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Via Electronic Submittal: *https://ww2.arb.ca.gov/applications/public-comments*

Clerks' Office
California Air Resources Board
1001 I Street
Sacramento, California 95814

Re: Comments from The Two Hundred For Homeownership on the Environmental Assessment for the Draft 2022 Scoping Plan

Dear Madame or Sir:

We represent The Two Hundred, a statewide coalition of community leaders, opinion makers and minority advocates, formed to mitigate the growing racial wealth gap through homeownership and home building in California. We are honored and grateful to submit these comments regarding Appendix B of the Draft 2022 Scoping Plan ("Scoping Plan") on their behalf. Appendix B of the Scoping Plan is the Draft Environmental Analysis ("EA") prepared pursuant to the California Air Resources Board's ("CARB") certified regulatory program for compliance with the California Environmental Quality Act ("CEQA").[1] The EA is a "programmatic" analysis for "implementation of the 2022 Scoping Plan."[2]

The legal errors in the EA are both profound and profuse. Broadly, the EA fails as an informational document because it (I) does not correctly characterize the Project, (II) does not analyze cumulative impacts of the Project, (III) fails to identify significant unavoidable impacts (IV) does not analyze a reasonable range of alternatives, (V) does not adequately disclose the environmental impacts of its Measures on any resource category, and (VI) fails to articulate lawful mitigation measures.

[1] Projects approved under certified regulatory programs "remain subject to the broad policy goals and substantive standards of CEQA not affected by the limited exemption set forth in section 21080.5, subdivision (c)." *Pesticide Action Network North America v. Department of Pesticide Regulation* (2017) 16 Cal.App.5th 224, 242, citing *Sierra Club v. State Bd. of Forestry* (1994) 7 Cal.4th 121 (approval of timber harvest plans through certified regulatory program must comply with CEQA's substantive requirements.).
[2] EA, at p. 1.

I. The Environmental Assessment Must Comply With CEQA By Analyzing the Reasonably Foreseeable Impacts of the "Whole of the Action" the CARB Will Take in Approving the Scoping Plan.

Although CARB claims an exemption from CEQA pursuant to its certified regulatory program, "[a] certified program remains subject to other provisions in CEQA such as the policy of avoiding significant adverse effects on the environment where feasible."[3] As such, the EA must review the impacts of the whole "project," as defined by CEQA. First, for "CEQA's purposes, '[p]roject' means an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment."[4] Second, the "Project" must include the "whole of the action," including "ARB's action in enacting the regulations plus its actions in implementing of the regulations."[5] In violation of this principle, the EA attempts to bypass CEQA by mischaracterizing the Project, stating that that the Scoping Plan approval "would not lead directly to any adverse impacts on the environment" because CARB's approval "does not authorize any activities that would change the physical environment."[6] Such a claim – that a lead agency's approval of a foundational plan to direct future agency decisions that authorizing actual construction and related changes to the environment does not require assessment under CEQA – was decisively considered, and rejected, in numerous court challenges resolved decades ago.[7] The "project" CARB is required to consider in the EA is the entirety of the Scoping Plan, for which a "summary" is provided in Chapter 2 of the EA.[8]

A. The EA Must Review the Direct Effects of the Scoping Plan Activities and the Reasonably Foreseeable Indirect Effects Thereof.

The EA neglects to conduct a detailed impacts analysis of many Measures, claiming that there is too much uncertainty around actual implementation given its programmatic level. Relatedly, the Attorney General has, on multiple occasions, tried and failed to persuade the courts that the Scoping Plan has "no physical impacts on the environment."[9] Furthermore, on one prior occasion, the Attorney General asserted this in a remarkable Demurrer to a still-pending lawsuit

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[3] CEQA Guidelines § 15250; see also *Id., Sierra Club v. State Bd. of Forestry* (1994) 7 Cal.4th 1215, 1220.
[4] *Muzzy Ranch Co. v. Solano County Airport Land Use Com*. (2007) 41 Cal.4th 372, 381–382, as modified (Sept. 12, 2007)
[5] *POET, LLC v. State Air Resources Bd*. (2017) 12 Cal.App.5th 52, 74.
[6] *Id.* But note that "[t]he notion that the project itself must directly have directly have such an effect [on the environment] was effectively scotched in *Friends of Mammoth*." *People ex rel. Younger v. Local Agency Formation Com.* (1978) 81 Cal.App.3d 464, 479 citing *Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247, 265
[7] *Bozung v. Local Agency Formation Com*. (1975) 13 Cal.3d 263, 281 (holding that CEQA applies to annexation of land into county and that even though LAFCO was not itself authorizing project construction, as the lead agency it must analyze project impacts); see also *Twain Harte Homeowners Association, Inc. v. County of Tuolumne* (1982) 128 Cal.App.3d 644 and *Koster v. County of San Joaquin* (1996) 47 Cal.App.4th 29 (holding that General Plan adoption triggers CEQA even though no physical construction was authorized by General Plan and subsequent agency approvals would be obtained before any such physical construction activities occurred).
[8] EA, at p. 1.
[9] See generally *The Two Hundred v. California Air Resources Board*, Order on Demurrer After Hearing, (Super. Ct. Fresno County, 2018, No. 18CEC601494).

by our client The Two Hundred against the 2017 Scoping Plan wherein the Attorney General also asserted that it was entirely Constitutional for CARB to impose racially-discriminatory housing measures given the climate emergency.[10]

In fact, the Scoping Plan includes a discrete set of CARB staff policy decisions which would result in a "physical change to the environment," As acknowledged in the EA, the Scoping Plan "project" is the "set of measures" included in Tables 2-2 and 2-3 in Chapter 2 of the Scoping Plan (hereinafter referred to as "Measures"); CARB staff has selected these Measures to "achieve carbon neutrality by 2045."[11] The Plan expands on the substantive content of these Measures in Chapter 4, which lists multiple "Strategies for Achieving Success" that identify further physical changes to the environment that must be made to implement the Scoping Plan ("Strategies"). (as used hereinafter, "Measures" are used to describe both Measures and Strategies unless otherwise indicated) As explained in the EA:

1. This [EA] analysis addresses the environmental impact resulting from implementing the proposed 2022 Scoping Plan, compared to a baseline consisting of existing conditions.
2. The analysis of environmental impacts is based on the effects of compliance responses that are reasonably foreseeable, if the measures in the 2022 Scoping Plan are implemented.
3. The analysis in this Draft EA addresses environmental impacts both within California and outside the state to the extent that they are reasonably foreseeable and do not require speculation.
4. The level of detail in the impact analysis is necessarily and appropriately general because the 2022 Scoping Plan . . . is itself programmatic. Furthermore, it would be speculative to predict decisions by other entities regarding the specific location and design of new or modified facilities, source and production of materials, and other activities that may be undertaken to implement measures in the 2022 Scoping Plan.[12]

The EA overplays the uncertainty of implementation to conclude that that impacts are "potentially significant," but ignores impacts and implementation that is very reasonably foreseeable. The EA claims that it can only complete a certain level of analysis at this programmatic level.[13] While the EA claims that "[t]he impact analysis is based on foreseeable compliance responses that rely on a set of reasonable assumptions," CARB actually fails to analyze several reasonably foreseeable compliance actions which could result in impact of the

[10] See *The Two Hundred v. California Air Resources Board*, Order on Demurrer After Hearing, (Super. Ct. Fresno County, 2018, No. 18CEC601494), 12 ("[W]hile defendants argue that there is no constitutionally protected right to housing free of discrimination and thus plaintiffs have not stated a valid due process claim, the court notes that it is well—established that there is a constitutional right to be free of discrimination based on race.").
[11] EA, at p. 11.
[12] EA, at p. 7.
[13] EA, at p. 1.

environment.[14] In fact, the Scoping Plan selects some Measures, and rejects others, including Measures such as:

- the massive expansion of solar and wind electric generation facilities which do in fact have reasonably foreseeable locations, as well as modifications to transmission, substation, and other distribution infrastructure which are likewise reasonably foreseeable and in documentation commissioned by and submitted to CARB;
- a ten-fold expansion of forest "management" activities including timber harvesting and tree/vegetation removal which likewise will occur in reasonably foreseeable locations and - to pick just one example - will generate many thousands of tons of wood waste and debris requiring disposal or other management;
- the prescribed development of most new housing in transit priority areas (or equivalent), each of which is identified in Sustainable Communities Strategies prepared for both urban and other California regions which have been submitted to and accepted by CARB as meeting regional GHG reduction standards pursuant to SB 375; and
- the physical modification of scores of stationary sources of emissions subject to the Cap and Trade program, including but not limited to the installation of carbon capture and sequestration technologies requiring the modification of existing facilities as well as the construction or modification of off-site pipeline conveyance and sequestration facilities.
- The Plan boasts that "California has never undertaken as comprehensive, far reaching, and transformative an approach to climate change as this plan" and acknowledges that the ***Scoping Plan affects "every aspect of how we work, play and travel in California***."[15] The EA then goes on to identify twelve categories of "reasonably foreseeable compliance responses" and explains that all are analyzed against the "existing environmental conditions and regulations" baseline.[16]

In short, the Scoping Plan, its Measures, CARB's implementation of those Measures, and the reasonably foreseeable effects of that implementation constitutes the "project." The implementation of the Measures has more certain and ascertainable impacts than CARB portends.

B. The EA Must Analyze the "Whole of the Action."

In claiming that there is too much uncertainty about the implementation of the Measures to fully analyze their impacts in detail, the EA fails to adequately analyze the "whole of the action" constituting the project. While CARB has repeatedly tried, and failed in prior litigation to persuade courts that it does not have to really comply with CEQA for its Scoping Plan, courts have had none of it, holding that CARB must analyze "the whole of the activity constituting the

[14] *Id.*
[15] Scoping Plan, Executive Summary, at p. ix (emphasis added).
[16] EA, at pp. 18-27.

'project' includ[ing] the enactment, implementation and enforcement of the [Scoping Plan]."[17] Since the Scoping Plan identifies the concrete Measures described above and because the Scoping Plan is based on Measures which have been selected and rejected with certainty, the EA must review all of these Measures in as much detail as is currently known.

Having inadequately described the Scoping Plan "project," the EA then fails to disclose, analyze, or mitigate the impacts of almost all Measures that it does go on to analyze. "Because of CEQA's broad policy goals apply, the agency's environmental review document must include the same types of basic informational information as an EIR including a description of the activity and an analysis of impacts, mitigation measures, alternatives, and cumulative impacts."[18]

II. The EA Entirely Omits Any Analysis of Cumulative Impacts for Any CEQA Impact Category in Violation of CEQA.

CARB's willful violation of CEQA need go no further than the EA's omission of any "cumulative impact" of Scoping Plan implementation. Other state agencies have tried and failed to persuade courts that they should be excused from the CEQA obligation to analyze cumulative impacts. CARB chose to blatantly violate the law.[19]

III. The EA Fails to Identify Significant Unavoidable Impacts.

The EA's impact summary states that 25 of 34 impact categories and subcategories are each "Potentially Significant and Unavoidable." This is a violation of CEQA: CARB may not duck its legal obligation to reach a conclusion about whether an impact is in fact significant and unavoidable. The CEQA Guidelines require that an EIR include a discussion of "Significant Environmental Effects Which Cannot be Avoided if the Proposed Project is Implemented."[20] The addition of the word "Potentially" plainly ignores the language of the Guidelines. The uncertainty expressed undermines the entire purpose of CEQA: "to demonstrate to an apprehensive citizenry that the agency has, in fact, analyzed and considered the ecological implications of its action."[21]

IV. The EA Fails to Identify or Analyze a Reasonable Range of Alternatives to Avoid or Minimize Significant Adverse Impacts to the Environment.

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[17] *POET, LLC v. State Air Resources Bd*. (2017) 12 Cal.App.5th 52, 57 (CARB was required by CEQA to analyze the regulation being promulgated and the effects of implementing those regulations, including the foreseeable effects of the Low Carbon Fuel Standards.).
[18] Koska & Zischke, *Practice Under the California Environmental Quality Act*, §21.13; see also *Pesticide Action Network N. Am. V. California Dep't of Pesticide Regulation* (2017) 16 Cal.App 5th 224, 227.
[19] Koska & Zischke, *Practice Under the California Environmental Quality Act*, § 21.14.
[20] CEQA Guidelines 15162.
[21] *Save Round Valley Alliance v. County of Inyo* (2007) 157 Cal.App.4th 1437, 1446 (internal citations omitted).

The EA's failure to determine which impacts remain significant and unavoidable after mitigation renders the EA's analysis of alternatives fatally flawed. As the EA itself acknowledges:

> CEQA Guidelines section 15126.6(a) speaks to the need to describe 'a range of reasonable alternatives to the project, or to the location of the project, which would feasibly attain most of the basic objectives of the project but **would avoid or substantially lessen <u>any</u> of the significant effects of the project**, and evaluate the comparative merits of the alternatives.' The purpose of the alternatives analysis is to determine whether different approaches to or variations of the project would reduce or eliminate significant project impacts, within the basic framework of the objectives, a principle that is consistent with CARB's certified regulatory program requirements.[22]

The EA goes on to describe 3 alternatives in addition to the no project alternative, comparing them against the Scoping Plan's objectives.[23] The entirety of the environmental analysis for each alternative is set forth in one conclusory and incomplete paragraph, devoid of analysis and largely devoid of reference to the 25 sub-categories of impacts which CARB has identified as "PSU" (potentially significant and unavoidable) in the EA Impact Summary Table.[24]

The Regents of the University of California tried this shoddy sleight of hand to avoid meaningful analysis in an EIR evaluating the relocation of some operations into the Laurel Heights neighborhood in San Francisco.[25] The Supreme Court issued a stinging rebuke, first noting CEQA requires that alternatives to proposed projects must be "thoroughly assessed," then holding that CEQA requires a "meaningful analysis of alternatives" that include "facts and analysis, not just the agency's bare conclusions or opinions."[26] The Supreme Court continued:

> The EIR prepared by UCSF contains no analysis of any alternative locations. An EIR's discussion of alternatives must contain analysis sufficient to allow informed decision making… The Regents argue that alternatives had already been considered and found to be infeasible during the University's various internal planning processes and that an EIR need not discuss a clearly infeasible project alternative….The Regents miss the critical point that the public must be equally informed. Without meaningful analysis of alternatives in the EIR, neither the courts nor the public can fulfill their proper roles in the CEQA process. We do not impugn the integrity of the Regents, but neither can we countenance a result that would require blind trust by the public, especially in light of CEQA's fundamental goal that the public be fully informed as to the environmental consequences of

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[22] EA, p. 251 (emphasis added).
[23] EA, Attachment B: Summary of Impacts; see also EA, at pp. 255-56.
[24] *Id.* Table 7-1, at pp. 256-57.
[25] *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 404, as modified on denial of reh'g (Jan. 26, 1989).
[26] See *id.* at p. 400, quoting *Wildlife Alive v. Chickering* (1976) 18 Cal.3d 190, 197 and *id.* at p. 404-05, quoting *Concerned Citizens of Costa Mesa, Inc. v. 32nd Dist. Agricultural Assn.* (1986) 42 Cal.3d 929, 935.

> action by their public officials…If the Regents considered various alternatives and found them to be infeasible, we assume, absent evidence to the contrary, that they had good reasons for doing so. Those alternatives and the reasons they were rejected, however, must be discussed in the EIR in sufficient detail to enable meaningful participation and criticism by the public. … If the Regents previously considered alternatives in their internal processes as carefully as they now claim to have done, it seems the Regents could have included that information in the EIR. The Regents also contend the Association failed to point to any evidence in the record that demonstrates reasonable alternatives to moving the School of Pharmacy research units to Laurel Heights. This argument is somewhat disingenuous given the Regents' own failure to provide any meaningful information regarding alternatives. It is the project proponent's responsibility to provide an adequate discussion of alternatives… That responsibility is not dependent in the first instance on a showing by the public that there are feasible alternatives. If the project proponent concludes there are no feasible alternatives, it must explain in meaningful detail in the EIR the basis for that conclusion…CEQA requires that governmental agencies consider reasonable alternatives. It is not limited to alternatives proposed and justified by objectors [to an EIR]. (internal citations and quotation marks omitted).[27]

The EA alternatives selection and analysis fails on all counts. First, there is no explanation linking the selection of alternatives to the avoidance or minimization of adverse impacts; instead the alternatives simply reflect different GHG reduction measure policy choices (faster phase out of fossil fuels versus slower, more/faster versus less/slower deployment of certain technologies). The EA concludes that operational as well as construction impacts are "PSU" for aesthetics, agriculture and forests, air quality, biological resources, cultural resources, geology and soils, hazards and hazardous materials, land use and planning, noise, transportation/traffic, tribal cultural resources, utilities and service systems, and wildfire. The EA's failure to identify and evaluate a reasonable range of alternatives that avoid or substantially reduce these (or some subset of these) impacts is a fatal legal flaw under CEQA.

V. EA Fails to Disclose, Analyze or Mitigate Significant Adverse Environmental Impacts for Scoping Plan Measures.

The EA avoids disclosure, impact analysis, cumulative impact analysis and the imposition of all feasible mitigation measures to avoid or reduce significant adverse impacts (including an assessment of mitigation measure effectiveness) for almost all Scoping Plan Measures in violation of CEQA.

A closer examination of just four of the Measures demonstrate the EA's failure to disclose both currently known and reasonably foreseeable construction and operational impacts, and

[27] *Id.* at pp. 404-06.

unlawfully defers both analysis and mitigation of such impacts to later agency actions in violation of CEQA's prohibitions on both piecemealing (breaking up the larger project of making California carbon neutral by 2045 into smaller subparts to avoid comprehensive environmental analysis of the "whole of the project"), and unlawful deferral of feasible mitigation to avoid or minimize such impacts. CARB, like other state agencies, claims that it is somehow too speculative to really do the disclosure, analysis and mitigation required to comply with CEQA. Courts haven't bought these arguments[28], and CARB's latest attempt to circumvent CEQA is constitutes willful violation of CEQA. Four specific examples of Measures whose impacts are not analyzed completely are provided below:

A. Solar & Wind Generation Facilities Required for Retail Electricity Supply.[29]

The Scoping Plan includes the following Measure: "Per SB 100, achieve 100 percent renewable and zero-carbon retail sales [of electricity] by 2045."[30] The Scoping Plan further clarifies that, per a 2021 SB 100 Joint Agency Report prepared by CARB, the California Energy Commission, and the California Public Utilities Commission ("Joint Report"), non-retail electricity sales as well as electricity losses from storage, transmission and distribution lines, are not subject to the SB 100 renewable generation mandate.[31] Neither the EA nor Scoping Plan describe what portion of electricity generation that is not from solar, wind, and battery ("SWB") facilities will continue to occur, presumably from existing non-SWB facilities, and the EA does not disclose the location, size or schedule for the required SWB facilities .[32]

The Scoping Plan acknowledges that a four-fold increase of electricity is required under the Proposed Scenario.[33] However, due to the intermittent nature of solar and wind generation, even more electricity generation capacity as well as electric storage (battery) capacity is required to meet projected electricity demand. The Scoping Plan and EA falsely assert, however, that the location, size, and pace of SWB development is unknown and thus cannot be disclosed, analyzed, or mitigated.

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[28] The agency's certified CEQA regulatory program document "must provide detailed information on the project's potential significant effects on the environment and describe mitigation measures and alternatives that could reduce the project's significant environmental impacts." Koska & Zischke, *Practice Under the California Environmental Quality Act* §21.13; *see also, Ebbetts Pass Forest Watch v. Dept of Forestry & Fire Protection* (2008) 43 Cal.App. 936, 943.

[29] The Scoping Plan acknowledges that some geothermal generation expansion will occur, but does not provide further details. Failure to disclose and analyze geothermal generation expansion is another deficiency in the EA, but for purposes of illustrating the magnitude of the EA's deficiency this comment focuses on the omission of SWB.

[30] Scoping Plan, at p. 164.

[31] Scoping Plan, Table 2-2, at p. 60.

[32] *Id.*

[33] Scoping Plan, Figure 4-5: Projected electricity resources needed by 2045 in the Proposed Scenario, at p. 162, demonstrating the increase in need from 50,000 MW to almost 200,000 MW from 2025 to 2045.

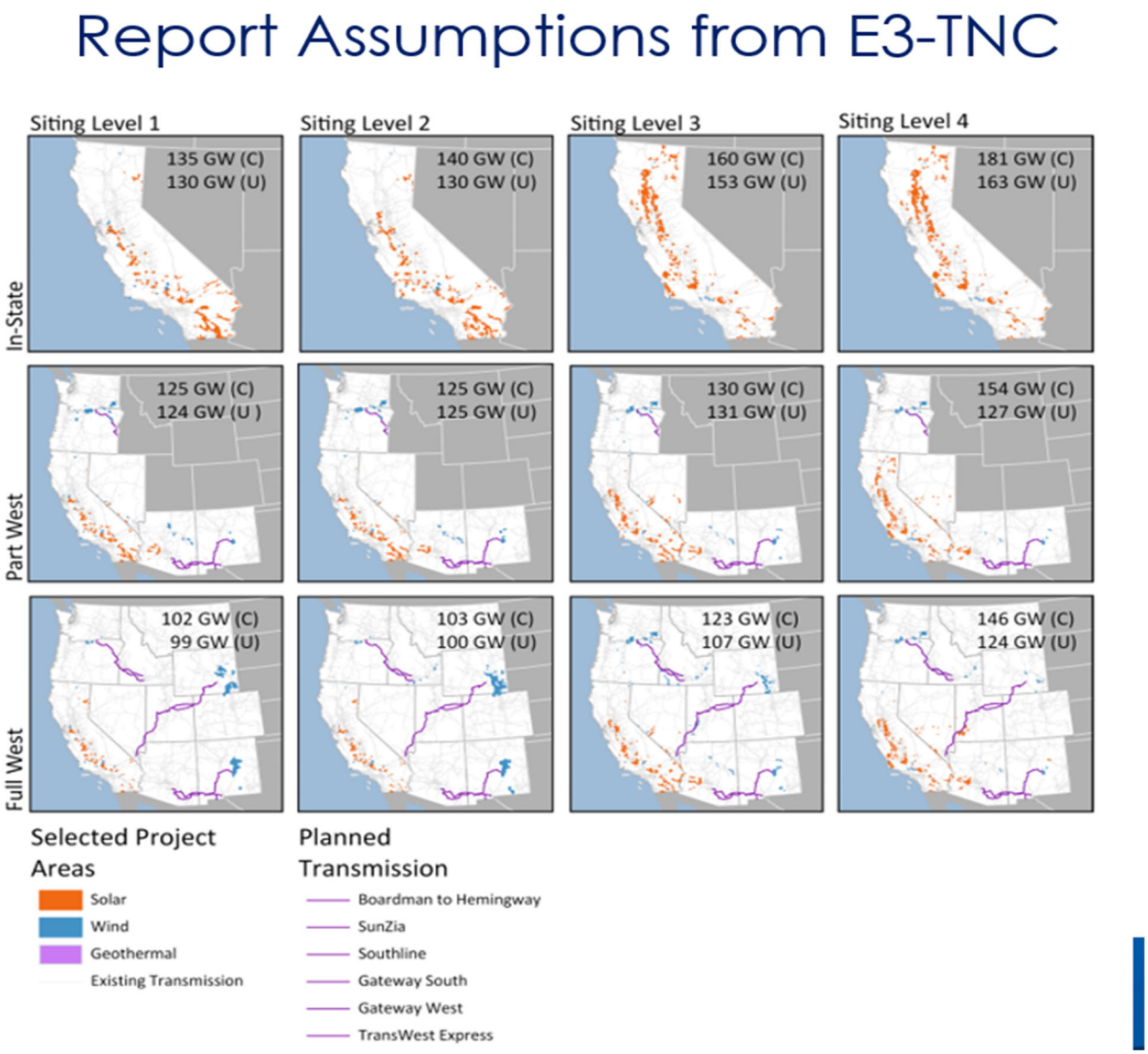
The Joint Report, and related reports commissioned by the California Energy Commission, California Public Utilities Commission, and CARB itself,[34] acknowledge the massive expansion of SWB facilities as well as transmission lines and related distribution infrastructure are all required, and states that "[c]onstruction of clean electricity generation and storage facilities must be sustained at record-setting rates."[35]

An expert CEQA consulting firm, ERM, examined CARB and other Joint Agency-commissioned studies that do in fact describe the size, scale and location of the planned "massive expansion" in these facilities, in a report titled *Final Draft Assessment Report - Potential Impacts of California's High Electrification Scenario*, 2021 (hereinafter "ERM Report"),[36] including for example a report prepared by The Nature Conservancy and E3 called "The Power of Place" ("E3-TNC") which sites are targeted for development of solar or wind facilities using 9 different scenarios which vary the amount of electricity imported into California (and thus partly reduce the need for California-sited generation facilities) and vary siting criteria to maximize avoidance of prioritized environmental impacts such as protected species and habitat. The siting Figure is reprinted here, as well as included in the ERM Report.

[34] See, e.g., Wu et al. 2019 ("E3-TNC") *Power of Place: Land Conservation and Clean Energy Pathways for California,* which provides details regarding the size, location and cost of solar wind, bulk transmission generation and geothermal facilities in California and other states required to implement the High Electrification Scenario as further described in ERM Report.

[35] SB 100 Joint Agency Report Summary, at p. 8, available at https://efiling.energy.ca.gov/GetDocument.aspx?tn=239588&DocumentContentId=73021 .

[36] ERM, *Final Draft Assessment Report - Potential Impacts of California's High Electrification Scenario*, 2021. The ERM Report is included in its entirety as Attachment A to this comment letter. Each subsection of the ERM Report (e.g., section 2.3.1) constitutes a separate comment on the Scoping Plan, relating to failure to accurately describe energy costs, economic and equity impacts, land use and environmental impacts, and waste materials and volumes, of this SWB measure in the Scoping Plan. ERM has extensive experience in preparing EIRs for renewable energy projects in California, including analyzing and mitigating the environmental impacts of such projects as required by CEQA.

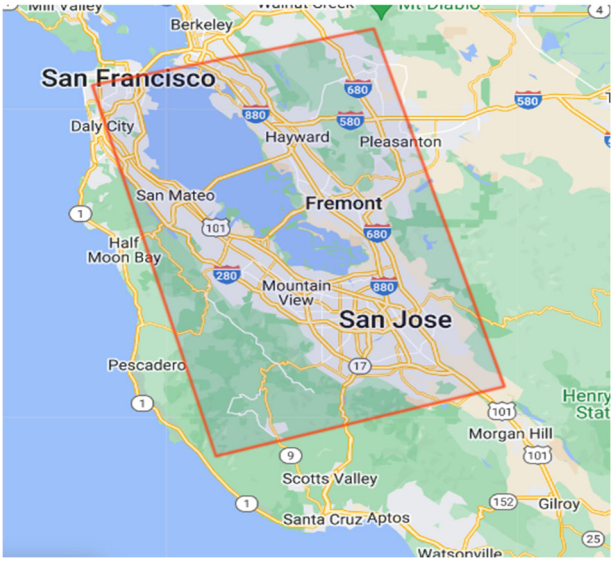


The ERM Report includes this E3-TNC and related Joint Agency studies, which collectively constitute the reasonably foreseeable physical consequences to the environment of just this 100 percent renewable retail electricity Measure. The ERM Report then uses the least impactful of the nine scenarios, which maximizes importation of electricity from other states and which avoids and minimizes impacts to prioritized environmental resources, to disclose the environmental impacts of the lowest impact version of this one Measure.

The ERM Report, using the physical siting, sizing, and scheduling information regarding SW facilities commissioned by and known to CARB, to identify the environmental impacts of this Measure. As set forth in the ERM Report:

- By 2050 installed capacity will need to increase by approximately 489 to 650 percent for solar and 30 to 250 percent for wind to provide the necessary supply. This is a net increase of between 101.5 to 107.3 gigawatts ("GW") of solar and 4.7 to 15.42 GW of wind.[37]
- Approximately 70 percent of overall solar and wind development would occur in the San Joaquin Valley and Mojave/Sonora desert regions; however, after accounting for land conservation and development prohibitions, only about 30 percent of these regions would likely be eligible for permits under existing legal constraints.
- If such development were in fact to occur, approximately 11,000 acres of wetlands and regulated waters, 43,000 acres of critical habitat, 40,000 acres of important bird areas, 2,000 acres of wildlife linkages, 119,000 acres of prime farmland, 100,000 acres of agricultural land, and 30,000 acres of rangeland would be impacted. Impacted protected species include the Giant Kangaroo rat, the San Joaquin Kit Fox, the Blunt Nosed Leopard Lizard, and the Desert Tortoise.[38]
- Assuming that California can in fact access the desired amount of electricity imports from other states, "approximately 740,000 to 1.24 million acres will be converted from agricultural, rangeland, and open space to industrial land in order to supply the needed electricity."[39] The ERM Report illustrates the size of this development activity on the Los Angeles area map; below is the construction overlay onto the Bay Area - which swallows San Francisco, Silicon Valley, San Jose, most of the Bay itself, and large swaths of Oakland and other East Bay cities. CARB's Scoping Plan and Environmental Assessment provide zero disclosure of the massive size, and massive impacts, of even this one Measure, as shown the Figure below.

[37] ERM Report, at p. 1.
[38] *Id.* at p. 4.
[39] *Id.* at p. 3.



Low Acre Conversion Estimate for Solar/Wind Facilities Required to Provide Retail Electricity from Renewable Sources; Estimate Assumes Increasing Already Massive Importation of Electricity from Other States.

- The increase in development is between 14 and 25 percent of the approximately 5.19 million acres of urbanized land in California.[40]
- The increase in solar development is approximately 6 to 10 times more than current solar facility development. Installed solar capacity in Fresno and Kings county combined is only 1.3 percent of the land area needed for solar.[41]
- The size of solar facilities would need to increase from today's average of 120 acres to an average of 988 acres.[42]
- The required schedule for solar and wind buildout would continue the record high buildout year for the next 25 years.[43]
- The ERM Report also describes other reasonably foreseeable impacts of this 100 percent renewable energy for retail sales measure, including for example foreseeable waste volumes associated with the routine and far more frequent need to replace batteries, windmill equipment, and solar panels. For example, battery equipment has a limited duration lifespan of about 13 years, wind turbines typically last 20 to 25 years, while solar PV panels last approximately 30 years, and thereafter must be replaced.[44] The EA does not disclose, analyze, or mitigate for this massive increase in electronic wastes, some of which include hazardous chemical constituents that require special handling under California's universal waste laws. Recycling and disposal both involve operations of waste handling facilities as well as waste transportation, and battery recyclers in particular have created legacy hazard conditions requiring regulatory interventions and

[40] *Id.*
[41] *Id.*
[42] *Id.* at p. 71.
[43] *Id.* at p. 73.
[44] *Id.* at p. 139.

taxpayer funded cleanups. The ERM Report identifies waste handling volumes omitted from the EA, which neither acknowledges, analyzes, or mitigates for these massive new quantities of spent batteries, solar panels, and turbines.[45] The EA omits even the most basic waste volume and landfill capacity analysis, which applies to shipping materials for new SWB equipment, new transmission and distribution lines and substations, and demolished or replaced existing infrastructure.[46]

More detailed information regarding this Measure that the EA fails to disclose, analyze, or mitigate is included in the ERM Report in Chapters 1, 2, 4 and 5.

B. Ban on Affordable Personal Vehicles and 30% Decrease in Personal Mobility

The Scoping Plan includes numerous measures to transition various categories of vehicles to electricity or hydrogen fuel sources, and to partly transition other vehicle categories to reduce but not eliminate fossil fuel use.[47] As with the Facility Measures, the EA does not disclose, analyze, or mitigate the physical effects to the environment of constructing or operating the required new solar, wind, and battery ("SWB") facilities, hydrogen, hydrogen fuel cell, or biomass fuel power source replacements, or of transporting, storing, and dispensing these new vehicular fuel sources at the scale needed to achieve Scoping Plan compliance. Please refer to our separate comment on the mandated phase-out of internal combustion engines, which is incorporated herein as a comment on the EA.

The Scoping Plan also establishes new Vehicle Miles Traveled ("VMT") reduction targets for specified vehicular categories. While the overall VMT reduction target is 22 percent by 2045[48], the Scoping Plan calls for all GHG reductions to be achieved from "light duty" cars and pickup trucks, resulting in the need for a 30 percent VMT reduction for the passenger vehicles used by individuals and families. CARB staff has made the discretionary determination that these VMT reductions by California residents are required even with the planned EV fleet transition, and even with CARB's recognition that direct carbon removal technology and land management practices should be used to offset some GHG impacts - but not the GHG emissions from families that cannot afford to buy an electric vehicle.

As a legal matter, CARB's VMT reduction measure is legally infeasible, as well as unlawful, for the civil rights and mobility law reasons addressed in our pending lawsuits[49] and in a separate

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[45] *Id.* at pp. 138-39.
[46] *Id.* at pp. 132-39.
[47] See e.g., Scoping Plan, Table 2-2, at p. 58 (proscribing the following actions: "100 percent of LDV sales are ZEV by 2035," "100 percent of medium duty (MD)/HDV sales are ZEV by 2040," "10 percent of aviation fuel demand is met by electricity (batteries) or hydrogen (fuel cells) in 2045.").
[48] Scoping Plan, Table 2-2, at p. 59.
[49] See The Two Hundred et al. v. California Air Resources Board et al., (Super. Ct. Fresno County), Case No. 18CECG01494, attached hereto as Attachment B and The Two Hundred et al., v. The Governor's Office of Planning

comment letter.· For ease of reference, each of these pending Petitions has been marked with comment numbers in the margin, as each paragraph of each lawsuit is separately submitted as a comment to this Scoping Plan and EA and attached hereto.

The adverse environmental impacts of mandating VMT reductions have been well documented under SB 375, but are wholly and unlawfully ignored in the EA. As background, SB 375 expressly establishes a process by which regional GHG reduction targets must be established. CARB has published current GHG reduction targets on its website.[50] The most ambitious SB 375 reduction targets, for the most urbanized regions with the most transit service, is 19 percent below 2005 levels by 2035.[51] All other regions have targets of 16 percent or less and some rural regions have targets below 10 percent.[52] Differing regional targets are consistent Legislatively-mandated SB 375 target setting procedures. Also under SB 375, each region is required to develop a plan (a sustainable communities strategy or alternative compliance strategy, collectively referred to as "SB 375 Plan") for achieving these regional GHG reduction targets[53]; each region has done so and has also certified an Environmental Impact Report ("EIR") or other CEQA compliance document (collectively, "EIRs") for their SB 375 Plan.[54] These SB 375 Plan EIRs document a staggering list of significant unmitigated adverse impacts to the physical environment; the Summary Impact Tables for the most recent of each such SB 375 Plan are included as Attachment D here. Like CARB, the regional agencies that adopt SB 375 Plans do not approve the commencement of physical (e.g., construction) changes to the environment. However, also like CARB, each such regional agency is required by CEQA to disclose the environmental impacts associated with such SB 375 Plans, such as substantial increases in housing and population densities for existing communities, and substantial shifts in planning resources away from roads and highways and into transit, bike paths, and higher density development near high frequency public transit to reduce VMT.[55]

The Scoping Plan acknowledges that the SB 375 VMT reduction aspirations have not been achieved in practice, and in fact that with the exception of the pandemic shutdown period, VMT has increased even while public transit investments and services have expanded. [56] An important new study from the UCLA has again exhaustively documented why fixed route public transit (bus and rail) dropped precipitously pre-COVID in Southern California even as massive public investments in transit systems had resulted in significantly expanded transit service without any

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and Research et al., (Super. Ct. Sac. County.), Case No. 34-2020-80003447-CU-WM-GDS, attached hereto as Attachment C.

[50] Regional Plan Targets, CARB, available at https://ww2.arb.ca.gov/our-work/programs/sustainable-communities-program/regional-plan-targets.

[51] See *SB 375 Regional Plan Climate Targets*, California Air Resources Board, available at Regional Plan Targets | California Air Resources Board.

[52] *Id.*

[53] *Id.*

[54] See Regional Plans & Evaluations, California Air Resources Board, available at Regional Plans & Evaluations | California Air Resources Board.

[55] *Id.*

[56] Scoping Plan, at pp. 89-90.

significant transit fare increase.[57] Ridership loss was most significant for lower income households that acquired cars. The study confirmed that 55 times more jobs could be accessed by car in a 30 minute commute than could be accessed in a 30 minute transit ride, and also noted that the overwhelming share of transit ridership was limited to portions of Los Angeles county and not the remainder of the region.[58] For example, the report notes that "LA Metro, which serves Los Angeles, carries over 70% of the region's trips, many of them on its 20 busiest routes." Further, "LA Metro ridership is sufficiently concentrated that from 2011 to 2016 losses along a dozen of its routes accounted for 38 percent of all the lost ridership in *California*." (emphasis in original). The report notes that even though Los Angeles has high population density,[59] the absence of a historic downtown core built before cars both in LA County and the Southern California region render all but a handful of public transit routes more of a social service safety net for the poor than a meaningful transportation mode choice.

C. AB 197 Facility Measures.

Many of the Measures that CARB proposes to undertake under the authority of AB 197 have environmental impacts that have not been disclosed, analyzed, or mitigated in the EA. CARB has broad but by no means unfettered authority from the Legislature to select greenhouse gas ("GHG") reduction measures for specified types of "facilities" that emit GHG ("Facility Measures"). CARB's selection of which Measures should be applied at what time to what types of facilities in this Scoping Plan has direct physical effects on the environment. Examples of these industrial facility physical modification requirements include:

- 25 percent of Ocean-going Vessels are required to use hydrogen fuel cell electric technology by 2045.[60] Installation and operation of hydrogen fuel cell electric technology fuel depots, supply pipelines, fueling equipment, along with demolition and modification of complex Port infrastructure, are reasonably foreseeable consequences of implementation of this Measure which the EA ignores.
- 75 percent of "Food Product" processing facilities must convert from natural gas to "direct or indirect" electricity by 2045.[61] Electricity generation can be solar or wind (on an intermittent basis), supplemented with batteries, or through hydrogen-based

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[57] M. Manville et al., *Vehicle access and falling transit ridership: evidence from Southern California*, UCLA Department of Urban Planning, Institute of Transportation Studies, and Lewis Center for Regional Policy Studies (2022), at fn 3, available at Vehicle access and falling transit ridership: evidence from Southern California | SpringerLink. Copies of these and other cited studies are submitted in their entirety for purposes of the administrative record in this Scoping Plan proceeding, in a "Reference Source" list provided in Attachment E.
[58] "In Los Angeles,… job access via automobile in 2014 was 55 times higher than job access by transit." *Id.*
[59] The Los Angeles/Long Beach Metropolitan Statistical Area is the most dense in the nation according to the US Census; New York City's MSA is second. San Francisco, San Jose, and other California MSAs also rank as more dense than cities traditionally considered more dense such as Chicago and Boston. U.S. Population Density Metro Area Rank , US Census Data, available at http://www.usa.com/rank/us--population-density--metro-area-rank.htm.
[60] Scoping Plan, Table 2-2, at p. 59.
[61] *Id.* at p. 61.

fuel systems, all of which have known but undisclosed and unanalyzed physical impacts to the environment.

- 100 percent of "Chemicals and Allied Products; Pulp and Paper" facilities must convert to hydrogen for "process heat," and electricity for "all other energy demand by 2045."[62] As with other industries, these energy source transitions have a physical footprint as energy consuming and energy product equipment is modified in complex physical plants.

For some but not all of these Facility Measures, the Scoping Plan expressly acknowledges that implementation requires physical changes to the environment, e.g., by noting that "[s]ignificant increases in marine imports would likely require significant reconfiguring, retrofitting, or replacing of crude pipelines and storage tanks at current marine terminals and possible reconfiguring of existing finished fuel infrastructure to account for changes in volumes and locations of supply points."[63]

Under CEQA, CARB, as the lead agency has the legal obligation to first disclose, then analyze, then mitigate, physical impacts to the environment.[64] The level of detail required is based on what's known, and what's reasonably foreseeable.[65]

The EA fails to disclose the physical impacts to the environment of the Facility Measures, including but not limited to construction-phase impacts such as air emissions, and hazardous materials and accident risks, onsite operational impacts following Facility modifications, indirect impacts such as hazards from intermittent power shortages and offsite impacts if as is reasonably foreseeable changes to the existing configuration of electricity and natural gas systems as well as the creation of new hydrogen-based energy sources, and cumulative impacts from the concurrent construction and reconfiguration of all other Facilities during overlapping implementation deadlines.

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[62] *Id.*

[63] Scoping Plan, at p. 84.

[64] "'[T]he agency which is to act first on the project in question shall be the lead agency (following the principle that the environmental impact should be assessed as early as possible in governmental planning).'" *Bozung v. Local Agency Formation Com.* (1975) 13 Cal.3d 263, 282, quoting CEQA Guidelines § 15065, subd. (c) (now CEQA Guidelines § 15051 subd. (c).).

[65] "[A]n agency must use its best efforts to find out and disclose all that it reasonably can." *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 428, as modified (Apr. 18, 2007); see also *San Franciscans for Livable Neighborhoods v. City and County of San Francisco* (2018) 26 Cal.App.5th 596, 614 ("The sufficiency of an EIR is to be reviewed in the light of what is reasonably feasible .... The courts have [therefore] looked not for perfection but for adequacy, completeness, and a good faith effort at full disclosure." The overriding issue on review is thus 'whether the [lead agency] reasonably and in good faith discussed [a project] in detail sufficient [to enable] the public [to] discern from the [EIR] the "analytic route the ... agency traveled from evidence to action." (internal citations omitted) (citing California Oak Foundation v. Regents of University of California (2010) 188 Cal.App.4th 227, 262.)

D. Ban on Housing Affordable to Median Income (80-120% AMI) Households.

As described in greater detail in our other comment letters, and in the attached Complaints filed against CARB and OPR on behalf of The Two Hundred[66], as further validated by Federal District Judge Carter's decision in a pending "skid row" homeless lawsuit, Scoping Plan measures demand that housing be built at higher densities on previously-developed land in neighborhoods with existing high frequency public transit service so new housing residents will drive a minimum of 30 percent less than other residents. Some of these Measures are directly and immediately activated (e.g., by CEQA lawsuits challenging housing that is inconsistent with the Scoping Plan's housing and VMT measures), others are in direct conflict with existing laws (e.g., the civil rights law requiring Affirmatively Furthering Fair Housing by dispersing new housing throughout California's counties and cities, and within transit-served communities dispersing new housing even in driver-dependent lower-density neighborhoods that most often house whiter and wealthier single family neighborhoods with more park and school amenities).

The EA fails to disclose, analyze, or mitigate the environmental impacts of imposing radical housing measures as climate policies that directly contradict existing civil rights and other housing laws, or have been expressly rejected by the Legislature, as more fully discussed in *Green Jim Crow: How California's Climate Policies Undermine Civil Rights and Racial Equity*.[67]

The specific locations of these high frequency transit areas are known to CARB in the Sustainable Communities Strategies required to be submitted under SB 375. The relocation of housing density - prohibiting housing in most counties, cities and neighborhoods that do not have high frequency public transit - in contravention of state and local law has known environmental impacts, ranging from massive amounts of demolition and new construction in targeted areas, to increased exposure to urban pollutants, higher temperatures, and other impacts.[68] The EA fails to disclose, analyze, or mitigate these Scoping Plan housing, natural and working lands, and VMT measure impacts on housing, population, and employment.

VI. Scoping Plan Unlawfully Fails to Identify Which Measures Are Required to Achieve the Legislated AB/SB 32 GHG Reduction Target of 40 Percent by 2030.

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[66] See The Two Hundred et al. v. California Air Resources Board et al., (Super. Ct. Fresno County), Case No. 18CECG01494, attached hereto as Attachment B and The Two Hundred et al., v. The Governor's Office of Planning and Research et al., (Super. Ct. Sac. County.), Case No. 34-2020-80003447-CU-WM-GDS, attached hereto as Attachment C.

[67] J. Hernandez, *Green Jim Crow: How California's Climate Policies Undermine Civil Rights and Racial Equity*, The Breakthrough, August 21, 2021, available at Green Jim Crow | The Breakthrough Institute.

[68] See, e.g., Judge Glock, *The Environmental Case for Suburbia* 2022, Breakthrough Institute, available here https://urbanreforminstitute.org/2022/02/sprawl-is-good-the-environmental-case-for-suburbia/ and attached hereto as Attachment F.

The Legislature has repeatedly declined to approve statutes that would require VMT reductions, a ban on internal combustion engines, housing production outside transit-neighborhoods, and scores of other measures in the Scoping Plan. The Legislature likewise has declined to enact a statutory statewide GHG "carbon neutral" or 80 percent reduction mandate. CARB has a statutory obligation to prepare a Scoping Plan in compliance with AB/SB 32, but has instead prepared a Scoping Plan that prescribes an undifferentiated suite of scores of measures to achieve the latest Governor's GHG executive order and not the Legislated GHG reduction mandates.

The Scoping Plan must separately identify and recommend those measures required to achieve the AB/SB 32 40% GHG reduction target. CARB makes clear that in its opinion, meeting that statutory reduction target would undermine the timely achievement of far more radical carbon neutral and GHG reduction targets. CARB's opinion is interesting, but does not authorize CARB to subvert the Legislature's GHG enacted target.

At minimum, the Scoping Plan must identify which measures - presumably those having the fewest adverse equity, environmental, and economic impacts - are appropriate to achieve CARB's legislated AB/SB 32 40 percent GHG reduction target.

CARB may also identify "beyond compliance" GHG measures recommended to achieve Executive Order requirements that have been rejected by the Legislature, but whether or to what extent such excess measures should be imposed on today's Californians is a policy call requiring transparency and accountability in the Scoping Plan and related appendices.

The Scoping Plan's omission of identified measures to achieve the Legislature's AB/SB 32 40 percent target is a fatal legal flaw, and its insistence on a Plan that achieves only Executive Order targets is ultra vires.

The Scoping Plan and related EA must be revised and recirculated to clearly and separately identify, and analyze, the AB/SB 32 40 percent target measures.

VI. The EA Fails to Evaluate or Disclose the Impacts that Measures Will have on Urban Decay and Blight

Implementation of the Scoping Plan Measures listed above and many others will cause certain employers to go out of business, causing job loss and deterioration of existing facilities – economic and physical blight. "CEQA requires urban decay or deterioration to be considered as an indirect environmental effect of a proposed project" and the lead agency must analyze this environmental impact where the project is likely to cause a "downward spiral of business closures, vacancies and deterioration."[69] CARB must fully analyze the impacts that the Measures

[69] *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1205, citing *Citizens Assn. for Sensible Development of Bishop Area v. County of Inyo* (1985) 172 Cal.App.3d 151 and *Citizens for Quality Growth v. City of Mt. Shasta* (1988) 198 Cal.App.3d 433, 445–446.

will have on urban decay "when the economic or social effects of a project cause a physical change."[70]

For example, the "Increase in Renewable Energy and Decrease in Oil and Gas Use Actions"[71] group of measures could result in job loss at natural gas plants, pipelines, and oil and gas extraction facilities. The ERM Report estimates that, under the HES, "[t]he assumed 86 percent decline in petroleum demand in 2050 may lead to up to 179,000 job losses, including over 7,000 jobs in the San Joaquin Valley specifically."[72] "Labor income for the oil and gas industry could decline by $13.4 billion (57 percent), with a $34.1 billion decline in GDP (63 percent). Total output may decrease by $100 billion (69 percent), decreasing state and local tax revenue by $14.2 billion."[73] Loss of major employers will lead to economic blight that itself creates adverse environmental impacts on the environment, including physical deterioration of both plant sites, refinery operations, and retail stores reliant on this industry.[74] Loss of state and local tax revue on such a large scale could also result in degradation of local infrastructure, contributing to environmental impacts caused by urban decay. Since the Scoping Plan Measures will impact these industries by causing facility shutdown and job loss, the Scoping Plan needs to analyze the impacts of the project on urban decay.

VII. The EA's Mitigation Measures Are Unlawful.

As shown above, the EA fails to apprise the public of the environmental impacts of the Scoping Plan because it conducts a conduct a sparse, vague, and incomplete analysis of the environmental impacts of the selected Measures. Beyond this, the mitigation measures and general mitigation approach that CARB has identified breaks nearly every rule in the CEQA handbook, failing, on even a basic level, to demonstrate that they will "[p]revent significant, avoidable damage to the environment."[75] First, the EA's basic approach to mitigation, relying on enforcement of laws by other regulators, fails because the EA neglects, as a preliminary matter, to disclose which impacts need to be mitigated. Second, the EA unlawfully defers mitigation measures until a later time[76] and, third, fails to create specific performance standards for the mitigation measures[77].

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[70] *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1205, citing CEQA Guidelines § 15064 (e).
[71] EA, at p. 18-19.
[72] ERM Report, at p. 2.; see also *id.* at 54 ("The California oil and gas industry contributes to over 365,000 jobs and $21.6 billion in state and local taxes.").
[73] *Id.*
[74] *Oil & Gas In California: The Industry, Its Economic Contribution and User Industries at Risk*, 2019 Report, Los Angeles County Economic Development Corporation, available at Oil and Gas Industry in California: 2019 Report - Los Angeles County Economic Development Corporation (laedc.org) (detailing the jobs, facilities, tax bases supported).
[75] CEQA Guidelines § 15002(a)(3).
[76] CEQA Guidelines, § 15126.4, subd. (a)(1)(B).
[77] *Oakland Heritage Alliance v. City of Oakland* (2011) 195 Cal.App.4th 884, citing *California Native Plant Society v. City of Rancho Cordova* (2010) 172 Cal.App.4th 603.

A. The EA's Approach to Mitigation Is Inadequate because the Scoping Plan's Environmental Impacts Have Not Yet Been Adequately Evaluated and Disclosed

The EA relies on compliance with already established laws and regulatory programs to mitigate the environmental impacts of the Scoping Plan Measures, repeatedly citing to the EA's Environmental and Regulatory Setting Description in its own Attachment A.[78] Without first disclosing the impacts of the proposed Measures to the public, to the extent possible, the efficacy of CARB's approach to mitigation through reliance on established laws cannot be demonstrated: "…[c]ompliance with a regulatory permit or other similar process may be identified as mitigation ***if compliance would result in implementation of measures that would be reasonably expected***, based on substantial evidence in the record, ***to reduce the significant impact to the specified performance standards***."[79] CARB must fully analyze the impacts of all twelve groups of Table 2 Measures in order to demonstrate that these Mitigation Measures are adequate. For example, the impacts of the following Measures have not been analyzed in the EA:

- Forest, Shrubland, and Grassland Management Actions: Table 2-2 proposes "Forest, Shrubland, and Grassland Management Actions" to decrease emissions from our Natural and Working lands ("NWL").[80] This includes, among other actions, mechanical thinning of forests, targeted herbicide uses, and prescribed burns meant to mitigate the severity of wildfires.[81] The following potential impacts have not been disclosed or considered in the EA, such that it is impossible to know whether compliance with all applicable laws and regulations will be effective mitigation.
    - While proposing and encouraging the use of herbicide in forest management, the EA fails to consider specific known impacts of herbicide use on biological resources, water quality, soil quality, and impacts on human health.[82] Regarding biological resources, the impacts of glyphosate on flora can be catastrophic: "[e]xcessive glyphosate application has been linked to disease development in many crops."[83] "Glyphosate can also predispose plants to diseases indirectly by reducing the overall growth and vigor of the plants, modifying soil microflora that affects the availability of nutrients required for disease resistance, and altering the physiological efficiency of plants."[84] With respect to soil quality and water quality, "[g]lyphosate has an affinity to bind to soil particles and thus mostly accumulates in the top-soil layers," but has also been "found to transport deep into

[78] See e.g., EA, Mitigation Measure 1.a, at pp 36-37, Mitigation Measure 2.a, at pp. 53-55.
[79] CEQA Guidelines 15126.4 (a)(1)(B) (emphases added).
[80] Scoping Plan, Table 2-2, at p 64.
[81] EA, at p. 25.
[82] See Statement of Overriding Considerations for the California Vegetation Treatment Program, Final Program EIR, Board of Forestry and Fire Protection, available at ceqa-template-findings_soc-508-compliant.dotx (live.com).
[83] R. Kanissery et al. *Glyphosate: Its Environmental Persistence and Impact on Crop Health and Nutrition,* Plants vol. 8,11 499, November 13, 2019, available at Glyphosate: Its Environmental Persistence and Impact on Crop Health and Nutrition - PMC (nih.gov).
[84] *Id.*

the soil and leach out with drainage water."[85] In humans, exposure to glyphosate has been shown to cause infertility, birth defects and other hormone disorders.[86] Without having disclosed these impacts, the public cannot know whether CARB's approach to mitigation is effective.

- The EA fails to consider specific known environmental impacts of mechanical forest thinning[87] and prescribed burns on biological resources.[88] CARB only vaguely gestures at these impacts, anticipating that these will have potentially significant impacts to biological resources by causing "modifications to existing habitats," "interference with wildlife movement or wildlife nursery sites," "loss of or disturbance to special-status species," and conflicting with various habitat conservation plans.[89] CARB neglects to provide details about the specific species that forest thinning and prescribed burns could impact, even though the locations of these burns could be reasonably ascertained by looking at the California Vegetation Control Treatment Plan.[90]

- Agricultural Actions: Table 2-2 proposes Measures to "[r]educe short-lived climate pollutants," "[i]ncrease soil water holding capacity," and"[i]ncrease organic farming and reduce pesticide use."[91] According to the EA, these Measures include "reduced till practices, cover cropping, transitioning to organic agriculture, and compost application."[92] The following potential impacts have not been disclosed or considered in the EA, such that it is impossible to know whether compliance with all applicable laws and regulations will be effective mitigation.

    - The EA fails to consider the impact of increasing the agricultural dependence on composting on energy resources, odors, and air quality. Specifically, the EA does not describe the extensive research on the increased emission volatile organic

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[85] *Id.*
[86] K. Gandhi et al., *Exposure risk and environmental impacts of glyphosate: Highlights on the toxicity of herbicide co-formulants,* Environmental Challenges, Volume 4, August 2021, available at Exposure risk and environmental impacts of glyphosate: Highlights on the toxicity of herbicide co-formulants - ScienceDirect.
[87] R. Graham et al.. *The effects of thinning and similar stand treatments on fire behavior in Western forests*. Gen. Tech. Rep. PNW-GTR-463. Portland, OR: U.S. Department of Agriculture, Forest Service, Pacific Northwest Research Station (1999), available at https://www.fs.fed.us/pnw/pubs/pnw_gtr463.pdf; G. Moreau et al., *Opportunities and limitations of thinning to increase resistance and resilience of trees and forests to global change,* Forestry: An International Journal of Forest Research, 2022, available at Opportunities and limitations of thinning to increase resistance and resilience of trees and forests to global change | Forestry: An International Journal of Forest Research | Oxford Academic (oup.com).
[88] *See* : W. Block et al., *Effects of Prescribed Fire on Wildlife and Wildlife Habitat in Selected Ecosystems of North America*. The Wildlife Society Technical Review 16-01. The Wildlife Society, Bethesda, Maryland, USA (2016), available at TechManual16-01FINAL.pdf (wildlife.org).
[89] EA, at p. 78-79.
[90] California Vegetation Treatment Program, Final Program EIR, Board of Forestry and Fire Protection, available at Welcome to CalVTP Programmatic EIR.
[91] Scoping Plan, Table 2-2, at p 65.
[92] EA, at p. 25.

compounds ("VOCs") on our working farms that result will from increased compost use.[93] Not only can these VOCs react with other precursors to make criteria pollutants, but they can release noxious odors that disproportionately impact the low-income and minority groups that live adjacent to agricultural lands.[94] While the EA proposes compliance with other state laws as a general approach to Mitigation, the public cannot be sure that this Mitigation will be effective without adequate disclosures of these impacts. Furthermore, the composting programs created by SB 1318 do not guarantee that compost will not be contaminated with pesticides or other hazardous chemicals.[95] The EA discloses no state infrastructure available to ensure that the compost applied to agricultural lands is free of these hazards.

- The EA also does not consider the negative environmental impacts of increased organic farming. Organic farming can have significant environmental impacts to soils, land use, and air quality.[96] Broadly, organic farming may cause a reduction in soil profile soil organic carbon stocks and may require that more overall land be used for crop agriculture due to lower crop yields.[97] One study showed that 40 percent more land is needed with organic farming to produce the same crop yield as using conventional methods.[98] Studies have also found that increased use of organic farming may actually cause air quality impacts as well: "[d]irect GHG emissions are reduced with organic farming, but when increased overseas land use to compensate for shortfalls in domestic supply are factored in, net emissions are greater."[99] Without proper disclosure of these impacts, among numerous others, the public will not know whether CARB's approach to mitigation is effective.

B. EA Unlawfully Defers Mitigation to Future Third Party Agency Actions.

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[93] *Composting Emissions and Air Permits*, CalRecycle, available at Composting Emissions and Air Permits - CalRecycle Home Page ("actively composting piles of organic feedstocks emit volatile organic compounds (VOC), which can react in the atmosphere with oxides of nitrogen (NOx) to make ground-level ozone, a criteria pollutant. VOCs can also react with ammonia (NH 3) to create fine particulates (alternatively referred to as particulate matter (PM 2.5), another criteria pollutant). VOCs are a class of more than 1,000 chemicals with greatly varying degrees of reactivity and toxicity.").

[94] *Id.;* see also A. Kumar et al., *Volatile organic compound emissions from green waste composting: Characterization and ozone formation*, Atmospheric Environment, Volume 45, Issue 10, 2011, available at https://linkinghub.elsevier.com/retrieve/pii/S1352231011000215.

[95] See Pesticide/Herbicide Residues in Compost - CalRecycle Home Page

[96] K. Lorenz, R. Lal, *Environmental Impact of Organic Agriculture*, Carbon Management and Sequestration Center, School of Environment and Natural Resources, College of Food, Agricultural, and Environmental Sciences, The Ohio State University (2016), available at Environmental Impact of Organic Agriculture (osu.edu).

[97] *Id.* at p. 46.

[98] H. Treu et al., *Carbon footprints and land use of conventional and organic diets in Germany*, Journal of Cleaner Production, Volume 161, 2017.

[99] L.G. Smith, *et al.* The greenhouse gas impacts of converting food production in England and Wales to organic methods. *Nat Commun,* 10**,** 4641 (2019).

"Formulation of mitigation measures shall not be deferred until some future time."[100] A lead agency "evade[s] its duty to engage in a comprehensive environmental review by approving the [project] subject to a condition requiring future regulatory compliance" because this "effectively remove[s] this aspect of the project from environmental review." [101] It is inadequate and deferred mitigation, therefore, to entrust the other regulatory bodies and the project applicant will just work out a solution to environment impacts in the future because "reliance on tentative plans for future mitigation after completion of the CEQA process significantly undermines CEQA's goals of full disclosure and informed decision making."[102] Therefore, CARB's overreliance on compliance with regulatory programs and future CEQA review constitutes deferred mitigation. For example, the following Mitigation Measures defer mitigation to other regulatory bodies in a manner that is impermissible - and scores of other "mitigation" in the EA suffer from the same deficiency.

- Mitigation Measures 3.c.1 and 3.c.3 propose to mitigate odor associated with "development of new or expanded organic material composting, digestion and/or other facilities throughout the state" through future CEQA review and through compliance with the SB 1813 SLCP EIR. Both Mitigation Measures require creation of Odor Impact Minimization Plans ("OIMP").[103] However, these are merely "tentative plans for future mitigation" and defer the mitigation to CalRecycle without creating any concrete requirements.
- Mitigation Measure 9.b.1 requires compliance with applicable laws and regulations in order to mitigate impacts from hazards. The EA states that, although there could be potential hazards impacts from Measures in the "Improvements to Oil and Gas Facilities Actions" that promote conveyance of methane, these impacts would be mitigated because "collected vapors may be injected into existing, permitted underground wells," and those wells must be in compliance with UIC permit requirements.[104] This is deferred mitigation because it puts the onus of ensuring no hazards impacts on CalGEM or EPA, concluding

[100] CEQA Guidelines § 15126.4.
[101] *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 309.
[102] *Id.* ("By adopting the condition that applicant would comply with environmental standards for sludge disposal, the county effectively removed this aspect of the project from environmental review, trusting that the Regional Water Quality Control Board and the applicant would work out some solution in the future.") and *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 92, citing *Gentry v. Murrieta* (1995) 36 Cal.App.4th 1359, 1396, (conditioning a permit on "recommendations of a report that had yet to be performed" constituted improper deferral of mitigation), *Defend the Bay v. City of Irvine* (2004) 119 Cal.App.4th 1261, 1275 (deferral is impermissible when the agency "simply requires a project applicant to obtain a biological report and then comply with any recommendations that may be made in the report"), *Endangered Habitats League, Inc. v. County of Orange* (2005) 131 Cal.App.4th 777, 794 ("mitigation measure [that] does no more than require a report be prepared and followed, ... without setting any standards" found improper deferral*), Quail Botanical Gardens Foundation, Inc. v. City of Encinitas* (1994) 29 Cal.App.4th 1597, 1605, fn. 4 (city is prohibited from relying on "post approval mitigation measures adopted during the subsequent design review process").
[103] EA, at pp. 74-77.
[104] EA, at p. 141-42.

that, through the UIC permit process, there would be reduced impacts with little to no analysis.[105]

- Mitigation Measures 1.a, 2.a, 3.a, 4.a, 5.a, 7.a, 9.a, 10.a, 11.a, and 13.a all assume that impacts will be mitigated because state and local government will complete CEQA review for all "new development and new facilities and structures constructed…" wherein they will require that proponents implement all feasible mitigation to reduce or substantially lessen the potentially significant … impacts of the project."[106] This is deferred mitigation because it assumes that, through CEQA processes, project proponents and lead agencies in the future will come up with solutions to these impacts. The Mitigation Measures thus allow CARB to skip any meaningful review of these reasonably foreseeable impacts where a future lead agency has no concrete standard against which to measure mitigation or no opportunity to mitigate because the project is exempt from CEQA. These Mitigation Measures assume that every single project that is the result of Scoping Plan implementation is subject to CEQA, when in fact, many infrastructural projects and programs are exempt from CEQA. For example, CEQA provides statutory exemptions for the following projects which the Scoping Plan could cover: modifications to existing facilities, minor infrastructure projects, increase passenger or commuter services on rail or highway rights[107], various minor transit projects[108], work on pipelines less than eight miles in length[109] and certain water infrastructure[110], just to name a few. Therefore, certain impacts from modifications to existing facilities pursuant to the Scoping Plan's "Improvements to Oil and Gas Facilities Actions" that are purportedly mitigated by CEQA compliance could potentially be exempt.[111]

C. The EA's Mitigation Measures Are Inadequate because they Lack Specific Performance Standards

"[F]or kinds of impacts for which mitigation is known to be feasible, but where practical considerations prohibit devising such measures early in the planning process ..., the agency can commit itself to eventually devising measures that will satisfy specific performance criteria articulated at the time of project approval. Where future action to carry a project forward is contingent on devising means to satisfy such criteria, the agency should be able to rely on its commitment as evidence that significant impacts will in fact be mitigated."[112] The following

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[105] *Id.*
[106] See e.g., EA, at p. 36, regarding aesthetic impacts.
[107] Cal. Pub. Res. Code § 21080(b).
[108] Cal. Pub. Res. Code § 21080.25.
[109] Cal. Pub. Res. Code § 21080.23.
[110] Cal. Pub. Res. Code § 21080.47.
[111] See e.g., EA, at p. 134-35.
[112] *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 94.

Mitigation Measures are representative of the scores of mitigation measures that lack specific performance standards, and could be made more concrete to ensure adequate mitigation:

- Mitigation Measure 2.a suggests that the impacts of construction on agricultural and forest resources could be mitigated through compliance with CEQA for each individual projects and then lists measures that an EIR should include to minimize impacts on agricultural and forestry resources. These include:
    - "Avoid lands designated as Important Farmland (State-defined Prime Farmland, Farmland of Statewide Importance, and Unique Farmland) as defined by the Farmland Mapping and Monitoring Program. Before converting Important Farmland to non-agricultural use, analyze the feasibility of using farmland that is not designated as Important Farmland (e.g., through clustering or design change to avoid Farmland) prior to deciding on the conversion of Important Farmland.
    - Avoid lands designated as forest land or timberland before converting forestland or timberland to non-forest use, analyze the feasibility of using other lands prior to deciding on the conversion of forest land or timberland."[113]
- These do not include specific performance metrics, and there is no way to determine whether these measures would result in adequate mitigation. The requests to "avoid" and "analyze feasibility" create no real mandates. To ensure adequate mitigation, one of these measures could *require* complete avoidance. The alternative to this avoidance is a suggestion to mitigate by preserving "Important Farmland of equal or better agricultural quality, at a ratio of at least 1:1," but this mitigation also lacks specific performance standards because it leaves the lead agency and project proponent to decide what "agricultural land of equal or better quality" means. For forestland, "[m]itigation may include but is not limited to permanent preservation of forest land or timberland of equal or better quality at a ratio of 1:1 or 1.5:1 because some lost ecological value may not be replaceable." However, it is unclear still here what "equal or better quality means, and it is unclear what "lost ecological value" means.[114]

[113] EA, at p. 54.
[114] *Id.*

VIII. Conclusion

In summary, the EA for the Draft 2022 Scoping Plan fails to apprise the public of the true environmental impacts of the entirety of the Scoping Plan and requires substantial revision. A revised Scoping Plan, and revised EA, must be revised and recirculated. The comment period should commence with the later of the publication of the revised Scoping Plan, EA, and other appendices - and the disclosure of the public records identified in Public Records Act requests submitted under separate cover on behalf of The Two Hundred. The public comment period should be at least 90 days, to provide adequate time for expert analysis and community engagement and feedback from low income communities and communities of color.

Sincerely,

HOLLAND & KNIGHT LLP

Jennifer L. Hernandez

JLH:lmp
Attachments

cc: Robert Apodaca