**Date: May 3, 2022**

**To: California Air Resources Board**

**From: Richard Grow**

**Subject: Comments on 2022 Scoping Plan – Initial Air Quality & Health Impacts and Economic Analysis.**

The following are my comments on the “2022 Scoping Plan – Initial Air Quality & Health Impacts and Economic Analysis Results”, or “initial modeling results”, as presented at the April 20, 2022 workshop of the same title. On April 21, 2022 the California Air Resources Board (CARB) notified the public that a docket for comments would be open through May 3, 2022. These comments are submitted for that docket and, to the extent not adequately addressed in the draft Scoping Plan and accompanying CEQA analysis scheduled for release in June of 2022, applicable to those documents.

These comments are based on my 53 years as an air quality professional, including 40 years at the US EPA in its air quality, environmental justice and civil rights programs. In my work at EPA I participated in developing guidance for market-based programs, evaluations of such programs and the development of safeguards to protect against potential environmentally unjust consequences of such program. Since retirement from the US EPA in 2019 I have continued in an informal advisory role for environmental justice and indigenous communities and advocates.

While the initial modeling results for the evaluated scenarios were extensive and informative, they nevertheless failed to address key recommendations, questions and issues raised by environmental justice and public health advocates over the past several months. The release of such incomplete and inadequate analyses simultaneously with CARB staff’s premature selection of “scenarios number 3” as the preferred alternative demonstrates on its face the fundamental flaws of CARB staff’s approach.

**CEQA and Title VI Failures**

The analyses, and any decisions based on them, suffer from at least two fundamental flaws: failure to assess foreseeable impacts and consideration of alternatives. These flaws place CARB and its Scoping Plan in potential violation of both the California Environmental Quality Act and Title VI of the Civil Rights Act of 1964.

**Foreseeable impacts**

None of the CARB recommendations or decisions have any meaning unless they are accompanied by or based upon meaningful assessment of impacts. In the language of CEQA, there is a requirement to consider “reasonably foreseeable environmental impacts”. To state the obvious, what is “foreseeable” now in 2022 is quite a bit more than was foreseeable at the time of the 2017 Environmental Assessment, which CARB posited at the time as its de facto CEQA compliance demonstration. The EJAC has raised numerous highly likely, and thus reasonably foreseeable, conditions that require meaningful assessment. To name just two of many available examples:

* CCS. It is highly unlikely, and technically unjustifiable, to assume 90% effectiveness for CCS, especially on complex sources such as refineries. In the likely even that CARB’s assumption of, and reliance on, such a high level of effectiveness prove overly optimistic, there needs to be analysis of the consequences, especially in the disadvantaged communities where many of these sources are located.
* Cap and trade and refineries. While cap and trade remains largely invisible and obscured in the current Scoping Plan, its presumed effect in bringing about a steadily declining level of emissions from covered sources remains in place in implicit in the Scoping Plan. Yet there is abundant data available in, among other places, OEHHA’s February, 2022 report, that refineries are not only failing to reduce their emissions, but instead have been increasing emissions of both GHG and co-pollutants over the several years since inception of the program. There needs to be assessment of not only (1) the effects of the already accumulated failures of the program but also assessment of (2) potential continued failure of the program and (3) potential safeguards and remedies to such failures going forward. The EJAC has already provided recommendations in discussions with CARB staff as well as the Board itself (March 10, 2022).

**CEQA and alternatives analysis.**

As CARB is well aware, its actions, including development of this Scoping Plan, are subject not only to the requirements of the underlying AB 32 and associated climate change legislation, but are also the requirements of the California Environmental Quality Act (CEQA). The consideration of alternative scenarios lies at the heart of the scoping plan process. Likewise, consideration of alternatives, as confirmed by decades of environmental policy and court decisions, lies at the heart of environmental assessment under both CEQA and its national counterpart, the National Environmental Policy Act (NEPA).

Because CEQA requires consideration of alternatives to reduce or eliminate adverse impacts, CARB’s incomplete and inadequate consideration of all reasonably foreseeable impacts renders its analysis of alternatives likewise incomplete. EJAC’s many suggestions and recommendations address many of these impacts and also provide alternatives to the measures included in CARB’s current Scoping Plan analyses. CARB must significantly improve and expand its current consideration of measures to address foreseeable impacts.

**The ”high level plan” CEQA evasion**

CARB has also taken the position, as have some Board members, that the current Scoping Plan” is intended as a “high level” document, with many of the concerns of environmental justice, community and public health advocates more appropriately assessed later during the “implementation” phase of the Scoping Plan. This is in fact a familiar posture by agencies seeking to avoid an defer more detailed assessments, but it is also one addressed in current CEQA guidance addressing such attempts at “tiering”:

“Tiering does not excuse the lead agency from adequately analyzing reasonably foreseeable significant environmental effects of the project and does not justify deferring such analysis to a later tier EIR or negative declaration.” (Emphasis added; CEQA Guidelines at Section 15152(b)).

CARB’s attempt to evade and postpone analysis of conditions, concerns and recommendations of the EJAC until “the implementation phase”, by which CARB means after finalization of the Scoping Plan and after elimination of alternative scenarios, is a blatant abuse and avoidance of CEQA requirements for meaningful consideration of alternatives.

**Title VI of the Civil Rights Act of 1964.**

As a recipient of federal funding, CARB’s actions are subject to the requirements of Title VI of the Civil Rights Act of 1964. Title VI requires recipients of federal funding such as CARB to take care to ensure that none of their policies procedures and activities result in disproportionate adverse impacts to populations protected under the Act. (See 40 CFR 7.35(b)) In its Scoping Plan CARB has failed to exercise due, or even minimum, care is complying with this requirement. In avoiding this obligation CARB is inviting federal investigation and oversight into its compliance with the Civil Rights Act.

**Civil rights and alternatives analysis.**

Closely paralleling CEQA requirements for alternatives analysis are procedures for compliance with Title VI pertaining to “*less discriminatory alternatives*”. If a recipient agency such as CARB is found to have taken actions potentially resulting in disproportionate adverse impacts on a protected (e.g. minority) population, the recipient agency can be required to demonstrate that it has considered and adopted any and all reasonably available alternative measures to reduce or eliminate those impacts. In the present instance CARB has failed both consideration of (1) such impacts and (2) alternatives for addressing those impacts.

**Prior Title VI complaints.**

In 2012 a formal Title VI complaint was filed with the federal government, specifically the US EPA, alleging violation of Title VI by CARB in its AB 32 program, in particular its cap and trade program. The complaint was ultimately dismissed by the US EPA on the grounds that it was “premature”, in light of the fact that the cap and trade program was then in its earliest stages and its effects not ripe for assessment. Now, 10 years later and 9 years into implementation of the cap and trade program, such a complaint would clearly not be “premature”.

**Evidence of violation.**

CARB already has sufficient data in front of it demonstrating at least a prima facie proof of discriminatory effects of the cap and trade program. Specifically the February, 2022 OEHHA report documents that the refinery sector, with its facilities disproportionately located in proximity to Black populations and communities, have failed to reduce, and instead increased, GHG and co-pollutants. As has been described in EJAC discussion of recommendations for the cap and trade program, these increases could have been avoided if CARB had instead, as recommended by this and previous EJACs, required direct controls of these sources. This failure to require such reductions arguably amounts to a deniable of benefits to these populations and communities, and must be addressed and remedied if CARB is not to be found in violation of the Civil Rights Act.

Respectfully,

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