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VIA Electronic Submission and U.S. Mail

California Air Resources Board Members and Staff
California Air Resources Board
Headquarters Building
1001 "I" Street
P.O. Box 2815
Sacramento, CA 95812

RE: Comments on Draft Scoping Plan and Appendices

California Air Resources Board Members and Staff:

On behalf of the Center for Biological Diversity, we offer the following comments on the Draft Scoping Plan and its Appendices (hereinafter "Draft Scoping Plan").[1] We appreciate the staff's significant effort on this critical project and hope these comments will support your development of a successful and legally defensible plan.

Global warming poses an unparalleled challenge to California and the world. The legislature has recognized the real threat posed by global warming. Health and Safety Code § 38501(a) & (b). To address this problem, California enacted groundbreaking legislation, the California Global Warming Solutions Act of 2006 (hereinafter "AB32"). ARB was vested with the statutory duty to implement AB32. ARB must use this authority to achieve greenhouse gas reductions that will truly set California on a path to a low-carbon future.

We strongly support the implementation of AB32, and the development and full implementation of the Scoping Plan. These comments are intended to show that ARB has the authority, responsibility, and opportunity to increase greenhouse gas reductions by strengthening measures in the final Scoping Plan.

Although the Draft Scoping Plan contains many important elements that will help California achieve reductions in greenhouse gas emissions, it fails to require *all* of the reductions mandated by AB32 and fails to adhere to *all* of the mandates of AB32. Fundamentally, the Draft Scoping Plan is partially untethered from the statutory provisions of AB32. This letter provides a statutory analysis of AB32 and identifies key areas where the proposals in the Scoping Plan are

[1] The Draft Scoping and its Appendices are separate documents. This comment addresses both simultaneously because the Appendices provide more information about the Draft Scoping Plan. For references purposes, the Draft Scoping Plan is referred to as "DSP" and the Appendices as "DSPA."

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inconsistent with AB32. We appreciate the opportunity to comment early and believe that ARB can address the issues identified in this letter, and develop a final Scoping Plan that fully complies with the mandates of AB32 and achieves the level of reductions required by the law and the climate crisis we all face.

This letter focuses on three primary deficiencies in the Draft Scoping Plan: first, the Draft Scoping Plan uses the 2020 greenhouse gas emission limit as a ceiling on the amount of greenhouse gas emission reductions required, when in reality the emissions limit is the minimum amount of reductions to be achieved by 2020; second, the Draft Scoping Plan ignores that AB32 requires "maximum technologically feasible" emission reductions; and third, it proposes to link to the Western Climate Initiative's cap and trade system, a system that in its current form is inconsistent with AB32. This letter also discusses citizen enforcement.

I. AB32 REQUIRES THE SCOPING PLAN TO INCLUDE THE "MAXIMUM FEASIBLE" REDUCTIONS OF GREENHOUSE GAS EMISSIONS.

The Draft Scoping Plan is unnecessarily limited by a fundamental misreading of AB32. The Draft Scoping Plan proposes regulations that are intended to achieve the exact amount of emission reductions necessary to meet the statewide emissions limit. (DSP at 11). In December 2007, ARB set this statewide emissions limit at 427 million metric tons of carbon dioxide ("CO_2") equivalent emissions ("$MMTCO_2E$"); this number is the estimated 1990 level of greenhouse gas emissions in California. (DSP at 2). The Draft Scoping Plan projects a business as usual emission level in 2020 of 596 $MMTCO_2E$. (DSP at 8, Table 1). The Draft Scoping Plan simply subtracts the 1990 greenhouse gas emissions from the business as usual projection and determines that the state needs to achieve 169 $MMTCO_2E$ of emissions reductions to meet the statewide emissions limit. *Id*. The Draft Scoping Plan then proposes a strategy to achieve this exact amount of reductions. (DSP at 11). This approach is improper because it uses the statewide emissions limit as the maximum amount of emissions that must be achieved by 2020. The Draft Scoping Plan literally caps the amount of reduction achievable by proposing a cap and trade program that fills in the "gap" for twenty percent of the reductions for which ARB did not propose or analyze the effect of direct regulations.

The "statewide emissions limit" represents only the minimum amount of reductions required to be achieved by 2020. Health and Safety Code § 38505(n) defines "statewide emissions limit" as "the *maximum allowable level* of statewide greenhouse gas emissions in 2020." (emphasis added). By defining the statewide emissions limit as "the maximum allowable level of emissions in 2020," AB32 sets a floor, not a ceiling, on the amount of greenhouse gas emission reductions. Health and Safety Code section 38550 requires that California's 1990 emissions level be achieved by 2020, but this provision does not limit the amount of reductions to be achieved. In fact, it contemplates that the emission reductions may likely be greater than those needed to achieve the statewide emissions limit. Setting a "maximum allowable" emissions level indicates a minimum amount of reductions required, not a maximum.

AB32 requires the Scoping Plan to do more than merely achieve this "floor" of the statewide emissions limit. The statute is clear that the Scoping Plan instead must achieve the maximum feasible reduction in greenhouse gas emissions. Health and Safety Code section 38561 sets the parameters for the Scoping Plan. Subsection (b) explicitly states that the plan "shall identify and make recommendations" on a range of emission reduction strategies "to facilitate the achievement of the *maximum feasible* and cost-effective reductions of greenhouse gas emissions by 2020." (emphasis added). The use of the term "maximum feasible" is not limited to the "statewide emissions limit." The reductions required by AB32, therefore, can and most likely will be more than the 169 $MMTCO_2E$ of reductions needed to achieve the statewide emissions limit.

Subsections (a) and (h) of section 38561 are consistent with this interpretation. Health & Safety Code section 38561(a) requires ARB to adopt a scoping plan "for achieving the *maximum technologically feasible* and cost-effective reductions in greenhouse gas emissions from sources or categories of sources of greenhouse gases by 2020 under this division." (emphasis added). Subsection (h) parallels this language and requires ARB to "update its plan for achieving the maximum technologically feasible and cost-effective reductions of greenhouse gas emissions at least once every five years." By requiring the *maximum technologically feasible* reductions, the statute requires all the reductions that are technologically feasible, *i.e.* the maximum amount. This creates a mechanism for creating more reductions, not less. In contrast, the Draft Scoping Plan has artificially capped the amount of reductions at the statewide emissions limit. ARB discounts the ability of direct regulation to achieve the exact specific numerical target of 169 $MMTCO_2E$, but ARB is required by the statute to develop a Scoping Plan that achieves all the technologically feasible reductions which may be more than is strictly necessary to meet to the statewide emissions limit.

There is no artificial limit in AB32 suggesting that once the 1990 emission level is achieved no other emission reductions are required. In fact, the opposite is true. "It is the intent of the Legislature that the statewide greenhouse gas emissions limit continue in existence and be used to maintain and continue reductions in emissions of greenhouse gases beyond 2020." Health and Safety Code § 38551(b). By requiring maximum technologically feasible reductions, AB32 ensures that the appropriate technology is in place to facilitate the "maximum feasible" reductions. ARB is tasked with designing a plan that at a minimum will achieve the statewide emissions limit. ARB cannot neglect to pursue feasible reductions based on the projection that the additional reductions could potentially reduce emissions below the statewide emissions limit.

This interpretation is consistent with the structure of AB32. Part 4, the section entitled "Greenhouse Gas Emissions Reductions" begins with a provision that applies to all rules and regulations adopted pursuant to AB32 including the Scoping Plan. Health and Safety Code section 38560 requires ARB to "adopt rules and regulations in an open public process to achieve the maximum technologically feasible and cost-effective greenhouse gas emission reductions from sources or categories of sources, subject to the criteria and schedules set forth in this part." The Scoping Plan and every regulation adopted pursuant to AB32 is required to achieve both

"maximum technologically feasible" and "cost-effective" reductions. The same requirement also applied to the early action measures. Health and Safety Code § 38560.5(c)

II. ARB HAS FAILED TO IDENTIFY THE MAXIMUM TECHNOLOGICALLY FEASIBLE REDUCTIONS.

As discussed above, ARB has a statutory mandate to adopt "maximum technologically feasible" reductions. ARB inexplicably ignores this requirement and does not include it as a basis for evaluation. (*See* DSP at ii, Table of Contents, III.C.) By doing so, ARB removes an essential statutory standard for evaluating the scoping plan. As a consequence, decisions made by ARB appear politically motivated rather than based on a reasoned decision-making record. For example, ARB arbitrarily chose not to regulate the agricultural sector even though technologically feasible reductions exist.[2] AB32 simply does not exempt certain sectors from regulation.

AB32 contemplates a thorough review of the maximum technologically feasible reductions. In a letter to ARB dated May 4, 2007, Earthjustice, writing on behalf of CBD, emphasized that ARB must use the maximum technologically feasible standard when assessing the early action measures. That letter stated:

> There is no evidence of any systematic review of GHG sources in the State or any survey of the controls that could be, or already have been, adopted for these sources. For example, we know that local air districts regulate a number of source categories that are significant GHG emitters, such as dairies, composting facilities, stationary engines, and flares. Local controls of these sources vary from air district to air district resulting in disparate controls of GHG emissions. As an initial step, ARB should review the controls already in place at GHG sources to identify the local rules that are currently achieving the greatest reduction in GHG emissions. These are measures that have already been demonstrated as technically feasible and could easily be implemented statewide. ARB should further assess whether the emission reductions required by those rules represent the "maximum technologically feasible and cost-effective reductions" in GHG emissions, and, if not, propose necessary improvements.

With the early action measures ARB never did make a maximum technologically feasible assessment or a review of local control measures. While the short time-frames of those early action measure decisions may have made such a systematic review difficult, ARB has no such excuse for its refusal to conduct this review for the Scoping Plan.

[2] Several examples of available controls include but are not limited to: 1) electrification of agricultural internal combustion engines; 2) irrigation pump efficiency testing and improvements; and 3) solar installations that replace local combustion sources such as irrigation pumps.

ARB has now had the benefit of public input over many months on wide array of potential emission reduction measures. In fact, AB32 mandated this input: ARB must "adopt rules and regulations in an open public process to achieve the maximum technologically feasible and cost-effective greenhouse gas emission reductions from sources or categories of sources." Health and Safety Code § 38560. ARB cannot simply take public comment and then arbitrarily reject measures based on criteria that are not enumerated in the statute. If ARB once again ignores technically feasible emission reductions, it will violate both the letter and intent of the legislative requirement for "an open public process," as well as the requirement that greenhouse gas emission reductions be based on maximum feasible technology.

ARB has a statutory obligation to assess each of the technologies proposed if a technology is technically feasible, and it must be included in the draft scoping and assessed for cost-effectiveness. AB32 requires ARB to "rely upon the best available economic and scientific information and its assessment of existing and projected technological capabilities." Health and Safety Code § 38562(e).

In contrast to its lack of analysis related to the maximum technologically feasible standard, the Draft Scoping Plan does propose the appropriate method for determining cost-effectiveness. (DSP at 56). ARB has defined an approach that "is consistent with how cost-effectiveness is evaluated for strategies to reduce criteria and toxic pollutants." *Id*. By adopting this approach, ARB based the cost-effectiveness analysis on accepted and well understood framework. This approach also provides transparency because many of the participants in the Draft Scoping Plan have also participated in these types of rulemakings.

Despite proposing the appropriate method for assessing cost-effectiveness, ARB inappropriately limits the set of measures on which it will assess cost-effectiveness. The Draft Scoping plan states:

> The set of measures needed to achieve the necessary reductions of about 169 $MMTCO_2E$ required by AB 32 would be defined. These measures would be selected to provide the needed reductions in the most cost-effective manner possible. The cost of individual measures could vary widely, but would establish a range from most to least cost-effective.
>
> This range will assist the Board in evaluating the cost-effectiveness of individual measures when considering adoption of regulations. The range of acceptable cost-effectiveness may change if effective lower-cost measures and options are identified.

Id. By limiting the universe to 169 $MMTCO_2E$ tons of reductions, the draft Scoping Plan runs the risk of falling short of the minimum requirement of attaining the statewide emissions limit. If even one rule is found not to be cost-effective or does not achieve its projected amount of reductions, ARB would have proposed insufficient emissions reductions. Thus, ARB should use

the maximum technologically feasible requirement to identify the whole universe of potential of reductions, and then apply the cost-effectiveness analysis to that larger universe.[3] If this process demonstrates that more than 169 $MMTCO_2E$ tons of reductions exist, it is consistent the statutory mandate to achieve the maximum feasible reductions in the scoping plan.

The "maximum technologically feasible" standard is a technology forcing standard that serves as a key component to the success of the implementation of AB32. By requiring maximum technologically feasible controls, the legislature required ARB to put in place technologies that assure reduction over the long-term. Unfortunately, the Draft Scoping Plan does not evaluate its proposed measures under this standard. (*See, e.g.,* DSPA C-100 - C-128 (discussing a range of measures that it has not evaluated under this standard)). For example, the Draft Scoping Plan includes technologically feasible measures in a category entitled "other measures under evaluation." (DSP at 37-40). In this category, ARB includes a slew of industrial control measures upon which the Appendices provide some additional elaboration of industrial control measures for a variety of sectors. (DSPA at C-100 - C-122). Even a cursory review shows that many, if not all, of these measures are technologically feasible. For example, the Draft Scoping Plan states that ARB could require an increase in the thermal efficiency of industrial boilers. (DSPA at C-115 – C116). The question then should be what is the maximum technological fix or fixes that can increase thermal efficiency and reduce greenhouse gas emissions. Yet, ARB has not even committed to including this measure in the final scoping plan.

ARB must incorporate in the Scoping Plan any technologically feasible and cost-effective measures that would lead to greater reductions in greenhouse gas emissions. These measures should include all technologically feasible and cost-effective measures ARB designated as voluntary early action measures, all measures proposed as voluntary under the draft Scoping Plan, and all technologically feasible and cost-effective measures considered by ARB but were excluded from the recommendations of the draft Scoping Plan. For example, the use of methane digesters at large dairies and all of the ETAAC recommendations for recycling and waste are all measures that must be evaluated individually for adoption as mandatory measures based on their technological feasibility and cost-effectiveness.

ARB cannot reject a measure that is technologically feasible and cost-effective, based solely on the projections of economic modeling that may show that the combinations of other measures may achieve the minimum reductions necessary to reach the statewide emissions limit, or that the measure may to some degree eventually become voluntarily implemented under a cap

[3] This approach is consistent with the EPA's guidance on SIP approvals. EPA recognizes that its SIP rules will not achieve one hundred percent of the estimated emissions. EPA uses either a case-specific value or a default of 80% effectiveness when evaluating each SIP rule. ("Guidelines for Applying and Estimating Rule Effectiveness For Ozone/CO State Implementation Plan Base Year Inventories," USEPA (Nov. 1992), EPA-452/R-92-010 at 3). EPA's caution should be heeded. Fortunately, AB32 provides a specific statutory benchmark, the maximum feasible technology standard, that provides ARB with the mechanism to fully include all possible reductions in its analysis. As discussed in the next section, this technology standard also applies to any cap and trade program that ARB would propose.

and trade program. Neither can ARB reject any measure solely on the assumption that the minimum levels of emissions reductions may be achieved more inexpensively through other measures. That approach would potentially fail to maximize possible emissions reductions, and would dilute the meaning of cost-effectiveness. Instead, ARB can reject a measure or designate a measure as voluntary only if ARB can a show that the particular measure will achieve equal or greater reductions as a voluntary measure or under the cap and trade market mechanism than under mandatory implementation for that measure.

III. ARB'S PROPOSED CAP AND TRADE PROGRAM DOES NOT COMPLY WITH AB32.

A. AB32 Sets the Legal Parameters for the Design of a Cap and Trade Program.

AB32 permits ARB to design a cap and trade program but the system is constrained by a variety of statutory provisions. Health and Safety Code section 38562(c) permits but does not require ARB to establish a cap and trade program. It states:

> In furtherance of achieving the statewide greenhouse gas emissions limit, by January 1, 2011, the state board may adopt a regulation that establishes a system of market-based declining annual aggregate emission limits for sources or categories of sources that emit greenhouse gas emissions, applicable from January 1, 2012, to December 31, 2020, inclusive, that the state board determines will achieve the maximum technologically feasible and cost-effective reductions in greenhouse gas emissions, in the aggregate, from those sources or categories of sources.

Id. The next subsection, (d), sets additional parameters for all regulations adopted by ARB including the scoping plan and market-based compliance mechanisms. It requires the reduction to be "real, permanent, quantifiable, verifiable and enforceable by the state board" and requires that the reductions are "in addition to any greenhouse gas emission reduction otherwise required by law or regulation, and any other greenhouse gas emission reduction that otherwise would occur." Health and Safety Code §§ 38562(d)(1) & (2). Subsection (3) applies if direct emissions regulations are replaced by market-based compliance mechanisms. If so, greenhouse gas emission reductions must occur over the same time period and be equivalent to the amount of the direct emission regulation or regulations. In addition to the requirements in section 38562, the statute has a separate section, Part 5, that provides additional requirements for market-based compliance mechanisms.

ARB's proposal for the cap and trade system constitutes a serious departure from the requirements of AB32. ARB proposes to link to the Western Climate Initiative ("WCI")

regional cap and trade, but as currently designed, the WCI does not comply with AB32.[4] To participate in WCI, ARB is aware that it must ensure that its own program complies with AB32. (DSPA at C-15).

B. A Cap and Trade Program Must Achieve Compliance with Annual Declining Aggregate Emission Limits.

The Scoping Plan fails to fulfill the fundamental requirement that the cap and trade system requires a declining annual aggregate emissions for the sources or category of sources included in the cap. Health and Safety Code §§ 38562(c), 38505(k)(1). In contrast, the WCI allows three-year compliance periods, allowing annual emissions to rise and fall over these three-year periods as long as the average emissions comply with the set limits. (WCIDD at 4). This is not what the legislature intended to allow. AB32 is explicit that there must be declining annual aggregate emission limits. AB32 prevents backsliding and ensures that the emission reductions from a cap and trade system actually decline each year.[5] The only way to assure compliance with declining annual emission limits is to have annual compliance periods.

AB32 requires California to develop a cap and trade program that can assess whether the program is complying with the declining annual aggregate limit. WCI's intention to allow unlimited banking[6] violates this requirement. Allowing the use of banked credits means that emissions would be allowed to actually *increase* in future years. This "flexibility" contravenes AB32's requirement for declining annual aggregate emission limits, because there is no way to control when the banked credits will be used. On its face, allowing unlimited banking will not ensure compliance with declining annual aggregate limits, and thus, does not comport with AB32.

C. Maximum Technological Feasibility Must Be Assessed Before ARB Employs Any Flexible Compliance Mechanisms.

ARB cannot choose to use a cap and trade program to achieve an arbitrarily defined level of greenhouse gas emission reductions such as the proposed twenty percent reduction needed to exactly meet the statewide emissions limit. AB32 authorizes ARB to adopt a cap and trade

[4] Appendix D includes WCI Recommendations of May 16, 2008. Subsequent to the release of the Appendices, the WCI released a new set of recommendations. This letter refers to the WCI "Draft Design of the Regional Cap-and-Trade Program dated July 23, 2008, (referred to as WCIDD) .

[5] Both RECLAIM in the South Coast Air Quality Management District and the European Emissions Trading System had increases in regulated pollutants in their initial years. The legislature in AB32 wisely intended to prevent this possibility.

[6] WCI makes one exception to unlimited banking; it limits banking "to the extent that restrictions on the number of allowances any one party may hold are necessary to prevent market manipulation." (WCIDD at 7). This standard would most likely not be proved until after the fact which in essence defeats the purpose of the restriction, because the banked credits would have already been accumulated and misused. California's experience with the "energy crisis" demonstrates valid reasons to fear market manipulation, but this requirement provides nothing more than rhetoric.

system if ARB "determines" that it "will achieve the maximum technologically feasible and cost-effective reductions in greenhouse gas emissions, in the aggregate, from those sources or categories of sources." Health and Safety Code § 38562(c). Yet, instead of determining the maximum feasible reductions that can be achieved by these capped sectors, ARB "backs into" the emission reductions to be achieved by treating the trading program as the gap filler to achieve whatever additional reductions are left to meet the statewide emissions limit after the implementation of other controls. This approach misapplies the function of the statewide emissions limit (as discussed above) and ignores the statutory requirement to achieve the maximum feasible reductions through any such trading program.

ARB must determine whether reductions from the covered sectors in the cap and trade program will achieve at least the equivalent to reductions to direct regulation, but ARB has not presented this analysis. The Draft Scoping Plan reports that reductions from the industrial sector will be "significantly reduced via the cap-and-trade measure. However, opportunities to use other mechanisms to obtain reductions are also under consideration." (DSP at 39) This statement indicates that ARB has not assessed if the "significant reductions" that it plans to achieve with the cap and trade program will comply with its statutory obligation to achieve the maximum technologically feasible reductions.

The proposed WCI banking provisions are also inconsistent with AB32 because ARB failed to assess the reductions that can be achieved from direct regulations in the sectors to be covered by the cap. Health and Safety Code section 38505(k)(2) states that banking is allowed to the extent it " result[s] in the same greenhouse gas emission reduction, over the same time period, as direct compliance with a greenhouse gas emission limit or emission reduction measure adopted by the state board pursuant to this division." Thus, any banking system that is created pursuant to AB32 must be compared to the potential reductions that can be achieved from direct regulation.

Maximum technological feasibility must be assessed as a prerequisite to any "market-based compliance mechanism." In addition to a cap and trade system, ARB indicates that individual direct regulations will incorporate flexible market-based compliance mechanisms. The Draft Scoping Plan states that "[a]s with most of ARB's regulations, many AB32 regulations are likely to incorporate flexible market-based approaches to reduce emissions while lowering cost." (DSP at 10). As with the banking flexibility discussed above, these alternative compliance mechanisms must be analyzed in relation to the potential direct regulation covering the same source or sources on which a flexible system is adopted. (*See* Health and Safety Code §§ 38505(b) and 38505(k)(2)). By defining these mechanisms in relation to direct emission reductions, the statute requires an assessment of maximum technologically feasible reductions and cost-effectiveness for every proposed emission reduction even if ARB plans to achieve those emission reductions by a "market based compliance mechanism" or an "alternative compliance mechanism."

In order to adopt a cap and trade program and for that matter, banking, ARB must assess the potential reductions for each category of sources to be included in the cap. To make this determination, ARB must analyze the maximum technologically feasible reductions that would be replaced by the trading system. As discussed, ARB has not presented this analysis in the Draft Scoping Plan.

D. The WCI Proposal has Additional Problems that Make it Incompatible with AB32.

Linkage of WCI to the cap and trade program will not produce the promised reductions because WCI proposes to set an inflated baseline. Currently, WCI set the initial cap "at the best estimate of expected actual emissions for those sources covered in the initial year of the program (i.e., 2012)." (WCIDD at 4). This baselines encourages all covered sources to start increasing emissions before the start of cap and is directly contrary to ARB's statement that "[b]y 2012, the cap-and-trade program will begin delivering reductions." (DSP at ES-3).

Furthermore, the baseline is over-allocated because it fails to account for the reductions that will occur from direct controls in the covered sectors. As presently described, the baseline is established for each three-year compliance period based on actual emissions at the start of each compliance period. (WCIDD at 4). This baseline does not account for reductions resulting from any direct regulations in the covered sectors, such as implementation of the RPS standard. Since these reductions are not subtracted from the baseline, the allocations decisions will be based on an inflated baseline, because reductions within the cap will occur independently of the cap and trade program. This baseline is contrary to AB32's requirement that reductions from a cap and trade system must be "in addition to any greenhouse emission reduction otherwise required by law or regulation, and any other greenhouse gas emission reduction that otherwise would occur." Health and Safety Code § 38562(d)(2). This baseline issue is solved if ARB conducts the required assessment of maximum technologically feasible reductions. This assessment would eliminate this potential for over-allocation in the cap and trade program by providing a more accurate baseline that does not include reductions that would otherwise occur.

As currently constituted, the WCI program will stifle technological innovation and even the use of the existing technology necessary to make the maximum feasible reductions in the same way that the RECLAIM program did in Southern California. ARB argues that "[b]y setting a limit on the quantity of greenhouse gases emitted, a well-designed cap-and-trade program will complement regulatory measures for covered sectors and achieve additional reductions in greenhouse gases that would not have occurred otherwise." (DSP at 17). Yet, as currently designed, WCI does the opposite. Like the proposed WCI program, RECLAIM began with an over-allocated baseline that created inexpensive credits that allowed companies to avoid employing best available control technologies. Emissions actually increased during the first two years of the program. The credit market that arose did not encourage the widespread use of best

available control technology.[7] Eventually, to achieve greater emission reductions, the South Coast Air Quality Management District had to institute a rule that required best available control technology. ARB's proposal to provide "low-cost" reductions that have no relationship to the amount of reductions that can be achieved by maximum feasible technology is a recipe for repeating the flaws of RECLAIM.[8]

If a goal of the trading system is to encourage technological innovation, it is necessary to account for the reductions that can occur from the use of maximum feasible technology, because any reductions above the projected level would truly be additional and would demonstrate that the price signal set by the market encouraged the innovation. On the other hand, if the cap and trade program is over-allocated, this will reduce the allowance price and associated price signals, thereby undermining incentives for innovation and even for known control technologies.[9]

Similarly, ARB's and WCI's proposal to allow ten percent of the compliance for the cap and trade program to occur from offsets must only be considered after an evaluation of direct regulation. (*See* Health and Safety Code § 38505(k)(2)). ARB seems intent on providing offsets from sectors that it did not regulate such as agriculture. Yet, without an analysis of maximum technologically feasible reductions in all sectors including those outside the cap, ARB will not be able to show that the credits comply with Health and Safety Code sections 38562(d)(2) and (3). Credits do not become additional because ARB simply decided not to regulate certain sectors or sources.

The very nature of a regional cap and trade program, where credits are generated in other states and then traded into California, raises enforceability issues; it is not obvious how ARB would be able enforce the validity of credits generated in another state or a Canadian province. Yet, Health and Safety Code section 38562(d)(1) requires that the cap and trade program be enforceable by ARB. As ARB is well aware, WCI cannot create a trading a system where states have enforcement powers outside their jurisdictional boundaries, because this type of

[7] *See*, Richard Toshiyuki Drury, Michael E. Belliveau, J. Scott Kuhn, and Shipra Bansal, "Pollution Trading and Environmental Injustice: Los Angeles' Failed Experiment in Air Quality Policy, 9 Duke Envtl. L. & Pol'y F. 231, 263-68. (Spring 1999).

[8] The legislature clearly had considered RECLAIM and its problems when it set legal parameters on the scope on any carbon trading program authorized by AB32. It is incomprehensible that ARB has not provided a thorough analysis of RECLAIM, the significant pollution trading program that has been operating in California. ARB appears intent on ignoring the fact that cap and trade programs do not necessarily work as advertised. Luckily, AB32 set specific parameters to avoid some of the classic problems with trading programs. It is incumbent on ARB to implement these restrictions.

[9] ARB also makes the unsubstantiated statement that reductions from the cap and trade are the most cost-effective, but there is no analysis. Without first determining the cost of the potential direct regulation or regulations, there can be no comparison of whether the regulation or the cap and trade system is most cost-effective. Moreover, ARB's discussion of its trading program appears to be premised on a perfect theoretical market where all participants have complete and transparent information about the availability of cost and credits and where the market power of none of participants can affect the market. ARB assumes that a cap and trade program will accomplish the estimated emission reductions, but the real world function of these programs does not provide a solid foundation for ARB's assumption.

arrangement would raise constitutional issues. Before including a cap and trade system in the Scoping Plan, ARB must explain how WCI will be enforceable by ARB.[10]

By its own admission, ARB has not done the requisite analysis to include a market based program in the Scoping Plan. (DSP at 10). Before including any market-based compliance mechanism in its Scoping Plan, 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 impacted 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. (3) Maximize additional environmental and economic benefits for California, as appropriate.

Health and Safety Code § 38570(b).

IV. THE SCOPING PLAN SHOULD INCLUDE A PROVISION THAT PROVIDES FOR CITIZEN ENFORCMENT OF ARB'S EMISSION REDUCTION REGULATIONS.

Continued public involvement and support will be necessary for the successful implementation of the greenhouse gas emission reduction programs created pursuant to AB32. After the completion of the Scoping Plan, ARB will begin rulemakings to enact the proposed regulations. These rulemakings will be open to public involvement and, as the Scoping Plan process has demonstrated, participation will most likely continue at a high level. Once ARB has completed some rulemakings, ARB will have both the responsibility to continue developing emission reductions as well as enforce the measures that it has adopted. In addition, if ARB does eventually adopt a cap and trade program, ARB will be required to develop a whole new system for enforcing financial transactions, which will be fundamentally different than ARB's traditional enforcement mechanisms. ARB's resources will be stretched thin.

Citizen enforcement of the regulations promulgated by ARB can extend the resources of the State and provide more incentive for the regulated industries to comply with the required emission reductions. AB32 provides ARB with the authority in the Scoping Plan to identify and make recommendations on "monetary and non-monetary incentives" "necessary or desirable to facilitate the maximum feasible and cost-effective reductions of greenhouse gas emissions by

[10] Health and Safety Code section 38562(d) requires that the Scoping Plan be in compliance with each of its three provisions including enforceability. It states "[a]ny regulation adopted by the state board pursuant to this part or Part 5 (commencing with Section 38570) shall ensure all of the following." This part refers to Part 4, which includes Health and Safety Code section 38561, the provision defining the contents of the Scoping Plan. Thus, ARB must include discussion of enforcement in the Scoping Plan and not defer this discussion to some future time after the Scoping Plan has been adopted.

2020." Health and Safety Code § 38561(b). ARB should use this authority to evaluate and recommend that citizens should have a statutory right to enforce the emission reductions measures that ARB adopts. As ARB is well aware, citizen enforcement has been integral ingredient in the success of reducing air pollution in California. In addition, the California League for Environmental Enforcement Now ("CLEEN") published a report that documents the positive influence that private enforcement of environmental laws has had in promoting public health and the environment; the report entitled "Protecting California's Public Health and Environment through Citizen Action" provides a persuasive case for citizen enforcement.[11]

ARB should include in the final Scoping Plan a recommendation to the legislature that it adopt a law that clarifies that private citizens have the ability to enforce every greenhouse emission reduction regulation adopted pursuant to AB32. This law could be based on the model of Federal Clean Air Act's private right of action. This law would promote an engaged public and would provide an extra assurance that greenhouse gas emission reductions will be implemented by regulated entities. In contrast, it would be ironic twist if the public was only encouraged to participate in the rulemakings and then asked to stand aside and hope that these regulations will be successfully implemented.

V. CONCLUSION: THE IMMEDIACY OF THE THREAT FROM GLOBAL WARMING DEMANDS STRINGENT ADHERENCE TO AB32.

Global warming is already occurring, and it is caused by human activity.[12] With each passing day, the urgency to make immediate greenhouse gas reductions becomes greater. The scientific evidence and projections continue to reveal that the effects of global warming are occurring at rates faster than predicted.[13] The global climate is on the verge of catastrophic tipping points that could irreversibly affect the climate.[14] It is, therefore, imperative that ARB

[11] The report is attached.
[12] "Climate Change 2007: The Physical Science Basis, Summary for Policy Makers" (Fourth Assessment Report of the IPCC, February 2007).
[13] David Adam, "World CO2 levels at record high, scientists warn," guardian.co.uk (May 12, 2008) *at* http://www.guardian.co.uk/environment/2008/may/12/climatechange.carbonemissions (last visited July 8, 2008).; CNN World News, *North Pole Could Be Ice-Free This Summer, Scientists Say* (June 27, 2008), *at* *http://www.cnn.com/2008/WORLD/weather/06/27/north.pole.melting/* (last visited July 8, 2008); *see also Global and regional drivers of accelerating CO2 emissions*, Michael R. Raupach et al., 104 Proceedings the National Academy of Sciences 24 (June 2007), p. 2 (attached).
[14] James Hansen, "Tipping Point: Perspective of a Climatologist," *in State of the Wild 2008-2009; A Global Portrait of Wildlife, Wildlands, and Oceans*, Wildlife Conservation Society (Kent Redford, Eva Fearn eds., April 2008) (attached). *See also* Bill McKibben, "Civilization's last chance," L.A. Times (May 11, 2008) *at* http://www.latimes.com/news/printedition/opinion/la-op-mckibben11-2008may11,0,2392815.story (last visited July 8, 2008).

correctly interpret AB32 to require the maximum feasible reductions. ARB must use the statutory power it was given to curb greenhouse emissions as soon as possible.

Sincerely,

William Rostov
Staff Attorney
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