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May 4, 2007

VIA ELECTRONIC AND U.S. MAIL

Dr. Robert J. Sawyer
 Chairman
 Air Resources Board
 1001 I Street
 Sacramento, CA 95812

Ms. Catherine Witherspoon
 Executive Officer
 California Air Resources Board
 P.O. Box 2815
 Sacramento, CA 95812

RE: Proposed Early Action Measures to Mitigate Climate Change in California

Dear Dr. Sawyer and Ms. Witherspoon:

This letter is submitted on behalf of Center for Biological Diversity to express our disappointment in the Air Resources Board's ("ARB") extremely weak proposed list of discrete early action measures to reduce greenhouse gas ("GHG") emissions in California. ARB's effort to date fails to live up to either the spirit or letter of the California Global Warming Solutions Act of 2006, Health & Safety ("H & S") Code § 38500 *et seq.* ("AB32"). We urge ARB to prepare a more thorough analysis of available measures and not to squander this important opportunity to reduce GHG emissions as soon as possible.

AB32 provides as the overarching goal and instruction to ARB that:

The state board shall 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 [Part 4].

H & S Code § 38560. Part 4 of the statute outlines a two-step plan for reducing GHG emissions to 1990 levels by 2020. The second step requires ARB to prepare a strategy by 2009 for achieving these emission reduction targets, and adopt the regulations identified in this strategy by 2011. *Id.* §§ 38561 and 38562. In the meantime, AB32 requires ARB to identify and adopt "discrete early action" control measures that can be implemented before the measures adopted as part of the broader strategy. *Id.* § 38650.5(a). The regulations to implement these early action measures must be adopted by 2010. *Id.* § 38650.5(b). The

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purpose of this first step is to ensure that ARB does not postpone adoption of technologically feasible and cost-effective measures while it is preparing the broader strategy for achieving the 2020 emission reduction targets. In both steps of this statutory process, the goal is the same – to achieve the maximum technologically feasible and cost-effective GHG emission reductions from sources or source categories.

ARB's proposed early action measures fail to live up to this goal. ARB's proposed early actions include *only three* measures: one for a low-carbon fuel standard that was already required by executive order; one for certain limited uses of a single hydroflourocarbon refrigerant; and one to set statewide standards for controls at municipal solid waste landfills. "Proposed Early Actions to Mitigate Climate Change in California" at 7 (April 20, 2007) ("Proposed Report"). ARB has also identified measures that it is already working on to address other air pollution problems or that it plans to consider in the future. *Id.* at 7-8. These measures, however, are not included as early action measures because ARB does not plan to have these rulemakings completed by 2010.

ARB's proposal comes nowhere close to AB32's goal of ensuring that the maximum technologically feasible and cost-effective emission reductions will be achieved through measures that can be implemented early. By refusing to look at all of the sources that can be regulated, ARB suggests that all it needs to do is make sure that the maximum reductions are achieved at the three sources it has identified. The identification of the sources and proposed early action measures is the product of an artificially limited process and reflects a lack of real commitment to address GHG emissions in a meaningful way.

ARB's process in preparing the proposed list of early action measures appears to be completely arbitrary. 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. Such a review is not only appropriate for this first round of early actions, it should be a prerequisite to any consideration of market-based controls in the future phases of AB32 implementation because it results in leveling the playing field for sources throughout California.

ARB's "criteria" for considering or rejecting a measure for listing as an early action measure seems to emphasize whether ARB has the resources to adopt a given measure by 2010. *See* Proposed Report at 12 (including as criteria whether the reductions warrant the resources

required to adopt and implement a regulation, and whether the strategy can be developed with available resources). These criteria have no basis in the statute. Section 38560.5(a) directs ARB to identify “emission reduction measures that can be implemented prior to the measures and limits adopted pursuant to Section 38562.” Nothing in this paragraph refers to the ability of ARB to “adopt” a given measure by 2010. The reference to adoption is in the following paragraph, which provides that ARB is required to “adopt regulations to implement the measures identified on the list” by 2010. H & S Code § 38560.5(b).¹ The statute does not ask *whether* ARB can adopt the listed measures. This is a mandatory requirement. If the measure is listed, ARB is required to adopt regulations to implement it. The only question in section 38560.5(a) is whether the *control measure* can be implemented before the next set of control measures will be required under the second step of the process in Part 4. There is no reference to 2010 or to action on the part of ARB. This is a technological question not one of agency resources.

Moreover, even if one were sympathetic to ARB’s argument that agency resources should be considered, ARB provides no analysis of what “can be” done. Instead ARB rejects early action measures simply because adoption of technologically feasible and cost-effective controls by 2010 is not what ARB currently has planned. The Proposed Report explains that “ARB staff are working on additional GHG regulations to be adopted in late 2009 or early 2010, which will just miss the January 1, 2010 enforceability date for ‘discrete early action measures’ in AB 32.” Proposed Report at 16. Section 38560.5 asks ARB to identify measures that “can be” implemented early, not whether these measures “will be” adopted on time. ARB provides no explanation as to why these measures already underway could not be accelerated in order to be included on the list of early action measures.

Finally, we find any complaint about limited resources to be fairly disingenuous. According to the Legislative Analyst’s Office (“LAO”) analysis of the Governor’s 2007-08 budget proposal for implementing AB 32, ARB is requesting over \$24 million and is seeking to add 123 new positions. LAO, “Resources – 2007-08 Analysis” at B-54. Moreover, the LAO raised concerns about the inappropriate use of funds for implementation of a market-based cap and trade program and recommended budget bill language to prohibit expenditure of funds for this purpose until ARB has completed the statutorily-required evaluation of whether such a strategy is desirable. *Id.* at B-58 to 61. With all of these additional resources and misappropriated funds, ARB cannot reasonably suggest that it is only capable of adopting three new rules as discrete early action measures.

ARB must spend its remaining time conducting a meaningful review of the technologically feasible and cost-effective measures currently available to control GHG emissions. It must provide a rational basis for its selection and rejection of such controls. It is insufficient for

¹ The Proposed Report misstates the requirements of AB32 by conflating paragraphs (a), (b) and (d) of section 38560.5: “AB 32 requires that on or before June 30, 2007, ARB shall publish and make available to the public a list of discrete early action greenhouse gas emission reduction measures that can be adopted and made enforceable before January 1, 2010.” Proposed Report at 11. This is simply not the test for identifying early action measures.

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ARB to bring nothing new to the table and rely on the public to do the work for the agency. Adoption of discrete early actions is an important first step in determining whether this ambitious law will be implemented effectively. We urge ARB to take this effort seriously; the stakes for all of our future health and welfare are extremely high.

Thank you for your attention to this important matter. If you have any questions, please do not hesitate to call me at (510) 550-6777.

Sincerely,



Paul Cort
Staff Attorney

Cc: Hon. D. Perata
Hon. F. Núñez