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Clerk of the Board
California Air Resources Board
1001 I Street
Sacramento, CA 95814

Submitted electronically at https://www.arb.ca.gov/lispub/comm/bclist.php

Re: California's Proposed Compliance Plan for the Federal Clean Power Plan Under Clean Air Act Section 111(d)

Dear Air Resources Board Staff:

We write on behalf of the Sierra Club and its more than two million members and supporters nationwide, including more than 146,000 members living in California. We appreciate the opportunity to submit comments on California's proposed plan ("Plan") for implementing the federal Clean Power Plan ("CPP").[1] California's Plan is the first proposed CPP state implementation plan in the nation. While California is relying on its unique greenhouse gas Cap-and-Trade program to achieve compliance with federal carbon dioxide (CO2) emissions targets for existing power plants, some elements of the Plan will serve as a model for other state plans. For this reason, we have reviewed the Plan with an eye towards the example it sets for other states' compliance plans, as well as whether it strictly complies with each required component set forth in the Clean Power Plan.

We respectfully urge the California Air Resources Board ("ARB") to consider the following recommendations before finalizing the Plan. Our comments are limited because California's state laws are far more ambitious than the federal program in terms of overall carbon dioxide emissions reductions and clean energy deployment. So long as the current federal goal for CO2 emissions from California sources remains at its current level, it is the state programs that will

[1] *Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units; Final Rule*, 80 Fed. Reg. 64,662 (Oct. 23, 2015), *codified at* 40 C.F.R. Part 60, Subpart UUUU.

instead be driving changes in power production and related pollution in California. The public's review of those state programs is ongoing in separate processes.[2]

I. CARB Should Consider Extending the Comment Deadline to Allow Time for Evaluating Experts' Preliminary Environmental Equity Assessment of the Cap-and-Trade Program

On September 14, 2016, experts at the University of California, Berkeley, University of Southern California, San Francisco State University, and Occidental College published a preliminary environmental equity assessment of the Cap-and-Trade program that evaluates the location and greenhouse gas (GHG) and PM10 emissions of facilities regulated under the program, as well as changes in localized GHG emissions from large point sources since the advent of the program in 2013.[3] Sierra Club urges ARB to consider extending the Plan's comment deadline to allow interested stakeholders, in particular community members, ample time to evaluate the results of this study. Its findings are relevant to the Plan as ARB is proposing to use the Cap-and-Trade program as a federally enforceable emission standard on affected power plants under the Clean Power Plan and as a state measure on all other sources regulated under state law.

This study finds that regulated GHG-emitting facilities are located in neighborhoods with higher proportions of people of color and people living in poverty. It also concludes that the facilities that emit the highest levels of both GHGs and PM10 (the latter which has localized impacts) are situated in communities with higher proportions of residents of color and poor residents.[4] While GHG emissions overall have decreased, many industry sectors covered under the program have increased their in-state GHG emissions since 2013. One example of this pattern concerns the electric power industry. While the California GHG Emission Inventory shows that emissions from the electric power industry overall decreased by 1.6 percent between 2013 and 2014, the study disaggregated these emissions and found that the decreases in emissions correspond to imported electricity, while emissions from in-state electric power generation actually increased.[5] While those out-of-state reductions are beneficial for the climate because such reductions correspond to imported coal fired-power generation,

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[2] Although the public process for evaluating the Cap-and-Trade program, i.e., the 2030 Scoping Plan update is ongoing, it would be appropriate to evaluate the substance of this program in this Clean Power Plan-focused proceeding as well. Concerns regarding the Cap-and-Trade program are relevant to whether California should adopt it wholesale for Clean Power Plan compliance.

[3] L. Cushing et al., A Preliminary Environmental Equity Assessment of California's Cap-and-Trade Program, http://dornsife.usc.edu/assets/sites/242/docs/Climate_Equity_Brief_CA_Cap_and_Trade_Sept2016_FINAL.pdf

[4] Id. at 1.

[5] Id. at 6.

evaluating emission effects based on the location of increases and decreases – and not just overall emissions reductions – could help identify appropriate measures to reduce pollution from facilities that affect vulnerable communities, and thereby improve the environmental co-benefits of the cap-and-trade program.

In addition to extending the comment deadline, we urge ARB to review this study and discuss these findings with stakeholders in light of the information available under its Adaptive Management Plan process (as further discussed below), and to address these findings in its Scoping Plan update and the Plan, as appropriate. Again, although the Cap-and-Trade program is undergoing its own review at this time, the Clean Power Plan compliance plan should not get ahead of that process if Cap-and-Trade will be the primary compliance mechanism.

II. The Plan Should Explain the Full Scope of its Environmental Justice Outreach and Respond to Input It Has Received From That Process

The Clean Power Plan requires that implementation plans "include documentation of any conducted community outreach and community involvement, including engagement with vulnerable communities." 40 C.F.R. § 60.5745(a)(12). In accordance with this requirement, the Plan provides a brief description of the agency's outreach to vulnerable communities, explaining that ARB staff has met representatives of the Environmental Justice Advisory Committee (EJAC) twice and solicited feedback on compliance options under the CPP. The Plan will also be made available to EJAC and other representatives of vulnerable communities and ARB "is exploring" public workshops accessible to members of vulnerable communities. Plan at 69.

Sierra Club believes that ARB's outreach to communities with respect to CPP compliance so far is insufficient and does not constitute *meaningful* engagement. Meaningful engagement includes not only reaching out and soliciting input from vulnerable communities, but also fostering community involvement at critical junctures in the development and implementation of state plans. This means ensuring that overburdened communities have a strong understanding of the potential benefits and potential adverse impacts that a state plan may have on them. It also involves truly considering the feedback received and using this input to shape the content of state plans, unless there is a robust justification for not doing so, which should be explained in the agency's responses to comments. EPA's *Guidance on Considering Environmental Justice During the Development of Regulatory Actions*, which EPA has recommended states to consult as they conduct their stakeholder processes, identifies the lack of opportunities for communities of color, low-income, and tribal communities to meaningfully

participate in the development of regulations as an environmental justice concern.[6]

ARB should thus hold more than two meetings and proactively seek input and review of the Plan by community stakeholders throughout the state. In addition, while ARB notes that it has regularly offered Spanish language translation at its general workshops, we recommend that the agency provide background information on the Plan in Spanish and other languages as appropriate, as this information would allow community stakeholders to understand why it is important for them to attend such meetings and workshops. The record of public outreach listed in Appendix I should also be broken up into two categories: general outreach and outreach specific to vulnerable communities, the latter which EPA has singled out in the Clean Power Plan.

We understand that ARB has been working with EJAC to enable a very robust engagement process with communities as part of the second Scoping Plan update to reflect the GHG reduction target of 40 percent below 1990 levels by 2030 set forth in Executive Order B-30-15.[7] EJAC has held committee meetings throughout the state since December 2015, as well as 9 community meetings since July. Prior to these meetings, EJAC provided easy-to-understand flyers on the key issues involved in the Scoping Plan update in both English and Spanish.[8] Interested stakeholders have also begun submitting comments on the Scoping Plan update at the workshops that ARB has held to date.[9]

We also understand that the Cap-and-Trade program and a variety of other measures under California state law will help drive much more stringent GHG reductions in California as compared with the Clean Power Plan target for the state that EPA finalized, and that devoting resources to the Clean Power Plan process would divert funds from the agency that would be better employed in a robust Scoping Plan process. Holding two different stakeholder processes would also result in added burdens for community members, who may not have the resources or the time to get involved in both sets of discussions. Because ARB is crafting the Scoping Plan update and the Plan in parallel, the final Plan should explain that a robust stakeholder engagement process for the Scoping Plan update is ongoing and the substantive revisions to the program are being discussed as part of that process. This process should be documented

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[6] EPA, Guidance on Considering Environmental Justice During the Development of Regulatory Actions, at 10, https://www.epa.gov/sites/production/files/2015-06/documents/considering-ej-in-rulemaking-guide-final.pdf

[7] California Air Resources Board, AB32 Scoping Plan, https://www.arb.ca.gov/cc/scopingplan/scopingplan.htm

[8] California Air Resources Board, Environmental Justice Advisory Committee, https://www.arb.ca.gov/cc/ejac/ejac.htm#ejlcm

[9] California Air Resources Board, AB32 Scoping Plan Public Workshops, https://www.arb.ca.gov/cc/scopingplan/meetings/meetings.htm

extensively in the final Plan. Failure to do this will send other states a signal that California is conducting a poor community engagement process under the Clean Power Plan.

The Scoping Plan process, however, is no perfect substitute for the required community engagement process under the Clean Power Plan. Although the Scoping Plan is of much broader scope, these two sets of regulatory measures are intertwined and the Clean Power Plan should not be ignored. EJAC itself has provided draft initial recommendations in the context of the Scoping Plan update,[10] some of which are relevant to the design of California's compliance plan under the Clean Power Plan. Most notably, the draft recommendations call for ARB to eliminate the Cap-and-Trade program and replace it with a non-trading system like a carbon tax or fee and dividend program, and specifically call for ARB to "not commit California to continuing Cap-and-Trade through the Clean Power Plan."[11] EJAC and community members must have the opportunity to provide meaningful input on the Plan in the context of the Clean Power Plan because ARB proposes to use the Cap-and-Trade program for Clean Power Plan compliance.

In its draft recommendations, EJAC has also called for the elimination of offsets and of free allowances in the event the cap-and-trade program continues.[12] In the Plan, ARB has not yet clarified that the Clean Power Plan does not allow power plants to utilize offsets for compliance and should do so.[13] The agency is also proposing to give free allowances to existing power plants under the proposed backstop program for sources that fail to meet their emission reduction requirements, while these sources currently do not receive free allowances under the Cap-and-Trade program. Plan at 31, 20. These issues must be thoroughly discussed and therefore we urge ARB to incorporate the Clean Power Plan to the stakeholder engagement process under the Scoping Plan update (instead of holding two separate engagement processes).

Finally, we note that communications to sovereign tribal governments do not amount to meaningful public engagement of tribal communities as a whole. Sierra Club agrees that the agency must seek meaningful input from federally- or state-recognized tribes, but there are

[10] AB 32 Environmental Justice Advisory Committee (EJAC), Draft Initial Recommendations for Discussion Draft Version of 2030 Target Scoping Plan Update, August 26, 2016, https://www.arb.ca.gov/cc/ejac/meetings/08262016/draft_ejac_recommendations082616revised.pdf
[11] Id., at 4-5.
[12] Id.
[13] As we discuss below, the Clean Power Plan preamble provides that, where a state program relies on offsets and affected EGUs use those offsets to meet a portion of their obligation under the state program, no credit is applied to reported CO2 emissions from affected EGUs under the Clean Power Plan. 80 Fed. Reg, at 64,981-82, fn. 922.

tribes in California that have not been officially recognized[14] and we believe ARB should engage with them as well.

ARB should also engage members of tribal communities, not just their government representatives. We suggest that ARB follow EPA's *Policy on Consultation and Coordination with Indian Tribes* and the National Environmental Justice Advisory Council's (NEJAC) *Guide on Consultation and Collaboration with Indian Tribal Governments and the Public Participation of Indigenous Groups and Tribal Members in Environmental Decision Making* for guidance on this issue. EPA's Policy recognizes the need to be responsive to the environmental justice concerns of non-federally recognized tribes, individual tribal members, tribal community-based/grassroots organizations and other indigenous stakeholders.[15] NEJAC also recommends that agencies "seek information from tribal members in addition to persons who have been formally designated by tribal governments as contacts for consultation," because their interests (for example, those of traditional leaders and cultural authorities) do not always coincide with those of the tribal government.[16]

III. ARB Should Conduct an EJ Analysis of the Plan or at Least Incorporate the Results of Its Adaptive Management Process Under AB32

In the Clean Power Plan, EPA conducted a proximity analysis that provides detailed demographic and environmental information on the communities located within a 3-mile radius from each coal plant and gas plant covered under the rule. 80 Fed. Reg. at 64915. The analysis concludes that a higher percentage of minority and low-income communities live near power plants when compared to the national average.[17] EPA correctly noted that the impacts of power plant emissions are not limited to a 3-mile radius; however, evaluating the demographic and environmental characteristics of the communities closest to the power plants is a good starting point to understand how changes in those plants' emissions may affect air quality in those communities.[18]

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[14] *See e.g.*, U.S. Federally Non-Recognized Tribes-Index by State, http://www.kstrom.net/isk/maps/tribesnonrec.html

[15] EPA, Policy on Consultation and Coordination with Indian Tribes, May 4, 2011, at 4, https://www.epa.gov/sites/production/files/2013-08/documents/cons-and-coord-with-indian-tribes-policy.pdf

[16] National Environmental Justice Advisory Council, Guide on Consultation and Collaboration with Indian Tribal Governments and the Public Participation of Indigenous Groups and Tribal Members in Environmental Decision Making, November 2000, at 19, https://www.epa.gov/sites/production/files/2015-03/documents/ips-consultation-guide_0.pdf

[17] Environmental Protection Agency, EJ Screening Report for the Clean Power Plan, July 2015, https://www.epa.gov/sites/production/files/2016-04/documents/ejscreencpp.pdf

[18] Id. at 3.

Because states have better information on environmental and health issues affecting their communities, EPA is encouraging states to conduct environmental justice analyses of their own as they develop their state implementation plans (SIPs). EPA has indicated that these analyses can be done in several ways. For example, in examining different state plan options, states can project likely increases in emissions affecting vulnerable communities by evaluating air quality monitoring data or information from air quality models and gather information about health impacts, such as asthma rates and access to healthcare by those communities, or they can identify the expected utilization of power plants in geographic proximity to communities. 80 Fed. Reg. at 64,916. Sierra Club strongly urges ARB to develop an EJ analysis of its Plan. Failure to undertake this analysis would create a bad precedent for other states as they develop their implementation plans for compliance with the Clean Power Plan.

In the alternative, and only because ARB is already required under AB32 to consider and address the potential for direct, indirect, and cumulative impacts and any localized emission increases from the market-based program it created to reduce GHG emissions (i.e., the Cap-and-Trade Program), ARB could incorporate into the Plan its evaluation of adverse impacts of the Cap-and-Trade program under its Adaptive Management Plan. *See* Cal. Health & Safety Code § 38570(b)(1)-(2). As part of this program, ARB is working with local air districts and has proposed a process for collecting and evaluating the data needed to track potential localized air quality impacts that may result from the Cap-and-Trade program, on which the agency sought input late last year.[19] The agency is collecting information on GHG emission increases and decreases from individual entities covered under the program, and tracking GHG emissions from multiple cap-and-trade facilities using its publicly-available Greenhouse Gas Emissions Mapping Tool to conduct community analyses of aggregate emissions.[20]

As ARB gathers information on EJ impacts of the proposed Plan and its reliance on the Cap-and-Trade Regulation, ARB should ensure that (in contrast to the CPP compliance modeling demonstration) its analysis includes modeling of newly adopted mandates for renewable energy and energy efficiency. Modeling that does not include these mandates could inaccurately suggest that certain fossil plants of concern to EJ communities may still be required for grid reliability and capacity needs. Modeling the full scope of California's expected transition to cleaner technologies will help to identify fossil plants that are no longer needed to support the grid.

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[19] California Air Resources Board, *First Update on the Climate Change Scoping Plan: Building on the Framework Pursuant to AB32: The California Global Warming Solutions Act of 2006*, at 87, 128.
[20] California Air Resources Board, *Adaptive Management Plan for the Cap-and-Trade Regulation* https://www.arb.ca.gov/cc/capandtrade/adaptive_management/plan.pdf.

In the context of Clean Power Plan compliance, ARB should evaluate the information it has already collected in the context of AB32, and any further relevant analysis, to identify localized co-pollutant emission increases caused by the power plants regulated under the Clean Power Plan and impose federally enforceable requirements in the Plan that will ensure that the program does not cause those plants to increase co-pollutant emissions. ARB should not have to duplicate its ongoing analysis of the Cap-and-Trade program; however, the agency should allow enough time for EJAC and communities to provide meaningful feedback on this analysis before adopting both the Scoping Plan update and the Plan. In addition to other market-based alternatives, ARB should also consider proposals to address hotspots of pollutants that cause localized harm; for example, the imposition of hard CO2 emission limits or mass caps for individual sources of concern which would help to reduce their utilization. ARB must also provide an opportunity for public comment on such proposals and incorporate the input received from interested stakeholders.

IV. The Plan Should Maintain the Federal Enforceability of the Cap-and-Trade Program and Mandatory Reporting Regulation with Respect to the Affected EGUs[21]

The state's Cap-and-Trade Regulation and the Mandatory Reporting Regulation are included in the Plan as emission standards that are federally enforceable with respect to affected electric generating units ("EGUs") in California.[22] *See* Plan at 17. This approach to enforceability is the correct, federally mandated approach and should not be altered in the final Plan.

Section 111(d) of the Clean Air Act requires that states submit to EPA plans which establish "standards of performance" for existing sources and provide for "implementation and enforcement of such standards of performance." 42 U.S.C. § 7411(d)(1). The CPP requires states to include in their plans "an identification of all emission standards for affected EGUs," and allows "allowance systems" as an acceptable form of emission standards. 40 C.F.R. § 60.5740. These provisions thus authorize compliance through programs such as the Cap-and-

[21]Sierra Club has raised concerns about the state measures approach with EPA because it allows state plans to include elements that citizens will not have the ability to enforce. 40 C.F.R. § 60.5780(a)(5). The Clean Air Act provides that citizens may sue for violation of "an emission standard or limitation under this chapter," 42 U.S.C. § 7604(a), and defines "[e]mission standard or limitation under this chapter" to include "any requirement under section [111] or [112] of this title," *id.* § 7604(f)(3). While ARB is arguably not including "requirements" in its plan beyond the federally enforceable requirements on affected EGUs, the integrity of the Cap & Trade program as a whole depends on other actors beyond affected EGUs, and those programs are not necessarily enforceable by citizens. *See* Plan at 33 (noting that Cap & Trade as it applies to non-affected sources is a "state measure", i.e., not federally enforceable). The result is that Clean Power Plan compliance is not fully federally enforceable until EGUs have exceeded their combined state limit by 10% for a compliance period and the backstop is triggered. *See also infra* Section III.

[22]By "affected EGUs," we mean those regulated by the CPP.

Trade Regulation, so long as requirements on affected EGUs are federally enforceable. The CPP preamble specifically states that "[w]here an emission budget trading program addresses affected EGUs and other fossil fuel-fired EGUs," as is the case in California's proposed plan, "the requirements that must be included in the state plan [include] the federally enforceable emission standards in the state plan that apply specifically to affected EGUs. . . ." 80 Fed. Reg. at 64,891.

Section 111 also directs EPA to issue regulations that establish a state implementation process similar to the one applicable to the adoption of state implementation plans for criteria air pollutants under Section 110. Section 110 similarly requires that plans must include "enforceable emission limitations." 42 U.S.C. § 7410(a)(2)(A).

Based on the above authorities, California has properly indicated that its key state programs – the Cap-and-Trade Regulation and the Mandatory Reporting Regulation – so far as they apply to affected EGUs, will be federally enforceable.[23]

The concept of federal enforceability necessarily includes enforceability by EPA and citizens, in addition to the state. The Clean Air Act provides that citizens may sue for violation of "an emission standard or limitation under this chapter," 42 U.S.C. § 7604(a), and defines "[e]mission standard or limitation under this chapter" to include "any requirement under section [111] or [112] of this title," *id.* § 7604(f)(3). EPA has advised that "[a] core principle of the CAA is that by taking action to approve emission limitations into a SIP, the EPA thereby makes those emission limitations a federally enforceable component of the SIP that the state, the EPA, or citizens can thereafter enforce in the event of alleged violations."[24] A SIP's "required actions are enforceable if. . . [states] and the EPA maintain the ability to apply penalties and secure appropriate corrective actions where applicable, [and] [c]itizens can file suits against sources for violations."[25] *See also* 40 C.F.R. §60.5775(f)(5) ("An affected EGU's emission standard is enforceable if . . . [t]he Administrator, the State, and third parties maintain the ability to enforce against violations"). *See also* 42 U.S.C. §7413.

[23]Sierra Club is aware that legal challenges to the Cap-and-Trade program have not been resolved. If a court invalidates the program, the state will of course need to issue another proposed plan for Clean Power Plan compliance with an opportunity for public notice and comment.

[24] EPA, Memorandum to Docket for Rulemaking, "State Implementation Plans: Response to Petition for Rulemaking; Findings of Substantial Inadequacy; and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown, and Malfunction" (EPA-HQ-OAR-2012-0322) at 7 (Feb. 4, 2013).

[25] EPA, Improving Air Quality with Economic Incentive Programs, at 35-36 (Jan. 2001).

To ensure the final Plan comports with this fundamental Clean Air Act requirement, the final Plan must allow for the state, EPA, and citizens to enforce violations of the relevant emissions standards against the affected EGUs in federal court.

ARB's obligation and authority to make the Cap-and-Trade Regulation and Mandatory Monitoring Regulation federally enforceable upon approval of the SIP is beyond doubt, not only based on the requirements of the Clean Air Act and its implementing regulations, but also based on states' authority to go beyond Clean Air Act requirements. *See Union Electric Co. v. EPA,* 427 U.S. 246, 262-65 (1976); *Concerned Citizens of Bridesburg v. EPA*, 836 F.2d 777, 780 (3d Cir. 1987) (states are free to include measures that are more stringent than required by the Clean Air Act). *See also* 42 USC §7416 (allowing states to adopt standards that are more stringent than federal law, including requirements under section 111).

V. The Plan Should Maintain and Strengthen the Elements of the Backstop Requirement that Ensure That the State Will Quickly Meet the Mandated Carbon Reduction Goals and Make Up For Any Shortfall in Emission Reductions

EPA requires that if reported CO2 emissions from affected EGUs in the state exceed 10% of an interim or final CPP goal, a "backstop" program is triggered to bring CO2 emissions back within federal targets and make up the overage. Sierra Club disputes whether EPA's backstop approach comports with the requirements of the Clean Air Act. It is well-settled that a SIP cannot rely on emission reductions that are not part of the SIP, *Committee for a Better Arvin v. EPA*, 786 F.3d 1169, 1175 (9th Cir. 2015), and that EPA cannot approve a SIP that puts off until tomorrow what the Clean Air Act requires today. *Sierra Club v. EPA*, 356 F.3d 296, 303 (D.C. Cir. 2004). However, we recognize that ARB is obligated to design its plan pursuant to the regulatory language in the final Clean Power Plan.

The Plan emphasizes that the state's modeling of future CO2 emissions suggests that the backstop is unlikely to be triggered. Even assuming this prediction is correct,[26] however, ARB's design of the backstop is more than a theoretical exercise. First, California's approach to allocating allowances, timing of implementation, and other aspects will set an example for other states designing mass-based plans to comply with the CPP, whether they are state measures plans or standard mass-based plans. Second, in the event that EPA tightens the CPP

[26] ARB should ensure that its assumptions are transparent and easy to follow in the supporting materials. For example, ARB should clarify whether the possibility of an expansion of the territory of the grid balancing authority – as well as the possibility that this will not occur – were taken into account. The Plan's Appendix E is not clear on this point. *See, e.g.*, Plan, App. E at 37-38.

targets in the future, it may be more likely that the backstop would be triggered.[27] Ideally, the structure that California puts in place now would not need to be amended in that scenario.

For its backstop program (described pp. 30-31), the Plan proposes to create a second trading program in addition to the state Cap-and-Trade Regulation, in which allowances are capped at levels that would bring reported CO2 emissions from affected EGUs back in line with federal targets. Trading of this separate pool of allowances would occur only among California's affected EGUs. The state would allocate allowances for this backstop trading pool based on historical generation.

In general, Sierra Club supports auctioning allowances for any type of mass-based program rather than providing free permission to pollute.[28] In California, sources will already be paying for permission to emit greenhouse gases through the state cap-and-trade program; but the fact that the backstop has been exceeded may indicate that the price of greenhouse gas allowances in the state program is not creating sufficient incentives for affected EGUs, and could benefit from additional charges. Moreover, the prospect of an auction for backstop allowances could further encourage EGUs to ensure the backstop is never triggered, particularly if the state ceases at some point to auction allowances under the Cap-and-Trade Regulation. ARB should analyze these issues and explain its decision not to hold an auction, and to forego the accompanying revenues, before finalizing the Plan's backstop. The proposed Plan does not contain any discussion of this issue.

Even if ARB allocates the backstop allowances without an additional charge, it should carefully consider the incentives created by the proposed methodology based on "historical operations" and define exactly what metrics would determine how the allowances are distributed. Plan at 31. Sierra Club has recommended to EPA, and repeats the recommendation here, that the best approach for free allocation is to allocate allowances to affected sources according to their share of total electricity generation in the prior year and to update the calculation in each following allocation.[29]

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[27] In addition to urging EPA to regularly review the stringency of the standards, Sierra Club will also continue to urge EPA to require that states adopting mass-based plans recalculate their emissions targets based on the most recent data on existing sources meeting the applicability criteria *at the time the plan is submitted* rather than a historical baseline.

[28] *See* Sierra Club Comments on Proposed Federal Plan and Model Trading Rules, Dkt. No. EPA-HQ-OAR-2015-0199, *at* https://www.regulations.gov/document?D=EPA-HQ-OAR-2015-0199-1133, at 6-7.

[29] *See* Sierra Club Comments on Proposed Federal Plan and Model Trading Rules, Dkt. No. EPA-HQ-OAR-2015-0199, *at* https://www.regulations.gov/document?D=EPA-HQ-OAR-2015-0199-1133, at 14-15. It appears that the proposed backstop plan would only require one allocation, but this should be clarified in the final Plan.

The CPP requires that the backstop-triggering shortfall in CO2 reductions "must be made up as expeditiously as practicable." 40 C.F.R. § 60.5785(d). The Plan states that the backstop is "designed" to reduce EGU emissions to the federal target level, including making up any overage from the previous compliance period, "within 18 months." ARB should clarify the timeline and deadline for each step towards making up the shortfall (the bullet-points on pp. 30-31), and explain why 18 months is the shortest timeframe that would be practical. If a shorter timeframe would be practicable, the Plan must set earlier deadlines for each step towards addressing the excess emissions, and an earlier final deadline for achieving the federal target and making up any overage. Either way, the backstop must include firm, enforceable deadlines rather than what could be interpreted as aspirations only.

VI. The Plan Should Clarify That Any Trading Linkage with Other States Would Be to Link California's State-Level Cap and Trade Program to other Similar and Equally Stringent Programs, Not to Allow for Interstate Trade of Clean Power Plan Allowances

California notes that one of its goals is to facilitate linkage with other states and jurisdictions. Plan, Appendix J, at 20; *see also* Plan at 14, 18. ARB's spokesperson has stated that the Plan is a "proof of concept for other states, to demonstrate that this is a program that can be adapted to each state and that can be set up in a way that we can form a regional association."[30] Given this stated goal, the Plan should more directly address public concerns about linkage, particularly the concern that California's sources would be allowed to trade away surplus Clean Power Plan allowances to affected sources in other states that rely on fossil fuel-fired generation.

As we understand it, the Plan will operate under its current auction of allowances through the state's Cap-and-Trade Regulation, and will not be distributing "Clean Power Plan allowances" as tradeable instruments for a nationwide or region-wide CPP system. Even in the event the backstop is triggered, the allowances would be unique to California's backstop trading pool and traded only among in-state EGUs.

Further, as ARB states in the Plan, only those jurisdictions meeting California's strict linkage requirements would be permitted to link trading programs with California. *See* Plan at 21. One of the requirements for linkage is that "[t]he linked program has adopted program requirements for greenhouse gas reductions; including, but not limited to, requirements for offsets; that are equivalent to or stricter than those required by AB 32." *Id.* The final Plan should clarify that other states' Clean Power Plan compliance plans would not satisfy this stringency requirement unless those states decided to go significantly beyond the minimum

[30] ENERGY & ENVIRONMENT DAILY, Clean Power Plan: Calif. issues first-in-U.S. compliance plan (Aug. 3, 2016).

federal standards set forth in the Clean Power Plan. ARB should detail what kinds of provisions another state's Clean Power Plan implementation plan would need to include if the state intends to link programs with California.

Crucially, ARB should clarify that offsets may *not* be used to meet CPP compliance obligations. EPA indicates that although EGUs may rely on offsets to meet state compliance obligations, no credit is applied to reported CO2 emissions from affected EGUs under the CPP. *See* 80 Fed. Reg. at 64,981-82 n.922. The state's affected EGUs must take this state/federal discrepancy into account when planning for compliance.

VII. The Plan Should Clarify That All Legal Authority to Implement the State Measures Must Be In Place in Order for the Plan Submission to EPA to Be Considered Complete.

Under Section 111(d) Implementing Regulations, state plans must show that the relevant state has legal authority to carry out the plan, including authority to: (a) adopt emission standards and compliance schedules applicable to the affected facilities; (b) enforce applicable laws, regulations, standards, and compliance schedules; (c) obtain the information necessary to determine affected sources' compliance with those legal requirements, including authority to require recordkeeping, make inspections, and conduct tests of affected sources; and (d) require owners and operators of affected facilities to install emission monitoring devices and report periodically to the state, and make this data available to the public. 40 C.F.R. § 60.26(a). Consistent with this requirement, the CPP requires plans to demonstrate that the state has legal authority "to implement and enforce each component of the State plan submittal, including federally enforceable emission standards for affected EGUs, and State measures as applicable." 40 C.F.R. § 60.5745(a)(9). The Section 111(d) Implementing Regulations require state plans to identify the specific provisions of the state laws or regulations that provide the required authority for each of the above actions, and that such legal authorities "*are available to the State at the time of plan submission*." 40 C.F.R. § 60.26(b) (emphasis added).

The Plan states that ARB intends to finalize necessary legal authority prior to EPA's deadline for final plan submission in September 2018. Given this expected timeline, we recommend that ARB remove the portions of the text that suggest that the regulations need only be finalized prior to *CPP compliance dates* as opposed to plan submission.[31] State regulations needed to

[31] Plan at 66 ("ARB staff are proposing that all regulatory measures required to implement this Proposed Plan be implemented well before the CPP compliance dates, if approved by the Air Resources Board. Accordingly, ARB staff propose a single programmatic milestone: The finalization of regulations implementing this Proposed Plan as part of the MRR and Cap-and-Trade Regulation. This milestone must be met by the CPP's implementation date, January 1, 2022, and the implementing regulations must remain in force thereafter."), and at 31 ("First, the CPP requires ARB to submit an initial progress report

implement the Plan cannot be programmatic milestones that are only completed after plan approval. While a state may work with EPA ahead of the submission deadline to obtain feedback on its plan, a plan is only complete for submission when it contains all legally required elements, including the necessary state regulations that provide ARB's legal authority to implement the Plan.

VIII. The Plan Should Clarify How Its Leakage Analysis Relates to the Clean Power Plan's Definition of "Leakage" and to EPA's Options for Demonstrating that Leakage is Not Projected to Occur.

According to the Clean Power Plan's preamble, leakage is "the potential for an alternative form of implementation of the B[est] S[ystem] of E[mission] R[eduction] (e.g., the rate-based and mass-based state goals) to create a larger incentive for affected EGUs to shift generation to new fossil fuel-fired EGUs relative to what would occur when the implementation of the BSER took the form of standards of performance incorporating the subcategory-specific emission performance rates representing the BSER." 80 Fed. at 64,823. In other words, the statewide mass-based and rate-based goals that EPA has permitted states to use in developing their plans are flexible alternatives to implementing the BSER (which takes the form of nationally uniform emission performance rates, one for coal and one for gas, or the "dual rate"). In EPA's view, where those alternative types of state plans, such as a mass-based state plan, create a greater incentive for sources to shift more generation to new fossil sources relative to what would occur under a plan implementing the dual rate, "leakage" occurs.

EPA provides several options for addressing leakage, which it intends to clarify in a model state plan for mass-based programs that is not yet finalized. The first is adoption of a "new source complement" such that the state's mass-based target is enlarged by an amount defined by EPA to include emissions from new sources that meet the applicability criteria and those new sources are regulated by the state. 80 Fed. Reg. at 64,888. Adoption of the new source complement is the simplest way for states to address leakage and to be sure they can meet EPA's leakage requirement. EPA also notes that "states may choose to regulate new non-affected fossil fuel-fired EGUs, as a matter of state law, in conjunction with federally enforceable emission standards for affected EGUs under a mass-based plan," and cites California's program as "conceptually analogous" to the new-source complement approach. *Id.*

EPA also gives states an option of "provid[ing] a demonstration in the state plan, supported by analysis, that emission leakage is unlikely to occur due to unique state characteristics or state plan design elements that address and mitigate the potential for emission leakage." *See*

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to U.S. EPA by July 1, 2021, demonstrating that the state is on track to meet any programmatic milestone steps (such as confirming that all required regulations are in place). ARB commits to submitting this report by the due date.")

40 C.F.R. § 60.5790(b)(5)(iii); 80 Fed. Reg. at 64,888. Although the Cap-and-Trade program covers new sources, California does not adopt the new source complement and instead appears to be relying on this alternative option for satisfying plan approval requirements regarding leakage. Plan at 50. ARB states, "Because the Cap-and-Trade Regulation imposes more rigorous requirements than the CPP, and imposes the essentially the same central set of carbon costs and compliance obligations on affected and non-affected EGUs, it acts as state measure (with regard to non-affected EGUs) and emission standard (with regard to affected EGUs) removing leakage incentives." *Id.* To demonstrate that leakage is not projected to occur, ARB analyzes whether implementation of the Plan will result in increased CO2 emissions from new EGUs in comparison with 2014 levels. It appears from the results that new sources will not increase emissions as a result of the Plan.[32]

Sierra Club agrees that because the Cap-and-Trade program creates the same incentives for new and existing sources, the market pressure to shift generation to new sources will not exist. However, to further assure the public and EPA that there is no need to adopt the new source complement, the state should provide a comparison of predicted emissions from both new and existing affected EGUs to the "existing plus new source complement" mass target for California set forth in the Clean Power Plan. *See* 80 Fed. Reg. at 64,888.

Exceeding EPA's requirement to consider in-state leakage to new sources, ARB also considers whether out-of-state CO2 emissions will increase as a result of the Plan's implementation. This is also a useful consideration of leakage that can provide a model for other states. To more fully explore the leakage question, ARB could also compare the expected emissions of new fossil sources under the Plan to those that would occur under a "dual rate" plan for California.

IX. ARB Should Further Explain and Seek Comment on How the Clean Energy Incentive Program Would Function in California and Consider Whether it Would Be an Effective Way to Encourage Clean Energy Investments in Low-Income Communities and Reduce Emissions

ARB states that it "continues to be interested" in the Clean Energy Incentive Program (CEIP) and "will evaluate it." Plan at 4. Before formally opting into the CEIP, ARB must issue a proposal for participating in this program and accept public comment on the proposal. If California seeks to participate, it will need to indicate its interest to EPA in its initial plan submittal and provide

[32] ARB should provide detailed supporting data and assumptions for the leakage analysis for public review and comment. Appendix E's modeling documentation appears only to document the compliance demonstration and not the leakage demonstration.

the regulatory structure to implement the CEIP in the final plan submittal.[33] 40 CFR § 60.5737. The brief mention of the CEIP in the Plan is not sufficient to solicit meaningful input from stakeholders on incorporating the CEIP into California's final Plan.

The CEIP's incentive is provided in the form of both state-granted and EPA matching allowances (in the case of mass-based plans) or "emission rate credits" (in the case of rate-based plans) that would be of value to sources seeking to meet their CPP compliance obligations. To participate in the CEIP, a state must set aside allowances from its allotted federal target for the first compliance period. It is unclear how California would do so within the proposed Plan structure because the Cap-and-Trade program's cap applies to sources beyond affected EGUs. It is also unclear whether EPA's matching allowances would be of direct compliance value to California sources under the Cap-and-Trade rule or whether the CPP allowances contemplated by the CEIP would be a trading instrument only compatible with standard (non-state-measure) CPP compliance programs. EPA has proposed that "any trigger for the backstop required by the [CPP] for a state measures plan would not need to include or account for emissions authorized per EPA-awarded matching allowances under the CEIP," but is still taking comment on this issue. 81 Fed. Reg. 42,940, 42,958 n.58 (June 30, 2016). Another question is whether California sources and other clean energy project developers could sell EPA-granted matching allowances out of state to sources that have standard (non-state-measures plan) CPP compliance obligations, even if those allowances were not of value for California sources' own compliance demonstration. Before finalizing a decision on whether or not to participate, ARB should provide a proposal for how the CEIP would function in California and solicit public comment. We recognize that ARB likely will require further clarification from EPA before developing such a proposal.

While Sierra Club supports the goal of encouraging early clean energy investments, particularly in historically underserved low-income communities, the "matching credit" structure of the CEIP serves to dilute the overall stringency of the CPP if the credits are awarded to projects that would happen without the incentive. For this reason, Sierra Club has encouraged EPA to focus the program on low-income communities, and to ensure that matching credits for other projects go only to those projects that would not occur but-for the incentive.[34] In addition to evaluating the impact of these attributes as California considers whether to join the CEIP, which carries the risk of weakening the CPP as a whole, the state

[33] ARB should clarify its apparent intent to adopt the Plan as a final state implementation plan for submission to EPA (as opposed to an "initial submittal").

[34] *See* Sierra Club Comments on Proposed Federal Plan and Model Trading Rules, Dkt. No. EPA-HQ-OAR-2015-0199, https://www.regulations.gov/document?D=EPA-HQ-OAR-2015-0199-1133, Attachment 3. (The "tracked changes" in this document were intended to clarify for EPA the alterations between Sierra Club's December 15, 2015 and January 21, 2016 CEIP comments; the comments themselves are final.)

should consider expanding other types of incentives for clean energy investments in low-income communities.

We appreciate the opportunity to comment on these important matters.

Respectfully submitted,

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