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# Western Environmental Law Center

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

**Via Electronic Submission**

RE: Comments on Proposed Scoping Plan, Implementation of AB 32

November 13, 2008

Members of the Board and ARB Staff:

The Western Environmental Law Center (WELC) is a non-profit public interest law firm dedicated to ensuring that our nation's environmental laws are obeyed and enforced. WELC's headquarters is in Eugene, Oregon, with regional offices in Taos, New Mexico, Durango, Colorado, and Helena, Montana. WELC provides free or reduced-fee legal services to conservation groups, communities and individuals, challenging corporations and government agencies that violate environmental laws in the West.

We offer these comments in support of the Legislature's determination that California exercise a leadership role in addressing global climate change by adopting mitigation measures that, if emulated by other states, the federal government, and other countries, will protect public health, economic productivity, and natural resources. AB 32, Sec. 38501 (a), (c), (d), and (e). In many respects the ARB's effort in crafting the Proposed Scoping Plan constitutes a notable effort. Still, it fails to meet AB 32's mandate to prepare a plan "for achieving the maximum technologically feasible and cost-effective reductions" in greenhouse gas (GHG) emissions by 2020.

The Legislature, in AB 32, established two principal requirements for ARB with regard to planning and rulemaking aimed at reducing GHG emissions in California: (1) ARB must determine and set by 2008 a certain limit of GHG emissions, and ensure that annual emissions by 2020 are under that limit, and (2) ARB is required to adopt rules to ensure that, within certain constraints, maximum reductions of GHG emissions are achieved by 2020.

However the Proposed Scoping Plan sets out measures intended to meet the first of these requirements only, while it essentially ignores the second. For that reason, if the proposed plan is adopted without change, the ARB will fall short of meeting a fundamental mandate in AB 32.

The failure to establish a plan to achieve maximum reductions within certain constraints matters greatly in a practical sense, given that the 2020 limit is not based on climate stabilization requirements[1] and that current climate science does not support the limit as a safe and adequate emission level.[2] The Legislature clearly intended AB 32 to be a best-effort response, not a minimal response, to the "serious threat" presented by global warming to the well-being of the state. Sec. 38501 (a). It is accordingly critical that AB 32's 2020 limit be read properly, that is, as a minimal floor for reductions, and that any "target" set by ARB must aim for the maximum reductions that are technologically feasible and cost-effective. Accordingly, ARB should amend the Proposed Scoping Plan so as to fulfill its maximum reduction mandate.

**AB 32's Mandates**

Under Sec. 38550, the ARB is required to determine a "statewide greenhouse gas emissions limit … to be achieved by 2020," defined as the level of GHG emissions in 1990. These include all GHG emissions "from the generation of electricity delivered to and consumed in California…whether the electricity is generated in state or imported." Sec. 38505 (m). ARB set this limit in December 2007 at 427 $MMTCO_2E$. That limit requires a reduction by 2020 of 169 $MMTCO_2E$ from business-as-usual projected emissions, or 10 percent from the 2002-04 average state GHG emissions. Plan at 12.

[1] "The 2010 and 2020 targets are based on an ambitious estimate of how much the state can reduce emissions with strong top-down leadership and a coordinated effort amongst various state agencies. ... The 2050 target is based on emission reductions the science indicates will be necessary from all developed nations to ensure protection of the planet in the 100-year time frame." Climate Action Team, March 2006 report, page 18. http://climatechange.ca.gov/climate_action_team/index.html

[2] The gravity of the "serious threat" posed by global warming to "economic well-being, public health, natural resources, and the environment," AB 32, Sec. 38501, and the necessity of sharp emissions reductions, is now more apparent than at the time of the Legislature's consideration of AB 32. See, e.g., James Hansen, et. al., "Target Atmospheric CO2: Where Should Humanity Aim?" The Open Atmospheric Science Journal (November 2008): www.bentham.org/open/toascj/openaccess2.htm and Tina Tim, "Faster, stronger sooner: An overview of the climate science published since the UN IPCC Fourth Assessment Report," World Wildlife Fund (October 2008): http://assets.panda.org/downloads/wwf_science_paper_october_2008.pdf.

In the very next section of AB 32, Sec. 38560, the Legislature required ARB to "adopt rules and regulations…to achieve the maximum technologically feasible and cost-effective greenhouse gas reductions…." By January 1, 2009, ARB is to prepare a scoping plan for achieving maximum reductions by 2020. Sec 38561 (a). ARB is required in that plan to identify and recommend measures, mechanisms, and incentives that are "necessary or desirable to facilitate the achievement" of those maximum reductions. Sec. 38561 (b).

On their face, each of these requirements is independent of the other, so that ARB must give effect to each.

In several places AB 32 couples the two requirements by stating that the ARB must adopt "measures" or "regulations" that will achieve the maximum reductions "in furtherance of achieving the statewide greenhouse gas emissions limit."[3] There is no indication, however, that the Legislature intended that maximum reductions will be deemed to have been achieved merely by attaining the 2020 limit. Instead, the "in furtherance of" language operates to recognize that maximum reductions, where achieved, will in fact help the state to stay within that limit. In other places, including Sec. 38561 that requires ARB to prepare a scoping plan, the requirement to achieve maximum emission reductions stands on its own, with no conjoined "in furtherance of" language.

The only reasonable reading of the Legislature's intent, therefore, is that the 2020 emissions limit functions as the floor for the required reductions, so that achievement of the maximum reductions that are technologically feasible and cost-effective will require reductions beyond those necessary to ensure adherence to the 2020 limit.

Yet ARB has, in the Proposed Scoping Plan, given effect only to the 2020 limit -- by identifying and recommending measures and incentives that aim to reduce emissions only slightly below 1990 emission levels (and this small overshoot is intended to accommodate regulatory uncertainty – not to maximize reductions). That limit is treated by ARB repeatedly, and variously, as "the 2020 target,"[4] or "the 2020 goal."[5] But there is no statutory support for treating the 2020 limit as a target or goal for the reductions that are required under AB 32. Rather, as noted above, more is required to achieve maximum reductions.

[3] See, e.g., Secs. 38560.5 (c); 38562 (a), (b), (c); 38570 (b).

[4] Plan at 2, 5, 11, 12, 17, 22, 31, 40, 64, 67, 80, 84, 109, 117.

[5] Plan at 4, 20, 59, 63, 64, 66, 107, 118, 120.

**Cost-Effectiveness**

The Proposed Scoping Plan fails to settle on a threshold cost or criterion for cost-effective reductions. Additionally, it fails to provide a coherent discussion of how ARB will determine which feasible reductions are deemed cost-effective (and so, required to be achieved under Sec. 38560). The Plan asserts that the range of costs for the recommended measures "will assist the Board in evaluating the cost-effectiveness of individual measures," without having established that the recommend measures represent maximum feasible reductions under any defined cost-effectiveness standard, or that they even meet such a standard. The Plan states that "The range of acceptable cost-effectiveness may change if effective lower-cost measures and options are identified" without providing any policy or statutory rationale for such changes. (Why would the cost-effectiveness of a particular measure be influenced by unanticipated cost reductions in an unrelated industry?) The Plan further states that "The criteria for judging cost-effectiveness will be updated as additional technological data and strategies become available," but it does not define such criteria or the basis of such updating. Plan at 84.

The Proposed Scoping Plan notes that the AB 32 definition of cost-effective, as provided in Sec. 38505 (d), merely "specifies the metric by which ARB must express cost-effectiveness," but fails to "provide criteria to assess if a regulation is or is not cost-effective. It also does not specify whether there should be a specific upper-bound dollar per ton cost that can be considered cost-effective, or how such a bound would be determined or adjusted over time." Plan at 84.

It is true that Sec. 38505 (d) in itself in fact fails to provide such criteria and fails to specify whether such an upper-bound for cost-effective reductions must be set.

But, sections of the same statute must be read together where feasible. Accordingly, if here Secs. 38505 (d) and 38560 are be read together, as they plainly must, ARB is required to determine a cost per unit reduction below which feasible GHG reductions would be deemed cost-effective, and so, must be achieved. Further, if those sections are read together with Sec 38550 (again, as they must), then it is clear that the Legislature has in fact set at least a minimum criterion, namely the 2020 emissions limit or, more precisely, the expected cost per unit of emissions reduction from the set of measures and incentives needed to ensure adherence with the statewide emissions limit. However, the 2020 limit was established as a minimal cost-effective goal based on information that was available to the legislature, not based on "additional technological data and strategies" that were unknown and unforeseeable by the legislature. The proposed cost-effectiveness approach appears to use such information to ensure that the 2020 "target" is not substantially surpassed, contrary to the clear legislative intent that the Sec. 38560 maximum reduction requirement should influence the emission reductions achieved under AB 32. The proposed process of "updating" the cost-effectiveness criterion would be justified if it is required to avoid exceeding the 2020 limit, but it should not be used to circumvent the legislative intent of Sec. 38560.

Accordingly, AB 32 clearly requires ARB to set a reasonable cost-effectiveness criterion that is, at a minimum, consistent with the projected cost of compliance with the 2020 limit, and which is compatible with the legislative intent of Sec. 38560.

In employing such a reasonable criterion it would, perforce, be impractical – as well as not required under AB 32 – for ARB to evaluate every emission reduction proposal or mechanism for feasibility and cost-effectiveness, because future technology limits and costs cannot be reliably forecast. (To the extent that they can be forecast, they would have been incorporated in the 2020 limit.) Instead, a more feasible and practical method to achieve such reductions would be to employ monetary incentives (Sec. 38561(b)) such as a price floor for allowances in the cap-and-trade scheme. The virtue of such a price floor is that it would both ensure a cap on emissions and provide a continuing incentive for additional reductions up to a marginal cost limit defined by the cost-effectiveness criterion.

The CPUC has advised ARB against implementing a price floor on the grounds that "low prices are likely to indicate that the market is working to drive sufficient investment toward the required emissions reductions,"[6] but the concept of "required emission reductions" implicit in the CPUC opinion overtly disregards the statutory requirement for maximum technologically feasible and cost-effective greenhouse gas emission reductions. The CPUC further asserted as a "Finding of Fact"[7] that price triggers (such as price floors) "could very likely distort or defeat the cap-and-trade market by creating uncertainty that investments in emissions reduction technologies will achieve returns commensurate with the level of reductions needed to meet the State's emissions reduction goals." This statement is again dismissive of Sec. 38560, and it contradicts the advice of the Market Advisory Committee, which stated that "A price floor has the attraction of giving investors certainty that the price of emission allowances would never fall below a specified level ... a price floor would reinforce environmental integrity and the value of clean investments. The Committee encourages CARB to consider enforcing a price floor." [8]

**Western Climate Initiative Linkage**

WCI's September 2008 Design Recommendations for the WCI Regional Cap-and-Trade program do not include any recommendation for maximizing feasible, cost-effect reductions. Without a requirement similar to AB 32's Sec. 38560, then, the WCI design is inconsistent with the Legislature's mandate in AB 32.

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[6] CEC/CPUC joint recommendations on AB-32 implementation, October, 2008, page 247. http://www.energy.ca.gov/ghg_emissions/

[7] #64, p. 271

[8] June, 2007 MAC report, page 68. http://climatechange.ca.gov/market_advisory_committee/index.html

The Proposing Scoping Plan does note that the WCI Design Recommendations include "use of an allowance reserve for the first 5 percent of the auctioned allowances in the regional cap." Plan at 34. But this feature of the WCI Design aims only "to manage the risk of inadvertently setting the program cap higher than intended relative to emissions covered by the program." WCI Design Recommendations at 8, Appendix D of Proposed Scoping Plan. Clearly a reserve of 5 percent of allowance is inadequate to achieve maximum reductions. As a precondition for linkage to the California market, WCI should amend its design so as to incorporate rules compatible with Sec. 38560.

**Conclusion**

In light of the foregoing, we:

(1) Request an explanation in the Scoping Plan as to whether the Sec. 38560 requirement for maximum emission reductions has affected reduction levels under the Plan. If it has so affected those reduction levels, please describe how it has done so. If it has not, please explain what impediment stands in the way of implementing Sec. 38560.

(2) Request that in its Scoping Plan ARB adopt a price floor as a recommended measure. If ARB declines to recommend a price floor, we request that it be included among project alternatives and an explanation be supplied as to why was rejected.

(3) Request that ARB condition California linkage to WCI on WCI compatibility with Sec. 38560. If this request is not taken, we request an explanation in the Scoping Plan as to why it was not taken.

Thank you for your consideration of our views.

Sincerely yours,

Dan Galpern, Staff Attorney
Western Environmental Law Center
1216 Lincoln Street
Eugene, OR 97401