier subsequent rule-specific analysis from this plan level programmatic FED.⁷¹

⁶⁶ Bailey, *supra*, at 10.

⁶⁷ Pub. Res. Code § 21080.5(c).

⁶⁸ 14 CCR § 15251(d).

⁶⁹ Cal. Pub. Res. Code § 21080.5(d)(3)(A).

⁷⁰ *Mountain Lion Foundation v. Fish & Game* (1997) 16 Cal.4th 105.

⁷¹ PSP App. J at J-5.

There could be several advantages to conducting a program level review of the proposed Scoping Plan. A tiered programmatic environmental review could provide for a more exhaustive analysis of impacts and alternatives than would be possible in an individual environmental analysis.⁷² In addition, a programmatic analysis could ensure a more thorough cumulative impact analysis that might otherwise be “slighted in a case-by-case analysis.”⁷³ Moreover, a general program level analysis could allow the ARB “to consider broad policy alternatives and program wide mitigation measures at an early time when the agency has greater flexibility to deal with basic problems or cumulative impacts.”⁷⁴ In terms of mitigation measures, CEQA requires that ARB describe mitigation measures which would minimize significant impacts from the project including their efficacy and basis of inclusion.⁷⁵ Mitigation measures must also be legally enforceable.⁷⁶

ARB’s FED analysis provides none of this information. Instead, the FED provides a circular analysis of impacts, contains no mitigation measures but for compliance with already existing rules, and defers virtually all analysis to individual rule making. While CEQA recognizes that the level of detail in a first tier EIR need not be greater than that of the underlying plan being analyzed, tiering does not excuse a lead agency from “adequately analyzing reasonable foreseeable significant environmental effects of the project and does not justify deferring such analysis and future mitigation to a later tier EIR or negative declaration.”⁷⁷ The ARB’s FED analysis fails to inform decision-makers and the public about the significant impacts from the proposed Scoping Plan; it fails to provide an adequate discussion of the direct, indirect and cumulative impacts from plan, and it does not provide an informative analysis of possible alternatives to the proposed Scoping Plan.

2. ARB failed to analyze the direct, indirect and cumulative impacts of the Scoping Plan.

ARB defers the analysis of specific policy choices and regulatory decisions until each individual rulemaking process. This subverts the purpose of a *program* level analysis. Several of the policy choices ARB is making at this stage have not been analyzed. For example, ARB does not provide any analysis on the decision to not regulate agriculture as part of Scoping Plan. Furthermore, the ARB defers much of its analysis and mitigation of localized impacts to local land use agencies at the time of project siting. Under CEQA, ARB is responsible for its own compliance with CEQA and cannot rely on other agencies to cure its failures to analyze and mitigate. 14 CCR § 15020. Moreover, agencies are required to use their best efforts to find out and disclose all it reasonably can. 14 CCR § 15144. While the CEQA Guidelines do not directly apply to certified regulatory programs, such programs are still subject to the information

⁷² 14 CCR § 15168(1).

⁷³ 14 CCR § 15168(b)(2).

⁷⁴ 14 CCR § 15168(b)(4).

⁷⁵ 14 CCR § 15126.4(a)(1)(A)(B).

⁷⁶ 14 CCR § 15126.4(a)(2).

⁷⁷ 14 CCR § 15152(b).

disclosure provisions and broad policy goals of CEQA. *California Sportfishing Protection Alliance v. State Water Resources Control Board* (2008) 160 Cal. App. 4th 1643-45. Broadly, CEQA requires ARB to provide sufficient detail to enable those who did not participate in the preparation of the FED to understand and meaningfully consider the environmental impacts associated with the Scoping Plan.

Based on information ARB provided in its FED, it is possible for ARB to engage in a program level analysis of the Scoping Plan's impacts. For example, in terms of the Low Carbon Fuel Standard, ARB has identified the location of biofuel production facilities in the State. Appendix J, pgs 31-32. ARB could examine the environmental impacts and environmental justice impacts of those siting decisions and examine the impacts of the low carbon fuel standard in light of that information. A similar analysis could be conducted for refineries and power plants where locations are easily ascertained. This analysis would also contribute to a better understanding of impacts from ARB's decision to recommend a cap and trade program as opposed to a carbon fee or direct regulatory measures. The failure to provide this basic information about the plan level choices ARB is recommending minimizes the Scoping Plan's impacts and subverts the purposes a programmatic analysis under CEQA.

3. ARB failed to adequately analyze alternatives to the Scoping Plan.

CEQA requires that a certified regulatory program preparing a functional equivalent document include "a description of the proposed activity with alternatives to the activity, mitigation measures to minimize any significant adverse effect on the environment of the activity." Cal. Pub. Res. Code § 21080.5(d)(3)(A). Under CEQA, ARB must examine a reasonable range of alternatives that feasibly meet most the project's basic objectives while avoiding or substantially reducing the significant effects of the project. The selection of alternatives should foster informed decisionmaking and public participation. 14 CCR § 15126.6(a). 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." 14 CCR § 15126.6(b). In evaluating alternatives, the ARB must include "sufficient information about each alternative to allow meaningful evaluation, analysis and comparison with the proposed project." 14 CCR § 15126.6(d).

Here, ARB identifies the Scoping Plan's objective as "achieving the maximum technologically feasible and cost-effective greenhouse gas emission reductions," citing Health and Safety Code §38561(a). J-74. The fundamental objective of the Scoping Plan is to map out how California is going to meet AB 32's goals of reducing California's greenhouse gas emissions to 1990 levels by 2020. Health and Safety Code § 38550. The means by which ARB will do this are through achieving maximum technologically feasible and cost-effective regulations. By narrowly defining the objective, ARB has artificially limited the analysis of alternatives.

Regardless of whether ARB appropriately defined the objective of the Scoping Plan, ARB's alternatives analysis fails to comply with CEQA. ARB presents a cursory, circular and

results-oriented description of five alternatives to the proposed plan. The five project alternatives ARB identified are: (1) no project, (2) adopting a variation of proposed strategies or measures; (3) adopting primarily a cap and trade program; (4) adopting primarily source-specific regulatory requirements; and (5) adopting primarily a carbon fee. The introductory paragraph to the examination of alternatives 2 to 5 summarizes the major flaws with the alternatives analysis and the FED as a whole.

For these reasons, we expect that environmental impacts (both positive and adverse) of all the alternatives would be similar to the impacts expected from [the] mix of measures identified the draft Scoping Plan. While the magnitude of impacts might increase or decrease, it would be speculative to try to estimate the effects at this time, before the details of specific measures are developed.

J-85. This introduction makes clear that the ARB is not providing an informative analysis of alternatives to the Scoping Plan as a whole, which is the main function and advantage of a top tier FED analysis.

In conclusion, ARB's environmental analysis pursuant to CEQA is inadequate. It is a self-serving document that provides very little information to the public or decisionmakers with which to evaluate the environmental impacts of ARB's policy choices for reducing greenhouse gas emissions. It provides no information about how ARB's plan will avoid increasing local pollution and toxic air contaminants as required by AB 32.

The ARB missed an opportunity to analyze the impacts of the proposed Scoping Plan itself. Instead ARB provided a circular analysis of the plan's impacts and deferred all other analysis to subsequent individual rulemaking processes. This piecemealed approach artificially minimizes the plan's impacts and violates CEQA.

4. The ARB failed to respond to comments on the significant environmental points raised during the environmental review process.

If the Board acts to approve the Scoping Plan and the FED on December 11, it will be violating either Pub. Res. Code §21080.5 or its own environmental review rules and regulations. Section 21080.5 only allows certification of functional equivalent programs if the rules and regulations adopted by the administering agency for the regulatory program "require that final action on the proposed activity include the written responses of the issuing authority to significant environmental points raised during the evaluation process." Obviously, by having the close of the public comment period on the Scoping Plan and FED the day before the decision is to be made, the ARB has not given its staff or itself sufficient time to digest the comments made, much less provide written responses.

B. ARB's Specific CEQA Violations.

1. PROJECT DESCRIPTION

The project description discusses in very vague terms the potential regulatory measures ARB is considering for reducing greenhouse gas emission by 169 MMTCO²E. However, the Project Description does not discuss specific reductions from each sector it briefly describes nor does ARB discuss the policy choices it made to exclude some sectors from regulation.

2. AESTHETICS

Low Carbon Fuel Standard: This measure relies on future rule development and subsequent local land use decisionmaking processes to assess mitigation measures. See Part II A.2 above.

Energy and Natural Gas: Renewable Portfolio Standard and Million Solar Roofs: Again relies on local siting decisions to address impacts. See Part II.A.2 above.

3. AIR QUALITY

Cumulative Impacts: ARB states that the Scoping Plan's cumulative impact will be to substantially improve air quality. Appendix J p. 24. However, the ARB provides no facts or analysis to support this conclusory statement. ARB recognizes that there could be an increase in local air pollution. Appendix J p. 24. Again, ARB relies on local siting agencies to mitigate these impacts. Without ARB setting minimum statewide standards and guidance, this is speculative. See Part II.A.2 above.

Criteria Pollutants: ARB describes criteria pollutants in the Air Quality Analysis. However, it does not provide any information on the health effects of each pollutant. See Part II.A.2.

California Cap and Trade Program: ARB states that this program is not expected to result in adverse air quality impacts. Appendix J p. 25. However, ARB has no facts or analysis to support this conclusory statement. The FED makes reference to "some individuals" raising concerns that the cap and trade program could result in localize environmental impacts. Appendix, J p. 25. Specifically, the Environmental Justice Advisory Committee which was charged specifically with advising ARB on the Scoping Plan has consistently and repeatedly raised these concerns which ARB has consistently and repeatedly ignored, including in its CEQA analysis. Appendix J pp. 25-26. The ARB's analysis of this issues violates CEQA as well as the laws of reason.

First, ARB justifies the cap and trade program based on the fact that the cap will redress any localized impacts from trading without any support for that assumption. ARB then makes the statement that "[w]hile some localized impacts could result from overall implementation of AB 32... these would not be a direct result of the cap-and-trade program." Appendix J p. 26. This simply makes no sense. The cap and trade program would allow some facilities to emit more

pollution than they would otherwise by trading allowances with other facilities that have reduced their pollution.

Furthermore, even if this statement is true, it does not justify failing analyze the potential local impacts from the cap-and-trade program. ARB is required to analyze both the direct and indirect impacts from a proposed project. CEQA Guidelines §§ 15126, 15126.2. Also, as part of the effort to prevent local air pollution impacts, ARB notes that local air districts could impose more stringent requirements for sources of criteria pollutants and air toxics. However, absent ARB requirements and guidance, this is mere speculation. There is no assurance that local air impacts will be avoided or reduced in direct contradiction to Health and Safety Code § 38501(h) (design greenhouse gas reduction measures to maximize co-benefits for California).

Transportation: (T-2) Low Carbon Fuel Standard: ARB states that a reduction in the carbon intensity of fuels does not relate to a specific change in criteria or toxic pollutants or in fuel combustion. Appendix J p. 27. ARB defers any analysis of potential local criteria or toxic pollutants to subsequent rulemaking. ARB is required to at least examine the impacts of the Low Carbon Fuel Standard at a program level. ARB includes a map of biofuel production facilities in the state (both currently operational and proposed). Appendix J pp. 31-32. It also provides a general description of where biofuels will likely be produced and estimates that 10-30 new biofuel production facilities will be built in California. ARB can – and should – then analyze what emission are likely based on current biofuel production in the state and demographic information from the surrounding areas to complete the environmental and environmental justice impact analysis. This same analysis could and should be done for refineries and power plants which would also help ARB analyze the potential environmental impacts from the cap and trade program.

Electricity and Natural Gas: (E-2) Increased Heat and Power: ARB discloses that this measure may have significant local impacts if units are not installed properly. However, ARB can make this measure enforceable with significant penalties for non-compliance to ensure proper installation. Appendix J p. 35. See Part II.A.1.

Electricity and Natural Gas (E-3) Renewable Portfolio Standard: ARB reviews each of the renewable resources relative to natural gas and does not individually quantify them for the air emissions analysis. ARB identifies that there are potential construction related impacts with each of the resources analyzed. Appendix J pp. 35-36. ARB gives no information on where these facilities are currently located, what the actual impacts are from these types of facilities or what constitutes adequate mitigation. See Part II.A. 1 & 2. This is a violation of CEQA’s requirements that a FED actually examine the impacts of a proposed action.

Biomass: ARB describes a likely source of biomass to be redirected open burning of agricultural waste. Appendix J. p. 36. These new biomass facilities will likely be sited in agricultural regions. Several are operating throughout California now. ARB could provide the location of these facilities, known operating emissions, potential mitigation measures and

unmitigated impacts. Instead ARB relies on the uninformative and conclusory statement that modern control technologies and good plant design will reduce NOx and PM emissions. However, ARB provides no information on what constitutes modern control technologies or good plant design. See Part II.A.1&2.

Geothermal: Again, ARB relies on unspecified modern control technology and good plant design to reduce emissions from geothermal plants without specifying what that would be. Appendix J p. 37. ARB also does not provide any analysis of how much such practices reduce hydrogen sulfide, arsenic, mercury, radon 22, and ammonia. Appendix J p. 37. See Part II.A.2. Furthermore, geothermal production produces overburden containing naturally occurring radioactive materials which must be disposed of in landfills – often hazardous waste landfills in environmental justice communities such as the Latino farmworker communities of Buttonwillow, Kettleman City and particularly Westmorland (which is near the site of geothermal energy production). ARB must discuss the impact of this in its land use and hazardous materials analysis.

Hydro-electric: ARB again does not specify what constitutes good plant design and modern control technology to reduce short-term construction impacts related to hydro-electric facilities. Appendix J p. 37. Moreover, ARB does not disclose the efficacy of such measures. See Part II.A.1.

Water: (W-2) Water Recycling and (W-4) Reuse Urban Runoff: ARB defers mitigation to local jurisdictions and air districts. ARB states that additional mitigation is necessary to reduce construction impacts but it does not specify the extent of the impacts or what types of measures are needed. See Part II.A.1.

Water: (W-5) Increase Renewable Energy Production: ARB impermissibly defers any examination of impacts to the California Energy Commission. See Part II.A.1 2.

Industry: ARB identifies three types of measures specific to industry- audits, systems efficiency improvements and regulatory changes. It then defers all discussion of environmental impacts to subsequent rulemaking. Appendix J p. 38. This conclusory analysis violates CEQA. See Part II.A.1 & 2.

Recycling and Waste Management: (RW-1) Landfill Methane Control: ARB identifies potential increases in NOx and Carbon Monoxide (CO) as well as toxic pollutants. ARB also states that offsets may be needed to mitigate the impacts from criteria pollutants. There is no discussion of the extent of the impact from toxic pollutants nor is there any mention of potential mitigation for toxic pollution. Appendix J-39. Part II.A.1&2.

Recycling and Waste Management: RW-3 High Recycling/Zero Waste: This measure includes composting. Appendix J p. 39. ARB recognizes that composting is subject to region specific air district requirements. ARB also states that BACT reduces air emissions. However,

BACT varies widely between air districts. The South Coast Air Quality Management Board and the San Joaquin Valley Air Pollution Control District both require enclosure to reduce NOx and VOCs. The Mojave Air Quality Management Board does not. ARB needs to specify what constitutes BACT for large-scale composting facilities. ARB's reference to the Modesto study is misplaced. Again, ARB defers the use of anaerobic digesters to local land use agencies and subsequent CEQA review. See Part II.A.2.

Recycling and Waste Management: High GWP: (H-6) High GWP Reduction from Stationary Sources: ARB describes a foam discovery and destruction program whereby foam is recovered and combusted prior to landfilling. Appendix J p. 39. ARB discloses that such treatment may emit toxic air contaminants and criteria pollutants. However, ARB defers any analysis or mitigation. ARB does not disclose if such practices are occurring now. Where they might be located, what those emissions are, and any possible mitigation measures used and the efficacy of those mitigation measures. See Part II.A.1&2.

Agriculture: (A-1) Methane Capture at Large Dairies: ARB states that this is a voluntary measure. As justification for not requiring methane capture at large dairies, ARB claims that such that digesters may emit NOx, the control technology may not be available, it may not be cost-effective, or able to meet local air district requirements. However, ARB has not established a cost-effectiveness threshold yet for AB 32 implementation. Yet, it has already taken digesters off the table without trying to determine if any of these potential limitations are actually prohibitive. Furthermore, ARB provides no information or analysis as to the environmental impact of not choosing to regulate methane capture at large dairies. See Part II.A.2.

4. AGRICULTURAL RESOURCE IMPACTS

Transportation: (T-2) Low Carbon Fuel Standard: ARB states that the siting of new fuel production facilities may have a significant impact on state classified agricultural land. Appendix J p. 41. However, ARB defers any analysis or mitigation until subsequent local CEQA processes. ARB identifies a possible mitigation measure, a financial mechanism that supports the California Department of Conservation's California Farmland Conservancy Program, but there is no requirement that such mitigation be employed. Appendix J p. 41. See Part II.A.1&2.

Energy: (E-3) Renewable Portfolio Standard: Again, ARB discusses possible impacts from the siting of renewable projects, but fails to provide any analysis or required mitigation measures. Instead, ARB defers and delegates all environmental analysis to local land use agencies. Appendix J p. 41. See Part II.A.1&2.

Water: (W-3) Water System Energy Efficiency and (W-5) Increase Renewable Energy Induction: ARB provides no information about possible environmental impacts associated with these measures or their potential impacts to agricultural. ARB simply defers all project specific analysis to local land use agencies. Appendix J p. 42. See Part II.A.2.

Agriculture: (A-1) Methane Capture at Large Dairies: ARB raises the possibility that manure digesters may be incompatible with Williamson Act Contracts. Appendix J p. 42. However, ARB does not provide any basis for that statement and urges dairymen to investigate local land use requirements. By raising a potential hurdle and forcing dairymen to figure how to overcome it, ARB’s conclusory statement will have the effect of chilling voluntary implementation of this measure.

5. IMPACT TO BIOLOGICAL RESOURCES

Transportation: (T-2) Low Carbon Fuel Standard: ARB defers environmental review to subsequent rulemaking and local site specific permitting. However, ARB knows where such fuel production facilities are located or proposed, as well as where they are likely to be located.. Appendix J p 31-32. This would be enough to know generally what type of species are likely to be effected by the low carbon fuel standard. ARB has the opportunity at this early stage to evaluate the overall impacts at a state level which is often not possible in individual project environmental review. See Part II.A.1&2.

Electricity and Natural Gas: (E-3) Renewable Portfolio Standard: Again ARB defers analysis to local siting and rulemaking processes. See Part II.A.1&2.

Water: (W-2) Water Recycling, (W-3) Water System Energy Efficiency, (W-4) Reuse Urban Runoff, and (W-5) Increase Renewable Energy Production: ARB describes any attempt to identify potential impacts from these measures as speculative and defers any analysis to local implementing agencies. Appendix J-44-45. See Part II.A.2.

Agriculture: (A-1) Methane Capture at Large Dairies: ARB again defers any analysis to potential impacts until individual projects obtain Authority to Construct permits from local air districts. ARB avoids doing any environmental review and overlooks an opportunity to evaluate impacts from a state level that are often minimized during local individual project environmental review. Appendix J p. 45. See Part II.A.1.

6. CULTURAL RESOURCES

ARB concludes that the Scoping Plan will not have an impact on cultural resources because Scoping Plan measures “would not require the destruction or alteration” of significant sites. Appendix J p. 46. However, intent is not required under CEQA to have an impact or to necessitate mitigation. ARB identifies several measures that may have a significant impact, such as (T-2) Low Carbon Fuel Standard, (E-3) Renewable Portfolio Standard, (W-2) Water Recycling, (W-3) Water System Energy Efficiency, (W-4) Reuse Urban Runoff, and (W-5) Increase Renewable Energy Production. However, ARB defers any analysis of those potential impact to subsequent local land use decisions. Appendix J-46. See Part II.A.2.

7. IMPACTS TO ENERGY DEMAND

California Cap and Trade Program Linked to Western Climate Initiative Partner

Jurisdictions: ARB acknowledges that there may be a shift from internal combustion engines to electric which would increase energy demand. Appendix J p. 47. However, ARB admits that it is not possible to determine the level of significance at this time. Appendix J p. 47. ARB provides no information about the potential impacts from this measure yet expects the Board to endorse this approach without any information to support its decision. See Part II.A.1&2.

8. IMPACTS TO GEOLOGY AND SOILS

ARB claims that it is too speculative to identify potential geological or soil impacts from the proposed Plan because it does not know where proposed facilities will be located. Instead it relies on local and state regulations to mitigate any potential impacts for measures such as (T-2) Low Carbon Fuel Standard, (E-3) Renewable Portfolio Standard, (W-2) Water Recycling, (W-3) Water Systems Energy Efficiency, and (W-5) Increase Renewable Energy Production. Appendix J p.49. However, for some of these measures such as the Low Carbon Fuel Standard and the Renewable Portfolio Standard, ARB has some information about where such facilities are located or are likely to be located and could provide some general information about potential impacts and possible mitigation measures or regulations that could reduce those impacts. ARB's failure to provide this information is a violation of CEQA. See Part II.A.1&2.

9. IMPACTS ASSOCIATED WITH HAZARDOUS MATERIALS

ARB begins this section discussing the regulatory requirements for Class I Hazardous Waste Facilities. Appendix J pp. 50-51. It should be noted that all of California's three hazardous waste dumps are in low income communities and communities of color: Kettleman City, Buttonwillow, and Westmorland.

Transportation (T-6) Goods Movement: As part of the commercial harbor craft measure, use of a non-toxic antifouling product on hulls would be a way of reducing hazardous materials impacts. To implement this measure, ARB plans to rely on encouragement and education of owner/operators. Appendix J p. 51-52. However, this is unenforceable. This measure should be mandatory and fully enforceable. See Part II.A.1.

Electricity and Natural Gas (E-3) Renewable Portfolio Standard: ARB should discuss as part of this impact analysis the disposal of naturally occurring radioactive material as part of the production of geothermal energy.

10. IMPACTS TO LAND USE AND PLANNING

Cumulative Impacts: Under this section heading ARB discusses implementation of SB 375. ARB will work through Metropolitan Planning Organizations as part of their regional planning

process to set transportation goals and create sustainable community plans. Appendix J p. 54. There are numerous gaps within SB 375 which ARB could fill in the Scoping Plan and subsequent rulemaking. First, ARB should provide for alternative processes for rural areas which do not have metropolitan planning organizations. Second, SB 375 specifically states that local land use agencies need not implement the sustainable community plans once developed. ARB also speculates that Counties will likely adopt Greenhouse Gas Elements as part of their General Plans. However, absent state mandates, guidelines, and protocols this is unenforceable. ARB should designate mandatory local reduction targets of 15% by 2020 as recommended in the Scoping Plan for each large metropolitan area in the state. Appendix J p. 54. See Part II.A.1.

11. TRANSPORTATION

Transportation (T-2) Low Carbon Fuel Standard: ARB defers to local jurisdictions and subsequent rulemaking processes to mitigate land use impacts. Appendix J p. 55-56. See Part II.A.1.

Transportation (T-3) Regional Transportation Related Greenhouse Gas Targets: Again this tracks SB 375. There are numerous gaps within SB 375 which ARB could fill in the Scoping Plan and subsequent rule making. First, ARB should provide for alternative processes for rural areas which do not have metropolitan planning organizations. Second, SB 375 specifically states that local land use agencies need not implement the sustainable community plans once developed. ARB also speculates that Counties will likely adopt Greenhouse Gas Elements as part of their General Plans. However, absent state mandates, guidelines, and protocols this is not likely. ARB should designate mandatory local reduction targets of 15% by 2020 as recommended in the Scoping Plan for each large metropolitan area in the state.

Also as part of this discussion, ARB mentions formulating Indirect Source Rules for each region of the state. However, it defers any analysis of this measure. The Indirect Source Rule has been operational in the San Joaquin Valley and ARB could analyze the regional and localized impacts for informational purposes at this Plan level review. See Part II.A.2.

Electricity and Natural Gas (E-3) Renewable Portfolio Standard: Again ARB defers any analysis to subsequent permitting and rulemaking. Appendix J p. 56. ARB does not provide guidance where such projects could or should be sited in the state. See Part II.A.2.

Water (W-2) Water Recycling: ARB again defers to project specific analysis without providing any information at the plan level stage. Appendix J p. 56. See Part II.A.2.

12. IMPACTS TO WATER RESOURCES

Transportation (T-2) Low Carbon Fuel Standard: ARB identifies a potentially significant impact to water from biofuel spills. To reduce this impact, ARB relies on regulatory compliance and employment of appropriate spill prevention and spill abatement protocols. Appendix J p. 66-

67. However, ARB provides no information on what this entails and what expected reductions. See Part II.A.2.

Also ARB identified potential impacts from water use but provided no information on possible mitigation measures identified or discussed. Appendix J p. 66. See Part II.A.1.

In addition, ARB discussed potential impacts from pesticide use and fertilizers in the production of biofuels crops and hydrogen. ARB suggests minimizing use of pesticides and fertilizers. Appendix J p. 67. However, ARB does not disclose how this is enforceable especially in jurisdictions outside of California. See Part II.A.1.

Water (W-2) Water Recycling: ARB identifies reduction of water quality downstream as a potential impact from this measure. However, ARB relies on regulatory compliance and subsequent CEQA compliance to mitigate any impacts. Appendix J p. 67. However, ARB provides no information on what this entail or the efficacy of such measures. See Part II.A.1.

13. RECYCLING AND WASTE MANAGEMENT

(RW-3) Composting. Here ARB relies on compliance with waste discharge requirements to mitigate any impacts. However, ARB does not disclose what this means or how effective such compliance is in reducing impacts. Appendix J p. 68. See Part II.A.1.

14. ENVIRONMENTAL JUSTICE

ARB identifies two types of environmental justice impacts: procedural and geographic. In terms of process, ARB outlines the number of meetings held in environmental justice communities throughout the state and the number of Environmental Justice Advisory Committee meetings held. ARB has made important efforts in outreaching around the Scoping Plan. However, substantively, it is unclear how such outreach has had a demonstrable effect on the recommended measures in the Scoping Plan. When asked at the November 2008 Environmental Justice Advisory Committee meeting to identify specific reductions for which the committee was responsible, staff was hard-pressed to do so. Several environmental justice organizations throughout the state signed on to a Declaration against Cap and Trade which ARB recommends as a central component to the Scoping Plan. Instead of addressing this opposition, the Scoping Plan skirts over it and mischaracterizes the extent of such opposition in the Scoping Plan (p. 19) and in the FED (Appendix J p. 25). Environmental Justice is not merely about having the opportunity to comment. It is truly about having those comments make a substantive impact on the final decision.

In terms of geographical environmental justice impacts, ARB claims that the Scoping Plan itself does not reveal geographic inequities. This is largely because ARB defers all analysis of possible impacts to subsequent rulemaking and permitting processes. ARB could undertake such an analysis even at a program level based on currently existing information. In the FED, ARB

provided a map with all the existing biofuel production facilities in the state. Appendix J pp. 31-32. Based on that information, ARB could obtain demographic information about the areas surrounding those production facilities. ARB could also collect data about the impacts from those facilities from their site specific environmental review processes to create a general analysis on potential environmental justice impacts of the Low Carbon Fuel Standard based on the siting criteria ARB discussed in the FED. A similar analysis could be performed for other sectors such as power plants, refineries, distribution centers and ports. Instead ARB merely states that the Scoping Plans measures such as Energy Efficiency, Low Carbon Fuel Standard, Goods Movement, Industrial Measures and Cap and Trade may have a positive or negative on environmental justice. Appendix J p. 70. This is insultingly uninformative. A proper analysis is particularly important in understanding potential impacts from the Cap and Trade program. ARB is embarking on several important overarching policy choices yet is deferring all analysis of those choices to subsequent rulemaking and permitting process where it will be impossible to review the overall impact of the states approach to global warming. This failure to provide adequate information about the impacts of the Scoping Plan's policy choices is a violation of CEQA. See Part II.A.1&2.

15. PUBLIC HEALTH

The FED sites the public health analysis in Appendix H of the Scoping Plan. As discussed at the California Air Resources Board's hearing on November 20, 2008 the public health analysis is uninformative. ARB assumes that the plan will have an overall cumulatively beneficial impact on public health. Appendix J p. 72. However, ARB provides no support for this statement at a statewide, regional or local level apart from an incomplete analysis of the South Coast Air Basin and Wilmington. ARB's analysis fails to provide the public or decisionmakers with information necessary to understand the public health consequences of the regulatory framework ARB is recommending.

GB-1 Green Building: ARB encourages design elements for green buildings to improve indoor air quality. ARB should require such design elements be implemented. Appendix J p. 72. See Part II.A.1.

16. ALTERNATIVES

ARB discussed five general Alternatives to the Proposed Scoping Plan: 1) No Project, (2) adopting a variation of proposed strategies or measures; (3) adopting primarily a cap and trade program; (4) adopting primarily source-specific regulatory requirements; and (5) adopting primarily a carbon fee. ARB based its alternatives analysis on the Scoping Plan's stated objective of "achieving maximum technologically feasible and cost-effective greenhouse gas reductions citing Health and Safety Code § 38561(a). Appendix J p. 74. However, the purpose of the Scoping Plan is to ultimately implement AB 32 and result in a return to 1990 greenhouse gas emission levels by 2020 and an 80% reduction in greenhouse gas emissions by 2050.

No Project: The Alternative comprises the bulk of the Alternatives analysis. This section generally describes sector by sector the business as usual impacts compared to the proposed scoping plan. This is the only alternative for which ARB provides such a detailed discussion. Appendix J p. 75-84.

Alternative 2, Adopting a Variation of the Proposed Strategies or Mitigation Measures: ARB states that there are endless variations of measures or subsets of measures that could be adopted as part of Alternative 2. So many so that it would be speculative to analyze because information learned through future rule development could lead to further changes. Appendix J p. 85. This discussion is meaningless. It defers any analysis to subsequent rulemaking when it is too late to examine the program level decisions the Board is being asked to make regarding the Scoping Plan. It also subverts the entire purpose of preparing a tiered program level FED. See Part II.A.1.

Alternative 3, Adopt a Program Based Primarily on Cap and Trade for Sectors Included in the Cap: This alternative seems to be a California only cap and trade program where emission reductions are left to the marketplace. Appendix J p. 86. ARB states that under such a program it would be impossible to know in what sectors or where reductions would occur so ARB dispenses with any analysis of what the possible impacts could be under this alternative. See Part II.A.1&3.

Alternative 4, Adopt a Program Based Primarily on Source-Specific Regulatory Requirements with no Cap and Trade Component. Here, ARB states that it cannot predict what future regulatory process will reveal. Appendix J p. 86. However, this is disingenuous. There were numerous measures considered and then discarded by the Draft Scoping Plan and Proposed Scoping Plan such as regulating methane capture at large dairies. Appendix J p. 45. ARB could analyze the impact of including these known measures in this Alternative without speculation. See Part II.A.1&3.

Alternative 5, Adopt a Program Based Primarily on a Carbon Fee. ARB expects similar reductions from this alternative compared to the Proposed Scoping Plan. According to the ARB, it would be similarly difficult to predict where reductions will occur both in terms of sector and geography. Appendix J p. 87. Further, ARB reasons that with a carbon fee there is no certainty that emissions will be reduced unlike a cap and trade program where the cap provides certainty. Appendix J p. 87. This analysis is disingenuous and misrepresents both the effectiveness of a carbon fee and the historical inefficacy of cap and trade programs in controlling or reducing greenhouse gas emissions. First, ARB ignores the fact that a carbon fee assures in state reductions as oppose to a regional cap and trade program that ARB admits has an uncertain effect on greenhouse gas emission in state. Appendix J p. 26. Second, in Europe cap and trade has resulted in an increase in greenhouse gas emissions despite inclusion of a cap. This is largely due to the problems with enforcement and verification of actual reductions. Third, there is nothing that would prevent ARB from including a cap as part of carbon fee program. Fourth, ARB ignores the fact that carbon fees are easy to administer, collect, verify and enforce which experience has shown has a greater assurance of certainty of reduction then a nebulous cap and trade program over multiple jurisdictions.

Preferred Alternative: ARB states that the Proposed Scoping Plan which consists of a cap and trade program and complementary measures is the preferred alternative. Appendix J p. 89. ARB recommends the proposed Scoping Plan because the reduction measures were developed to reduce greenhouse gas emissions from key sources while “improving public health, promoting a cleaner environment, preserving our natural resources and ensuring impacts of the reductions are equitable and do not disproportionately impact low income communities and minority communities. Appendix J p. 89. However, ARB’s analysis does not support this conclusory statement. ARB defers its analysis to subsequent rulemaking and permitting processes. ARB has no support for this self-aggrandizing statement. See Part II.A.1&2.

Further, ARB’s numerous assumptions about the success of its proposed cap and trade program linked to the Western Climate Initiative have not been borne out by historical experience. Europe’s cap and trade program has been a failure at reducing greenhouse gas emissions and has had the opposite. ARB’s belief that it will design a better program in the future is not in evidence at this time and is sheer speculation. ARB’s alternatives analysis does not comply with CEQA.

III. PROCEDURAL IRREGULARITIES DEPRESSED PUBLIC PARTICIPATION AT ARB’S NOVEMBER HEARING AND WERE RACIALLY DISCRIMINATORY.

In addition to these substantive comments, we wish to lodge a protest about the conduct of the November 20, 2008 ARB hearing in Sacramento. We will describe in detail the experiences of one delegation of the public which attended the hearing with the ambition of presenting public testimony, that of the San Joaquin Valley. At the outset, we note that ARB member Dr. Telles correctly observed during the hearing that the contingent from the San Joaquin Valley was the largest in attendance at the hearing. CRPE coordinated and facilitated having 76 Valley residents attend the hearing, and 61 of those residents turned in cards to testify on the Scoping Plan. These residents, primarily farmworkers, hailed from 18 different Valley communities, including Arvin, Lamont, Weedpatch, Bakersfield, Delano, Earlimart, McFarland, Allensworth, Visalia, Lindsay, Fresno, and Merced. Many had taken an unpaid day off from work, and had to board the bus CRPE arranged at 4:00 a.m. in Arvin to make the trip north. The ARB’s actions with regards to these attendees, who were overwhelmingly Latino and Spanish-speaking, were discriminatory on the basis of race, color and national origin.

The ARB took three specific actions that both treated this Valley group differently from other hearing attendees on the basis of race, color and national origin and had the effect of not allowing these Valley residents to testify at the hearing.⁷⁸

⁷⁸It should also be noted that it has had the effect of depressing their participation at future ARB hearings, as Luke Cole informed James Goldstene on November 20 when Goldstene asked if the Valley residents would attend the diesel rule proceedings.

First, once the Valley contingent had entered the building, **they were forced to sign in a second time and produce identification that was held by ARB staff before they were given access to translation equipment.** Although the group was there under the auspices of CRPE – which has two members on the ARB’s EJAC and is presumably known to the ARB staff – each person who wanted translation equipment had to wait in line and present ID. This decision by the ARB had three immediate consequences: 1) Spanish-speakers were intimidated and made to feel anxious because government agents were demanding their identification. While this was perhaps unintentional on ARB staff’s part, there is a long history in this state and this country of state and federal employees demanding to see identification from people who look or are Latino. The ARB’s practice at the hearing directly played into this history of racial discrimination, and echoed it in the minds of Spanish-speaking attendees. 2) The long wait for many to be processed and receive the translation equipment meant that they were unable to hear the critical testimony of EJAC Chair Angela Johnson-Meszaros, which took place during the time these Spanish-speakers were being signed in. And 3) the long wait to get into the hearing room meant that almost all the seats in the hearing room were full by the time the Spanish-speakers were able to enter the room, which had implications that are set forth below.

There is an easier, non-discriminatory way for ARB to accomplish the same purpose of getting all its translation headsets back, and we urge the ARB to adopt this approach immediately. A simpler, less-discriminatory solution would be for ARB staff to delegate to CRPE (or whomever is coordinating the attendance) the task of distributing and retrieving the headsets, which CRPE staff on site could have done in about three minutes. It is inconceivable that ARB staff actually think that any of the Valley attendees would steal the headsets, which have no function or value outside of the hearing room, so we cannot fathom why Spanish-speakers were treated differently than English speakers.

Partially as a direct result of the long wait to get headsets, by the time the Spanish-speakers entered the hearing room most of the seats were taken. ARB had made the initial decision to have the hearing in a room that had inadequate capacity to hold those who attended the hearing, and for most of the morning of the hearing there were dozens if not more people standing in the aisles and at the back of the room near the doorways. The ARB took no action about these standees. However, and here is the second action ARB took with discriminatory effect, **within minutes of the Spanish-speakers entering the hearing room and – because there were no seats – standing to listen and take part in the hearing, the ARB staff cleared the aisles of all standees and those people were forced to move into the overflow room** to watch and listen to the hearing on television. For those who had been in attendance throughout the hearing (and standing), the timing of the forced removal to the overflow room was striking: mostly white people stood all morning, but upon arrival of a contingent of brown faces, all the standees were moved out of the room. Again, ARB staff were perhaps not intentionally discriminating, but the appearance and consequence of their actions were clear: Spanish-speakers were forced into a separate, and unequal, space to observe the hearing. They were thus denied the opportunity to fully participate and listen, and also to respectfully demonstrate their approval or disapproval of particular speakers in a way the ARB board could see. Holding up a sign that says “NO

TRADING” during testimony on trading is simply not effective participation if you are in the overflow room.

Again, there are simply, non-discriminatory ways the ARB could have handled this situation, starting with booking a hearing room with adequate capacity to seat those expected to be in attendance, and continuing through uniformly enforcing a no-standing policy.

The third discriminatory action, and perhaps the one taken by the ARB that had the most consequence in depressing the public participation by Valley residents, was when the ARB staff and chair arbitrarily chose certain speakers and allowed them to speak at the hearing long before speakers who had turned in cards ahead of them. This had direct discriminatory consequences when, because of the necessity of returning home to arrive before 9:00 p.m., **51 of the 61 Valley residents who had turned in speaker cards to provide testimony had to leave the hearing without testifying.** There are a number of ways in which the Spanish-speakers were treated differently than English speakers in this process: 1) although many of the Valley residents turned in their cards early in the hearing, others who had turned in cards later in the hearing were called to testify before them, a treatment of the Valley residents that the Valley residents who had to leave at 3:00 p.m. were excluded from speaking; 2) although the 61 speaker cards were turned in to ARB staff early in the hearing, they were not entered in to the speaker list with all the other speaker cards and were segregated for separate treatment; and 3) the Chair’s arbitrary and unilateral decision to place comments on regulating greenhouse gas emissions from agriculture – one of the central issues the Valley residents came to testify about because it has a direct daily impact on their lives – very last on the agenda had the effect of precluding their testimony.

The most troubling of these actions by ARB was the segregation of the speaker cards from the Valley. When CRPE staff member Luke Cole met with ARB staff during the morning hearing to try to ascertain where the Valley residents would be in the list of speakers, he was shown (on a computer monitor) the list of 240 speakers who had been entered. Not seeing any of the 61 speakers from the Valley on the list, he asked staff about this. “Oh, we are keeping those separate,” said the staffer, showing him the stack of 61 speaker cards, which were not being entered into the main speaker list. It is our belief that this failure to enter the speaker cards into the list meant that more Valley residents – who had to leave the hearing at 3:00 p.m. to return home by 9:00 p.m. – did not get to testify. After a series of tense negotiations with ARB staff, 10 of the 61 Valley speakers were called to the podium to testify, and when it was clear that no more would be called by 3:00 p.m., the Valley residents communicated several of their positions en masse and left the hearing room.

ARB staff, in the tense negotiations before the 10 people were allowed to testify, suggested that “if they are all from one group, perhaps one person could summarize their testimony.” This not only misses the point of individual public participation, but misunderstands the diversity and breadth of opinion from Valley residents. They took the time to come to Sacramento from 18 different Valley communities, facing different air quality issues and with

different life experiences, to testify; although CRPE facilitated that trip, it could not “summarize” the testimony of 61 people in the two minutes allotted by the ARB.

The experiences of the 76 Valley residents who took their day to attend the ARB hearing was, unfortunately, not unique. The 10 Inland Valleys residents who attended under the auspices of the Center for Community Action and Environmental Justice were forced to leave the hearing before their names were called, although they had turned in cards to speak early in the proceeding. ARB staff “lost” the speaker cards turned in by representatives from Communities for a Better Environment, who were likewise unable to speak because they were not called.

There are simple, non-discriminatory procedures that could be used to foster public participation. ARB could easily institute a sign-up form at the hearing where signatories would know when they would be called to testify and so could plan around that. The ARB could also institute a “community members first, paid representatives second” policy to encourage public participation and value those who are sacrificing their livelihoods to be at the hearings rather than being paid to be there. The ARB could take a first-come, first-served approach so that people who turn in their cards early in the process get to testify early in the process. Finally, if it continues with this flawed approach of grouping the testimony by subject area, the ARB could be far more transparent in its approach and tell those in attendance what the arc of the day will look like; it could also schedule subject areas that the public is likely to talk about (like agriculture) early in the day rather than last on the agenda.

We call on the ARB to immediately overhaul its public participation approach, which has demonstrably failed in this instance with discriminatory impact the result.

IV. CONCLUSION

We urge the ARB to take into account all of these comments, and fix the various illegalities the comments identify. The stakes are too high to get this central decision wrong.

Signed,

/S/ [submitted electronically]

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