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Superior Court of California
County of San Francisco

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SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

ASSOCIATION OF IRRITATED RESIDENTS,)
an unincorporated association; CALIFORNIA)
COMMUNITIES AGAINST TOXICS, an)
unincorporated association; COMMUNITIES)
FOR A BETTER ENVIRONMENT, a nonprofit)
corporation; COALITION FOR A SAFE)
ENVIRONMENT, a nonprofit corporation;)
SOCIETY FOR POSITIVE ACTION, an)
unincorporated association; WEST COUNTY)
TOXICS COALITION, a nonprofit corporation)
ANGELA JOHNSON MESZAROS; CAROLINE)
FARRELL; HENRY CLARK; JESSE N.)
MARQUEZ; MARTHA DINA ARGUELLO;)
SHABAKA HERU; TOM FRANTZ; in their)
individual capacities,)

Petitioners and Plaintiffs,)

vs.)

CALIFORNIA AIR RESOURCES BOARD,)
MARY D. NICHOLS, in her official capacity as)
Chairman of the Board; and DANIEL SPERLING,)
KEN YEAGER, DORENE D'ADAMO,)
BARBARA RIORDAN, JOHN R. BALMES, M.D.,)
LYDIA H. KENNARD, SANDRA BERG, RON)
ROBERTS, JOHN G. TELLES, RONALD O.)
LOVERIDGE, in their official capacities as)
Members of the Air Resources Board,)

Respondents and Defendants.)

Case No. CPF-09-509562

**TENTATIVE STATEMENT OF
DECISION:**

**ORDER GRANTING IN PART
PETITION FOR WRIT OF
MANDATE**

Judge: Hon. Ernest H. Goldsmith
Dept: 613

1 This Petition for Writ of Mandate came on regularly for hearing pursuant to notice before
2 Hon. Ernest H. Goldsmith on December 19, 2010. Petitioners were represented by Alegria De La
3 Cruz, Esq. and Brent Newell, Esq. of the Center on Race, Poverty and the Environment, and
4 Adrienne Bloch, Esq. of Communities for a Better Environment. Respondents were represented
5 by Mark Poole, Esq. and David Zonana, Esq. of the Office of the Attorney General of California.
6 The Court has considered the oral argument and the pleadings submitted and issues this Tentative
7 Statement of Decision Re: Order Granting in Part Petition for Writ of Mandate.

8 BACKGROUND

9 In 2006, the California Legislature passed the Global Warming Solutions Act of 2006
10 ("AB 32") in response to the dangers posed to California's environment by the release of man-
11 made Greenhouse Gases ("GHGs"). Health and Safety Code ("HSC") § 38500 *et seq.* The
12 Legislature designed this landmark statute to place California "at the forefront of national and
13 international efforts to reduce emissions of greenhouse gases." *Id.* at § 38501(c). AB 32 tasks the
14 California Air Resources Board ("ARB") with preparing and approving a Climate Change
15 Scoping Plan to create a regulatory path for reducing GHG emissions to 1990 levels by the year
16 2020. *Id.* at §§ 38501(a), 38550. AB 32 describes the process to be followed by ARB in creating
17 and implementing the Scoping Plan, and includes provisions for enforcement. *Id.* at §§ 38560-
18 38574, 38580.

19 Petitioners challenge ARB's implementation of AB 32, asserting that ARB failed to meet
20 the mandatory statutory requirements of AB 32 and the California Environmental Quality Act
21 ("CEQA") by essentially treating the Scoping Plan as a *post hoc* rationalization for ARB's already
22 chosen policy approaches. In the first portion of this case, Petitioners argue that in approving the
23 Scoping Plan, ARB violated AB 32 by: (1) excluding whole sectors of the economy from GHG
24 emissions controls and including a cap and trade program without determining whether potential
25 reduction measures achieved maximum technologically feasible and cost effective reductions; (2)
26 failing to adequately evaluate the total cost and total benefits to the environment, economy and
27 public health before adopting the Scoping Plan; and (3) failing to consider all relevant

1 information regarding GHG emission reduction programs throughout the United States and the
2 World, as required by AB 32, prior to recommending a cap and trade regulatory approach.

3 The CEQA portion of this case involves Petitioners' challenge to the Functional
4 Equivalent Document ("FED") prepared by ARB pursuant to its certified regulatory program. The
5 FED was prepared to evaluate the environmental consequences associated with the Scoping Plan.
6 Petitioners claim that ARB violated both CEQA and ARB's own certified regulatory program in
7 preparing and certifying the FED by: (1) failing to adequately analyze the impacts of the
8 measures described in the Scoping Plan; (2) failing to adequately analyze alternatives to the
9 Scoping Plan; and (3) impermissibly approving and implementing the Scoping Plan prior to
10 completing its environmental review.

11 In response to Petitioners' allegations, ARB asserts that it scrupulously complied with each
12 of its statutory duties under AB 32 and each of its obligations under its certified regulatory
13 program and CEQA by conducting a programmatic review of the Scoping Plan. ARB
14 characterizes Petitioners' claims as an attack on policy decisions made by ARB, particularly the
15 decision to include cap and trade as part of the preferred suite of chosen measures.

16 Petitioners have opted to merge two separate and distinct challenges to ARB's
17 implementation of AB 32. First, Petitioners allege that ARB improperly interpreted and failed to
18 comply with AB 32. ARB acts in a quasi-legislative capacity in interpreting and effectuating
19 legislation. Accordingly, the Court has applied an arbitrary and capricious standard of review
20 affording great deference to the agency in its interpretation of statutes. The Court denies the
21 Petition for Writ of Mandate to direct ARB to revise the Scoping Plan for the reasons stated
22 herein.

23 Second, Petitioners' allegations that ARB violated CEQA are reviewed by the Court
24 pursuant to an abuse of discretion standard of review. The Court grants the Petition and issues a
25 Peremptory Writ of Mandate commanding ARB to set aside its certification of the FED and
26 enjoining the implementation of the Scoping Plan until ARB has come into complete compliance
27 with its obligations under its certified regulatory program and CEQA, as described herein.

1 DISCUSSION

2 I. PETITIONERS' CHALLENGES UNDER AB 32

3 A. STANDARD OF REVIEW

4 The degree of deference courts accord to agency actions depends on the type of action
5 undertaken by the agency. (*Yamaha Corp. of America v. State Board of Equalization* (1998) 19
6 Cal.4th 1, 12 (“*Yamaha*”).) The *Yahama* Court indicated that there are two categories of
7 administrative rules: interpretative and quasi-legislative. (*Id.* at 10-11.) Quasi-legislative rules
8 enjoy more deference than interpretive rules and are reviewed under an arbitrary and capricious
9 standard since they are “adopted pursuant to a delegation of legislative power.” (*Id.* at 11.) “If
10 satisfied that the rule in question lay within the lawmaking authority delegated by the Legislature,
11 and that it is reasonably necessary to implement the purpose of the statute, judicial review is at an
12 end.” (*Id.* at 10-11.)

13 Petitioners argue that the *Yahama* decision created two separate inquiries when examining
14 quasi-legislative actions, each requiring different standards of review: the court must determine
15 (1) if the regulation is “within the scope of the authority conferred,” and (2) if it is “reasonably
16 necessary to effectuate the purpose of the statute.” (*Yahama*, supra, 19 Cal.4th at 11.) Petitioners
17 claim that for the first inquiry, the Court must employ a standard of “respectful non-deference” to
18 independently review ARB’s interpretations of statutory mandates that are ministerial in nature.
19 Only the second inquiry, whether the regulation is “reasonably necessary to effectuate the purpose
20 of the statute,” applies the arbitrary and capricious standard. This is an erroneous interpretation of
21 *Yamaha*. While courts must independently review quasi-legislative rules for consistency with
22 controlling law, *Yamaha* clearly states the inquiry is “confined to the question whether
23 classification is arbitrary, capricious, or without reasonable rational basis.” (*Yahama*, 19 Cal.4th
24 at 11.)

25 In a similar case, *Carrancho v. California Air Resources Board*, ARB was required to
26 develop and implement a plan for diversion of rice straw. (*Carrancho v. California Air*
27 *Resources Bd.* (2003) 111 Cal.App.4th 1255, 1262-63 (“*Carrancho*”).) The Court concluded that

1 the statutory provisions directing the agencies to develop and prepare a diversion plan and
2 progress report constituted quasi-legislative acts. (*Id.* at 1266.) In support of its decision, the
3 Court noted that, while the statute directed the agency to develop a plan to meet a general goal,
4 the “specifics of the plan [were] left entirely to the agency. (*Id.* at 1267.) The Court then applied
5 an arbitrary and capricious standard because the agency action was quasi-legislative. (*Id.* at 1268-
6 69.)

7 Here, ARB’s task under AB 32 is to create and implement the Scoping Plan to “create a
8 regulatory path for reducing GHG emissions to 1990 levels by the year 2020.” (HSC § 38550.)
9 AB 32 directs ARB to achieve this overall statutory goal through the use of “maximum
10 technologically feasible and cost-effective reductions,” but leaves the specifics of how to do so,
11 and how to balance a variety of competing concerns, up to the agency. (HSC §§ 38560.5.)
12 Furthermore, AB 32 expressly requires ARB to implement measures ARB “finds are necessary or
13 desirable” to achieve GHG emission reductions in the Plan. (HSC § 38561(b).)

14 Additionally, while the ultimate goal is to reduce emissions under AB 32, ARB must
15 utilize agency discretion to “minimize costs and maximize the total benefits. . . encourage early
16 action. . . not disproportionately impact low-income communities. . . receive appropriate credit for
17 early voluntary reductions. . . not interfere with efforts to achieve. . . air quality standards. . .
18 consider cost-effectiveness. . . consider overall societal benefits. . . minimize the administrative
19 burden. . . minimize leakage.” (HSC § 38562(b).) Thus, ARB’s duty to enact a Scoping Plan
20 cannot be characterized, as Petitioners argue, as ministerial. ARB was afforded discretion in
21 interpreting the GWSA to develop a set of measures to achieve AB 32’s multiple substantive
22 goals.

23 Accordingly, Petitioners challenge of the “fundamental legitimacy” of ARB’s quasi-
24 legislative action fails. ARB’s duty to develop the Scoping Plan is quasi-legislative and therefore
25 reviewed under the arbitrary and capacious standard affording the agency wide latitude in
26 statutory interpretation.

1 **B. DISCUSSION**

2 **1. MAXIMUM TECHNOLOGICALLY FEASIBLE AND COST-**
3 **EFFECTIVE REDUCTIONS**

4 AB 32 directs ARB to prepare a scoping plan “for achieving the maximum technologically
5 feasible and cost-effective reductions in GHG emissions from sources or categories of sources of
6 GHGs by 2020.” (HSC § 38561(a).) In furtherance of achieving this goal, AB 32 charges ARB
7 to “identify and make recommendations on direct emission reduction measures, alternative
8 compliance mechanisms, market-based compliance mechanisms, and potential monetary and non-
9 monetary incentives for sources and categories of sources that the state board finds are necessary
10 or desirable to facilitate the achievement of the maximum feasible and cost-effective reductions of
11 GHG emissions by 2020.” (HSC § 38561(b).)

12 Petitioners allege that ARB’s analysis of the maximum technologically feasible and cost
13 effective measures is defective in three ways: (1) ARB improperly used AB 32’s statewide
14 emissions limit as a “floor” for measures in the Scoping Plan; (2) ARB failed to create criteria to
15 determine the cost effectiveness of the measures included in the Scoping Plan; and (3) ARB
16 excluded the agricultural and industrial sectors from regulations. As discussed below, Petitioners
17 challenge ARB’s exercise of its statutory authority and discretion in compiling the measures in
18 the Scoping Plan.

19 **a. Petitioners Argue that the Scoping Plan Improperly Used the**
20 **Statewide Emissions Limit as the Target for the Amount of**
21 **Reductions to Be Achieved**

22 HSC section 38550 requires: “[b]y January 1, 2008, the state board shall. . . determine
23 what the statewide greenhouse gas emissions level was in 1990, and approve in a public hearing, a
24 statewide greenhouse gas emissions limit that is equivalent to that level to be achieved by 2020.”
25 This limit is to “remain in effect unless otherwise amended or repealed” and ARB is directed to
26 “make recommendations to the Governor and the Legislature on how to continue reductions” by
27 2020. (HSC § 38551.) ARB set the state emissions limit at 427 MMTCO₂E. (ARB026697.) AB

1 32 defines the “statewide emissions limit” as the “maximum allowable level of statewide GHG
2 emissions in 2020.” (HSC § 38505(n).)

3 Petitioners claim that the “maximum allowable” emissions level sets the minimum
4 amount of reductions required to achieve the goal, not the maximum reductions allowed. Thus,
5 ARB ignored its charge to make a Plan for achieving maximum technologically feasible
6 reductions and instead placed an artificial limit on the amount of reductions the individual
7 measures of the Scoping Plan can achieve.

8 When determining the rules and regulations for achieving the maximum technologically
9 feasible and cost effective GHG emissions reductions pursuant to HSC § 38561 it was appropriate
10 for ARB to use the state greenhouse gas emissions limit established pursuant HSC § 38550 as a
11 guide. ARB indicates throughout the Scoping Plan and the FED that it anticipates that the
12 measures included in the Plan will put California on a path towards an 80 percent reduction by
13 2050. (See, e.g., ARB026700, 26713, 26673, 27508.) It was not arbitrary and capricious or
14 without reasonable rational basis to set standards pursuant to HSCS 38561.

15 **b. Petitioners Argue that ARB Failed to Identify Clear Criteria**
16 **for Determining Cost-Effectiveness of all Maximum**
17 **Technologically Feasible Measures**

18 HSC section 38561(d) deals with the evaluation of costs from the Scoping Plan:

19 The state board shall evaluate the total potential costs and total potential economic
20 and noneconomic benefits of the plan for reducing greenhouse gases to
21 California's economy, environment, and public health, using the best available
22 economic models, emission estimation techniques, and other scientific methods.

23 ARB’s approach for analyzing cost-effectiveness, the “Cost of a Bundle of Strategies”
24 approach, is set forth on pages 84 and 85 of the Scoping Plan. (ARB026769-26770.) ARB
25 describes this strategy as analyzing the cost effectiveness of each of a number of methods to
26 reduce GHG, thereby establishing a range of cost effectiveness. A method within the range would
27 be satisfactory. (ARB010181.)

28 Petitioners claim the “Cost of a Bundle of Strategies” approach is flawed because ARB
determined the costs only of its chosen measures and used those measures to establish the range

1 of cost-effectiveness. This error results in the inability to make sound policy decisions and to
2 evaluate the cost-effectiveness of specific measures. Instead, ARB should have established the
3 range of cost-effectiveness before it chose its preferred measures.

4 ARB chose the “Cost of a Bundle of Strategies” approach after evaluating a number of
5 alternative approaches discussed in a white paper prepared by ARB staff, which was the subject
6 of a public workshop held on June 3, 2008. (ARB010177-010242.) After analysis, staff
7 concluded that the “Cost of a Bundle of Strategies” approach was the best way to determine cost-
8 effectiveness in the Scoping Plan. (ARB010181-010185, 010190.) This decision was supported
9 by The Natural Resources Defense Council, Union of Concerned Scientists, Environmental
10 Defense Fund, Coalition for Clean Air, Californians Against Waste, Center for Energy Efficiency
11 and Renewable Technologies, California Wind Energy Association, and the Nature Conservancy.
12 (ARB010324-010332.) HSC section 38561(d) requires an evaluation of the potential costs of the
13 plan as a whole and not, as Petitioners argue, an individual examination of every measure and
14 alternative ARB chose to pursue or not to pursue.

15 Petitioners have failed to show Respondents method for determining cost-effectiveness is
16 contrary to statutory authority. The Court concludes that ARB’s exercise of its discretion with
17 regards to its chosen approach was not arbitrary and capricious.

18 **c. Petitioners Argue that ARB Improperly Excluded the**
19 **Agricultural and Industrial Sectors from Regulations**

20 AB 32 requires ARB to prepare and approve a Scoping Plan “for achieving the maximum
21 technologically feasible and cost-effective reductions in GHG emissions from sources or
22 categories of sources of GHGs by 2020.” (HSC § 38561(a).) ARB must exercise its expertise
23 and discretion to identify and recommend a blend of:

24 direct emission reduction measures, alternative compliance mechanisms, market-
25 based compliance mechanisms, and potential monetary and nonmonetary
26 incentives for sources and categories of sources that the state board finds are
27 necessary or desirable to facilitate the achievement of the maximum feasible and
28 cost-effective reductions of greenhouse gas emissions by 2020. (HSC §
38561(b).)

1 Petitioners first allege that ARB failed to include direct emissions reduction measures
2 from the agricultural sector without finding that existing technologies and policies already in use
3 were not feasible or cost-effective. In relying on voluntary reductions, ARB fell short of AB 32's
4 legislative mandate to facilitate maximum reductions.

5 ARB analyzed the potential for emissions reductions from the agricultural sector,
6 eventually determining that reducing emissions from agriculture is problematic because it is a
7 sector comprised of complex biological systems, diverse source types and a complex life cycle
8 analysis. (ARB005292, 5296-5302.) This decision was confirmed by the work conducted by the
9 Economic and Technology Advancement Advisory Committee ("ETAAC") and the Agricultural
10 Working Group. (ARB001576.) Additionally, the Governor's Climate Action Team estimated
11 that 82 percent of the greenhouse gas emissions from agriculture involve biological processes
12 associated with complex agro-ecosystems for which there is a substantial gap in scientific
13 knowledge and existing data. (ARB033775-33776.) As a result of the uncertain science, ARB
14 elected to rely primarily on "economic incentives such as marketable emissions reduction credits,
15 favorable utility contracts, or renewable energy incentives" and included a methane capture
16 measure to encourage investment in manure digesters at large dairies. (ARB026752.) "Monetary
17 incentives" are one of the categories of measures specified under HSC § 38561(d). Thus, under
18 the plain language of AB 32, ARB's decision to proceed with an "incentive" approach is not an
19 exclusion of the agricultural sector.

20 Therefore, Petitioners are incorrect in their claim that ARB excluded the agricultural
21 sector from consideration for identification and recommendation of emission reductions
22 measures. Pursuant to an arbitrary and capricious standard of review, the Court finds that
23 exclusion of mandatory measures for the agricultural sector should not serve as the basis for
24 invalidating the Scoping Plan.

25 Next, Petitioners argue ARB should have identified and recommended the maximum
26 technologically feasible and cost-effective emissions reduction measures in the industrial sector.
27 Petitioners note that while the Scoping Plan proposes direct emissions reduction measures that

1 result in reduction, they claim more significant reductions were available that were both
2 technologically feasible and cost-effective. Petitioners support this position by citing to Public
3 comments made on the October 28, 2008 Proposed Scoping Plan. (ARB023459-60.)

4 The Scoping Plan does include direct emission reduction measures, and also includes the
5 industrial sectors sources that emit over 25,000 tons of carbon dioxide equivalent per year in the
6 cap and trade program. (ARB026715.) Although Petitioners criticize reliance on cap and trade, it
7 is not for the Court to make factual determinations as to one method for GHG control versus
8 another. Petitioners are incorrect that ARB “excluded” the industrial sector from regulations. Its
9 decision to pursue a mixture of regulations passes an arbitrary and capricious standard of review.

10 2. CAP AND TRADE

11 The Scoping Plan must facilitate the “achievement of the maximum feasible and cost
12 effective reductions of greenhouse gas emission by 2020.” (HSC § 38561(b).) ARB included a
13 cap and trade program among the comprehensive slate of emission reduction measures in its
14 Scoping Plan. Under a cap and trade program, the “cap” creates a limit on the total emissions
15 from a group of regulated sources, and generally imposes no particular limits on emissions from
16 any given firm or source. (ARB021872; (Stavin, “A Meaningful U.S. Cap-and-trade System to
17 Address Climate Change.” 32 Harv. Envtl. L. Rev. 293, 298 (2008).) The “trade” aspect of the
18 program allows the transfer or sale of permits (“allowances”) between the regulated businesses.
19 (*Id.*) If an individual source does not emit an amount equal to the amount of allowances it has, it
20 may bank them for future use or sell them to another source that emitted the pollutants in question
21 above the prescribed limits. (*Id.*)

22 Petitioners argue that although AB 32 allows ARB to include a market-based compliance
23 mechanism in the Plan such as cap and trade, that mechanism is allowed only to the extent that it
24 “facilitates the achievement of the maximum feasible and cost effective reductions of greenhouse
25 gas emission by 2020.” (HSC § 38561(b).) Therefore, ARB must determine whether the
26 reductions from the cap and trade program will likely achieve reductions that are at least the
27 equivalent to those that could be achieved through direct regulation.

1 As a preliminary matter, Respondents argue that this issue is moot because Petitioners
2 failed to properly plead it. A petition, like a civil complaint, serves to frame and limit the issues
3 and to apprise the defendant of the basis on which the plaintiff seeks recovery. (See *Hughes v.*
4 *Western MacArthur Co.* (1987) 192 Cal.App.3d 951.) Respondents argue that Petitioners relied
5 on two definitional sections of the HSC in making this challenge, sections 38505(b) and
6 38505(k)(2), yet failed to cite to these sections in their First Amended Petition.

7 While it is true that Petitioners did not cite those specific sections of the HSC in the First
8 Amended Petition, Petitioners properly plead their challenge to ARB's inclusion of cap and trade
9 and banking system by citing to the requirements in HSC section 38561(b), which require that
10 measures and mechanisms recommended facilitate the achievement of maximum feasible and
11 cost-effective reductions. (FAC ¶¶ 104, 110.) Petitioners also properly challenged ARB's
12 decision to join the Western Climate Initiative's ("WCI") system. (FAC ¶ 110.) Petitioners'
13 reference to sections 38505(b) and 38505(k) in their opening brief were simply to compare AB
14 32's alternative compliance with the market mechanism requirements. Thus, Petitioners properly
15 plead this challenge.

16 As to the merits of Petitioners' claim, HSC section 38561(b) defers to ARB the ability to
17 identify and make recommendations on those measures it "finds are necessary or desirable to
18 facilitate" the achievement of A.B. 32's objectives. As the agency with technical expertise and the
19 responsibility for the protection of California's air resources, ARB has substantial discretion to
20 determine the mix of measures needed to "facilitate" the achievement of greenhouse gas
21 reductions. (ARB026672, ARB026694.) Contrary to Petitioners argument, HSC section 38561(b)
22 does not express a preference for the type of regulation to achieve AB 32's goals, whether it be
23 direct or indirect.

24 Furthermore, HSC section 38505(k)(2) defines a "market based compliance mechanism"
25 to include "banking" or other mechanisms "that result in the same greenhouse gas emission limit
26 or reduction, over the same time period, as direct compliance with greenhouse gas emission limit
27 or emission reduction measure adopted by the state board pursuant to this division." By

1 referencing "direct compliance" in the definition of § 38505(k)(2), the legislature anticipated
2 overlap between market-based mechanisms and direct regulatory measures adopted by ARB and
3 provided that the market-based mechanisms should accomplish at least the same reductions as the
4 adopted measure. There is no indication that the Legislature imposed a requirement on ARB to
5 compare market-based mechanisms and potential direct regulatory measures in the Scoping Plan.
6 This issue is separate from the CEQA imposed mandates to analyze alternative methods of GHG
7 control methods. The statute does not support the argument that ARB must demonstrate that cap
8 and trade will result in the same reductions as any direct regulation.

9 Petitioners argue that the reference to "banking" in HSC section 38505(k)(2) requires that
10 a comparison must be conducted between banking and direct regulations. Banking does not alter
11 or change the quantity or timing of reductions under any direct emissions measures adopted by
12 ARB, and thus, meets the requirements of § 38505(k)(2).

13 Finally, Petitioners argue ARB's decision to rely primarily on cap and trade for reducing
14 GHG emissions conflicts with ARB's own description of its regulatory approach to include
15 "complementary measures directed at emission sources that are included in the cap and trade
16 program." (ARB026704.) With the decision to use cap and trade as the main vehicle by which
17 emissions will be reduced, ARB skipped the determination that no other mechanisms facilitate the
18 achievement of maximum feasible and cost-effective emissions reductions. (ARB020836;
19 020842.) This argument speaks to analysis and consideration of alternate methods of GHG
20 reduction as mandated by CEQA.

21 However, ARB has not completely avoided reliance on direct emission reduction
22 measures and non-cap-and-trade reductions measures. In ARB's Scoping Plan, greenhouse gas
23 reductions are projected to come from nearly twenty non-cap-and-trade measures. (ARB026702.)
24 ARB found in the Scoping Plan that cap-and-trade was "necessary or desirable to facilitate the
25 maximum feasible and cost-effective reductions" by finding that a cap-and-trade program works
26 to compliment "direct regulations" to reduce emissions in the "capped sectors." (ARB026700-01.)
27

1 Given the latitude of ARB's quasi-legislative powers, it is within its discretion, right or wrong, in
2 interpreting AB 32, to choose cap and trade as the primary methodology.

3 **3. PUBLIC HEALTH AND ENVIRONMENTAL ANALYSIS**

4 Among the requirements that AB 32 imposes on ARB in preparing the Scoping Plan is a
5 requirement that ARB:

6 evaluate the total potential costs and total potential economic and noneconomic
7 benefits of the plan for reducing greenhouse gases to California's economy,
8 environment, and public health, using the best available economic models,
9 emission estimation techniques, and other scientific methods. (HSC § 38561(d).)

10 Petitioners assert that ARB's Public Health Analysis (Appendix H to the Scoping Plan)
11 violates this provision. Petitioners allege that ARB's evaluation failed to comply with AB 32 in
12 two ways: (1) ARB did not analyze the public health or environmental impacts of the voluntary
13 or incentivized reductions; and (2) ARB's public health evaluation of its cap and trade and
14 regulatory approaches was conclusory and incomplete.

15 Petitioners argue that AB 32's mandate to evaluate the "total" potential economic and
16 noneconomic costs and benefits commands ARB to evaluate the entire economic and non-
17 economic costs and the entire benefits of the proposed Scoping Plan measures. Further, in order
18 to understand the total potential environmental benefits, ARB must also evaluate all of the
19 potential environmental impacts of AB 32 implementation. Respondents argue this goes too far,
20 and the Court agrees.

21 The plain language of section 38561(d) indicates that the statute requires ARB to evaluate
22 the total costs and benefits of "the plan" itself. The time for ARB to analyze all the costs and
23 benefits of particular measures will be when ARB takes action to adopt such measures. (See HSC
24 § 38562.) This is not to suggest that ARB has license to explain every shortfall in its plan by
25 claiming it is in the program level stage and detail awaits project level planning and review.

26 However, AB 32 requires broad analysis of total potential costs and total potential
27 economic benefits of the plan but calls for more detailed consideration and analysis of the impacts
28 on low income communities, the impacts on achieving air quality standards, societal benefits and

1 other factors in the staff report of each proposed measure. (See HSC § 38562, (b)(2), (b)4 and
2 (b)(6).)

3 **a. Public Health and Environmental Impacts of the Voluntary or**
4 **Incentivized Reductions Measures**

5 ARB chose to include voluntary measures in the Scoping Plan, such as reducing
6 agricultural emissions. (ARB026752.) Petitioners argue, however, that ARB did not provide any
7 evaluation of whether or not its decision not to mandate agricultural emissions reductions would
8 disproportionately impact low-income communities, interfere with efforts to comply with ambient
9 air quality standards, or maximize other co-benefits. Without this evaluation, ARB cannot
10 conclude that this is the best policy choice for AB 32 implementation.

11 However, Respondents counter that the administrative record contains evidence that ARB
12 analyzed the costs and benefits of potential voluntary or incentivized measures for agriculture.
13 ARB helped established the Agricultural Working Group that analyzed issues pertinent to
14 identifying and controlling greenhouse gas emissions from the agricultural sector. (ARB020826.)
15 Beyond the references to agriculture in Appendix H and the FED, the record includes a document
16 called “The Agriculture Sector Summary and Analysis.” (ARB 033775 – 033862.) This
17 document provides the Agricultural Working Group’s analysis of the sector, including evaluation
18 of the feasibility of mandating reductions as opposed to proposing voluntary or incentivized
19 measures. Ultimately, ARB proposed a voluntary approach for the agricultural sector reasoning
20 that it is a sector composed of complex biological systems, diverse source types, and complex
21 life-cycle analysis. (ARB033776.)

22 However an examination of the Agricultural Working Group’s document “The Agriculture
23 Sector Summary and Analysis” (ARB 033775 – 033862) reveals that the health evaluation merely
24 consists of two sentences:

25 It is anticipated that most of the proposed emission reductions measures for the
26 agricultural sector will also reduce criteria pollutants such as NOx, ammonia,
27 volatile organic compounds (VOCs) and particulate matter (PM) PM10 and
PM2.5. The operation of engines use for digesters and additional biomass
facilities may increase air emissions and require mitigation. (ARB33782.)

1 In the analysis of voluntary and incentivized measures for the agricultural sector, the
2 record does not demonstrate that ARB used the best available models as required by AB 32.
3 (HSC §38561(d).)

4 **b. Public Health Evaluation of Cap and Trade**

5 Petitioners assert that ARB’s analysis of the costs and benefits of direct regulatory and cap
6 and trade approaches was in violation of HSC § 38561(d). Petitioners argue that in evaluating the
7 public health impacts of AB 32, ARB only analyzes impacts on the State, the South Coast Air
8 Basin, and the City of Wilmington. (ARB021519-021525, ARB021534-021559.) ARB limited
9 its examination of air quality benefits to four sectors: Electricity, Fuel Combustion,
10 Transportation Fuels, and Industry. (ARB021536-37.) ARB further limited analysis by focusing
11 only on criteria air pollutants, such as NOx and fine particulate matter, and by not including toxic
12 air contaminants. (ARB021534-37.) This limited public health analysis is sharply contrasted by
13 the detailed economic analysis ARB conducted in the Scoping Plan. With respect to direct
14 regulations, ARB did not specifically assign emission reductions to individual facilities or
15 transportation corridors. (ARB021519.) ARB also admitted its estimations of statewide
16 emissions reductions were uncertain. (ARB021519.) Petitioners assert ARB had the ability to
17 estimate specific emission reductions and potential impacts from throughout the state and in other
18 regions, but failed to do so and that not including this analysis deprived decision-makers and the
19 public of important information in weighing total costs and benefits.

20 Respondents correctly assert that ARB’s economic analysis does not establish any
21 requirement or standard against which to measure the public health analysis. Section 38561(d)
22 calls for ARB to conduct its analysis “using the best available economic models, emission
23 estimation techniques, and other scientific methods.”

24 ARB’s examination of air quality benefits was not limited to the sectors listed by
25 Petitioners, but also covered: water (ARB027323-325), recycling and waste management
26 (ARB027327-329), forests (ARB027329-330), high GWP gases (ARB027330-333) and
27 agriculture (ARB027333). AB 32 does not specify that analyses must be quantitative – as a

1 result, when it was not possible to quantify air quality benefits, a qualitative description of the
2 potential benefits was provided.

3 ARB staff did limit the health benefits analysis associated with improvements in air
4 quality to the four main sectors of the Scoping Plan, which are responsible for approximately 92%
5 of emissions for the current year and an estimated 86% of emissions in 2020. (ARB020832.) Two
6 reasons were cited for this: (1) ARB was only able to quantify emission reductions from these
7 four sectors; and (2) ARB's method of calculating changes in health outcomes resulting from
8 improvements in air quality is based on concentration-response functions from epidemiology
9 studies conducted in urban areas. The main sources of pollution in urban areas are: electricity, fuel
10 combustion, transportation fuels, and industry. The Court cannot find that focusing the analysis on
11 these four sectors was inadequate under the statute.

12 Petitioners also allege ARB also failed to evaluate the potential disparate impacts of cap
13 and trade as part of AB 32 implementation. EJAC urged ARB to pay particular attention to
14 preventing disproportionate impacts (ARB011736-38, 012014, 020771), and that ARB made no
15 attempt to analyze disproportionate impacts to communities living closest to the facilities eligible
16 to participate in the cap and trade system. On the contrary, ARB assumes in its public health
17 analysis that cap and trade will result in a 10% reduction in fuel combustion by sources in the
18 South Coast and Wilmington. (ARB021539.) Also, cap and trade is linked to Western Climate
19 Initiative, which is comprised of other Western states and two Canadian provinces. ARB cannot
20 assure that the reductions will take place in California, much less in the South Coast or
21 Wilmington areas. (ARB020813.)

22 Petitioners' assertions are inaccurate inasmuch as ARB staff analyzed the impacts of the
23 cap and trade program, in conjunction with other measures in the Scoping Plan, in Wilmington, a
24 low-income community with a multitude of sources. (ARB027401.) One factor in choosing this
25 community is that it had a number of large industrial sources that were likely to be subject to any
26 future cap and trade regulation. ARB assumed emission reductions from cap and trade and other
27 measures could occur in a low income community like Wilmington to illustrate the potential

1 impacts of a cap and trade regulation and other Scoping Plan measures. However, ARB staff
2 made clear that their analysis showed that the benefits of these emission reductions would mostly
3 likely occur outside the community. As Appendix H states: “co-benefit emission reductions in the
4 study area [Wilmington] would produce regional health benefits. A relatively small portion of
5 these benefits would occur in the study area...” (ARB027412.)

6 In sum, Petitioners' criticisms of Appendix H are overbroad. While there may be flaws in
7 the analyses, Petitioners fall short of demonstrating that ARB was arbitrary and capricious in
8 violation of Section 38561(d).

9
10 **4. CONSIDERATION OF ALL RELEVANT INFORMATION
REGARDING OTHER GHG REDUCTION PROGRAMS**

11 HSC section 38561(c) provides that ARB “shall consider all relevant information
12 pertaining to greenhouse gas emission reduction programs in other states, localities, and nations,
13 including the northeastern states of the United States, Canada, and the European Union.” (HSC §
14 38561(c).)

15 Petitioners claim ARB failed to consider the performance of Cap and Trade programs in
16 other states, localities, and nations. ARB did not consider problems in other programs such as
17 over allocation, monitoring and equivalence, innovation, verifiability, accounting practices,
18 additionality, and public participation, or the extent to which these challenges have been
19 overcome in other programs. (ARB023431-023436.) ARB also did not consider these issues in
20 light of cap and trade as the primary framework for achieving reductions. Furthermore, ARB used
21 other examples of cap and trade programs only to justify cap and trade. (ARB021227-30.) Most
22 of the other programs failed in reducing emissions, but ARB offered no evidence that the failure
23 of these programs could be overcome.

24 Respondents counter that HSC § 38561(c) gives ARB discretion to determine what
25 information to consider regarding other GHG programs, by providing a non-exclusive list of
26 programs and leaving the determination of “relevance” to ARB. In general, a direction to
27 “consider” information, as here, is presumed to have been performed absent evidence to the

1 contrary. (Cal. Code. Evid., § 664 (“It is presumed that official duty has been regularly
2 performed.”).) Section 38561(c) does not dictate the content of the Scoping Plan – the
3 requirements for the content of the Scoping Plan are set forth in the prior section of AB 32, HSC
4 § 38561(b). Petitioners base their argument on selected excerpts of a single appendix to ARB’s
5 Scoping Plan. A review of the full record, including the entire Scoping Plan, demonstrates that
6 ARB did not abuse its discretion and gave consideration to problems experienced in other cap-
7 and-trade programs and incorporated solutions recommended by national experts. (See
8 Respondents’ Brief, 27: 1-16.) ARB’s written Responses to Public Comments on the Functional
9 Equivalent Document consider and address the same criticisms of existing cap-and-trade
10 programs that Petitioners raise. (See ARB027650-55.) Additionally, ARB conducted at least one
11 workshop and one board meeting specifically devoted to consideration of other jurisdictions’
12 programs to reduce GHG’s. (See ARB005372 and ARB005389-404 [January 16, 2008
13 Workshop]; ARB009541-010174 [May, 28 2008 Board Meeting].) Petitioners may disagree with
14 ARB’s conclusions, however the essential analyses were performed.

15 The Court agrees that Respondents’ interpretation that Section 38561(c) leaves the
16 determination of “relevance” to ARB is overbroad. However, the record provides sufficient
17 evidence to demonstrate that ARB at least met its responsibilities under Section 38561(c).

18 C. CONCLUSION

19 In summary, ARB’s plan to effectuate AB 32 survives challenge by Petitioners given
20 ARB’s quasi-legislative authority and the wide latitude afforded the agency under the arbitrary and
21 capricious standard of review. Accordingly, the Petition for Writ of Mandate commanding ARB
22 to revise the Scoping Plan is denied.

23 II. PETITIONERS' CHALLENGES UNDER CEQA

24 A. STANDARD OF REVIEW

25 In a mandate proceeding to review an agency’s compliance with CEQA, the Court reviews
26 the administrative record to determine whether the agency abused its discretion. (*California*
27 *Sportfishing Protection Alliance v. State Water Resources Control Bd.* (2008) 160 Cal.App.4th

1 1625, 1644.) Abuse of discretion is shown if (1) the agency's determination is not supported by
2 substantial evidence, or (2) the agency has not proceeded in a manner required by law. (*Ibid.*)

3 The substantial evidence standard of review is applied to the agency's factual
4 determinations. (*Save Our Peninsula Committee v. Monterey County Board of Supervisors*
5 (2001) 87 Cal.App.4th 99, 117-118.) For purposes of CEQA, substantial evidence means
6 "enough relevant information and reasonable inferences from this information that a fair argument
7 can be made to support a conclusion, even though other conclusions might also be reached." (Cal.
8 Code Regs, tit. 14, § 15384, subd. (a) (hereafter Guidelines).) "Argument, speculation,
9 unsubstantiated opinion or narrative, [or] evidence which is clearly erroneous or inaccurate ...
10 does not constitute substantial evidence." (*Ibid.*)

11 By contrast, questions concerning the proper interpretation or application of the
12 requirements of CEQA are matters of law. (*Save Our Peninsula Committee*, supra, 87
13 Cal.App.4th at p. 118.) "When the informational requirements of CEQA are not complied with,
14 an agency has failed to proceed in 'a manner required by law' and has therefore abused its
15 discretion." (*Ibid.*; Pub. Resources Code, §§ 21168.5, 21005, subd. (a).)

16 The FED is presumed legally adequate, however (*Al Larson Boat Shop, Inc. v. Board of*
17 *Harbor Commissioners* (1993) 18 Cal.App.4th 729, 740; Pub. Resources Code, § 21167.3.), and
18 the agency's certification of the EIR is presumed correct (*Sierra Club v. City of Orange* (2008)
19 163 Cal.App.4th 523, 530.) Petitioners therefore bear the burden of proving that the FED is
20 legally inadequate and that the agency abused its discretion in certifying it. (*Ibid.*; see also *Al*
21 *Larson Boat Shop*, supra, at p. 740.)

22 In reviewing an agency's actions under CEQA, the court must bear in mind that "the
23 Legislature intended the act 'to be interpreted in such manner as to afford the fullest possible
24 protection to the environment within the reasonable scope of the statutory language.'" (*Laurel*
25 *Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 390
26 (hereafter *Laurel Heights*)). "If CEQA is scrupulously followed, the public will know the basis
27 on which its responsible officials either approve or reject environmentally significant action, and

1 the public, being duly informed, can respond accordingly to action with which it disagrees." (*Id.*
2 at p. 392.) "The EIR process protects not only the environment but also informed self-
3 government." (*Ibid.*) "The court does not pass upon the correctness of the EIR's environmental
4 conclusions, but only upon its sufficiency as an informative document." (*Ibid.*)

5 **B. DISCUSSION**

6 **1. CERTIFIED REGULATORY PROGRAM**

7 State regulatory programs that meet certain environmental standards and are certified by
8 the Secretary of the Natural Resources Agency are exempt from CEQA's requirements for
9 preparation of EIRs. (Pub. Resources Code, § 21080.5; Guidelines, §§ 15250-15253.)

10 Environmental review documents prepared under the agency's own regulations are used instead of
11 the documents that would be required by CEQA. (Pub. Resources Code, § 21080.5, subd. (a);
12 Guidelines, § 15250.) When conducting its environmental review and preparing its
13 documentation, a certified regulatory program remains subject to other provisions of CEQA,
14 including CEQA's broad policy goals and substantive standards. (Guidelines, § 15250; *City of*
15 *Arcadia v. State Water Resources Control Bd.* (2006) 135 Cal.App.4th 1392, 1422.) These
16 include the duties to identify a project's adverse environmental effects, to mitigate those effects
17 through adoption of feasible alternatives or mitigation measures, and to justify its action based on
18 specific economic, social, or other conditions. (See *Sierra Club v. State Bd. of Forestry* (1994) 7
19 Cal.4th 1215, 1228, 1230-1231). Thus, the documentation required of a certified program
20 essentially duplicates what is required for an EIR. (See *Citizens for Non-Toxic Pest Control v.*
21 *Department of Food & Agriculture* (1986) 187 Cal.App.3rd 1575, 1586.) The CEQA Guidelines
22 governing the contents of EIRs do not, however, directly apply to an environmental document
23 prepared by a certified program. (*City of Arcadia*, *supra*, 135 Cal.App.4th at p. 1422.)

24 The documentation prepared under a certified program must address the "significant or
25 potentially significant effects" that a project might have on the environment. (Guidelines, §
26 15252, subd. (a)(2); *City of Arcadia*, *supra*, 135 Cal.App.4th at p. 1422.) Alternatives to the
27 proposed activity must also be described. (Pub. Resources Code, § 21080.5, subd. (d)(3)(A).)

1 Just as for EIRs, environmental documents prepared by certified programs must use scientific and
2 other empirical evidence to support their conclusions. (See *Ebbetts Pass Forest Watch v.*
3 *California Dept. of Forestry and Fire Protection* (2008) 43 Cal.4th 936.)

4 The standard of review applicable to a challenge to a certified program's environmental
5 documentation is the same as that applied to an EIR. (*California Sportfishing Protection*
6 *Alliance*, supra, 160 Cal.App.4th at p. 1644.) The court makes a limited inquiry into whether the
7 agency prejudicially abused its discretion; abuse of discretion is established if the decision was
8 not based on substantial evidence in the record or if the agency did not proceed in the manner
9 required by law in approving the environmental document. (*Ibid.*) In the absence of contrary
10 evidence in the record, the court will assume that the agency complied with its official duties
11 under the program. (*City of Sacramento v. State Water Resources Control Bd.* (1992) 2
12 Cal.App.4th 960, 976.)

13 ARB obtained certification of its regulatory program in 1978. The applicable provisions
14 of the certified regulatory program can be found at California Code of Regulations, title 17,
15 sections 60005-60007.

16 2. PROGRAM EIRS AND TIERING

17 ARB characterizes its FED as a first-tier, programmatic document, to be followed by
18 subsequent rule-specific environmental review. Petitioners do not dispute the appropriateness of
19 programmatic-level review.

20 A program EIR is an EIR which is prepared for a series of actions that can be
21 characterized as one large project. (Guidelines, § 15168, subd. (a).) Use of a program EIR can
22 provide an opportunity for a more thorough consideration of environmental effects and
23 alternatives than could be provided in an EIR on an individual action, ensure consideration of
24 cumulative impacts that might be slighted in a case-by-case analysis, and allow the lead agency to
25 consider broad policy alternatives and program wide mitigation measures at an early time when
26 the agency has greater flexibility to deal with basic problems or cumulative impacts. (Guidelines,
27 § 15168, subd. (b).)

1 Program EIRs are commonly used in conjunction with the process of tiering. (*In re Bay-*
2 *Delta Programmatic Environmental Impact Report Coordinated Proceedings* (2008) 43 Cal.4th
3 1143, 1170 (hereafter *In re Bay Delta*); Guidelines, § 15152, subd. (h)(3).) "'Tiering' refers to the
4 coverage of general matters in broader EIRs (such as general plans or policy statements) with
5 subsequent narrower EIRs." (*In re Bay Delta*, at p. 1170; Guidelines, § 15385.) At the first-tier
6 program stage, the environmental effects may be analyzed in general terms, without the level of
7 detail appropriate for second-tier review. (*In re Bay Delta*, at p. 1169.) The analysis in the EIR
8 should be tailored to the first tier of the planning process, with the understanding that additional
9 detail will be provided when specific second-tier projects are under consideration. (*Id.* at p.
10 1172.)

11 Accordingly, the standards for assessing the sufficiency of a program-level EIR are
12 different from those used to assess the sufficiency of a project-level EIR.

13 3. COMPLIANCE WITH THE FUNCTIONAL EQUIVALENT OF CEQA

14 a. ARB's Discussion of Impacts Is Sufficiently Detailed for a 15 Program-Level FED

16 ARB's certified regulatory program states that "all staff reports shall contain ... an
17 assessment of anticipated significant long or short term adverse and beneficial environmental
18 impacts associated with the proposed action and a succinct analysis of those impacts. The
19 analysis shall address feasible mitigation measures and feasible alternatives to the proposed action
20 which would substantially reduce any significant adverse impact identified." (Cal. Code Regs.,
21 tit. 17, § 60005, subd. (b).) When conducting its environmental review and preparing its
22 documentation under a certified regulatory program, an agency must still comply with the broad
23 policy goals and substantive standards of CEQA. (*City of Arcadia*, supra, 135 Cal.App.4th at p.
24 1422.)

25 "In addressing the appropriate amount of detail required at different stages in the tiering
26 process, the CEQA Guidelines state that '[w]here a lead agency is using the tiering process in
27 connection with an EIR for a large-scale planning approval, such as a general plan or component

1 thereof ..., the development of detailed, site-specific information may not be feasible but can be
2 deferred, in many instances, until such time as the lead agency prepares a future environmental
3 document in connection with a project of a more limited geographic scale, as long as deferral does
4 not prevent adequate identification of significant effects of the planning approval at hand." (*In re*
5 *Bay Delta*, supra, 43 Cal.4th at p. 1170; Guidelines, § 15252, subd. (c).) Tiering does not excuse
6 the lead agency from adequately analyzing reasonably foreseeable significant environmental
7 effects of the project and does not justify deferring such analysis to a later tier EIR or negative
8 declaration. (Guidelines, § 15152, subd. (b).) However, the level of detail contained in a first tier
9 EIR need not be greater than that of the program, plan, policy, or ordinance being analyzed.
10 (*Ibid.*) A more general analysis will suffice when the EIR evaluates a general policy or planning
11 proposal. (Guidelines, § 15146.)

12 Once broad, environmental issues have been examined in a first-tier EIR, EIRs on later
13 development projects may concentrate on the environmental issues specific to the later project.
14 (Guidelines, § 15152, subd. (a).) This allows lead agencies to prepare environmental documents
15 that focus on issues that are ripe for decision at each stage, and to exclude issues that have already
16 been decided or that are not ripe for decision. (Pub. Resources Code, § 21093, subd. (a);
17 Guidelines, §§ 15152, subd. (b), 15385.) A significant environmental impact is ripe for
18 evaluation in a first-tier EIR when it is a reasonably foreseeable consequence of the action
19 proposed for approval and the agency has "sufficient reliable data to permit preparation of a
20 meaningful and accurate report on the impact." (*Los Angeles Unified School Dist. v. City of Los*
21 *Angeles* (1997) 58 Cal.App.4th 1019, 1028.) "CEQA contemplates consideration of
22 environmental consequences at the earliest possible stage, even though a more detailed
23 environmental review may be necessary later." (*Rio Vista Farm Bureau Center v. County of*
24 *Solano* (1992) 5 Cal.App.4th 351, 370 (hereafter *Rio Vista*).)

25 An EIR must contain a sufficient degree of analysis regarding "reasonably anticipated
26 future projects" to provide decision makers with the information needed to make an intelligent
27 decision concerning the project's environmental consequences. (*Rio Vista*, supra, 5 Cal.App.4th

1 at p. 370; Guidelines, § 15151.) An evaluation of the environmental effects of a proposed project
2 need not be exhaustive, but the sufficiency of an EIR is to be reviewed in light of what is
3 reasonably feasible. (Guidelines, § 15151.) The courts have looked not for perfection but for
4 adequacy, completeness, and a good faith effort at full disclosure. (*Ibid.*) A reviewing court will
5 resolve any disputes regarding the adequacy of the analysis in favor of the lead agency if there is
6 any substantial evidence in the record supporting the EIR's approach. (*Laurel Heights*, supra, 47
7 Cal.3d at p. 409.) Substantial evidence includes facts, reasonable assumptions predicated on
8 facts, and expert opinion supported by facts, but does not include argument, speculation, or
9 unsubstantiated opinion. (Pub. Resources Code, §§ 21080, subd. (e), 21082.2, subd. (c).)

10 Petitioners first contend that ARB improperly deferred analysis of the impacts of potential
11 future biofuel production facilities, refineries and power plants to subsequent project-level FEDs.
12 The FED estimates that as a result of the proposed LCFS identified in the Scoping Plan, 10-30
13 new biofuel production facilities will be built in California. The FED includes a map of current
14 and proposed biofuel facilities in the state, and provides a general description of where potential
15 future facilities might be located. ARB concluded that the "conversion of biomass feedstocks into
16 energy can result in air quality impacts. Criteria and toxic pollutants, as well as greenhouse gas
17 emissions, will need to be assessed for these facilities during the siting and permitting processes."

18 Petitioners argue that because ARB knows where these facilities will likely be located, a
19 more detailed impacts analysis must be included in the Scoping Plan FED. In support of their
20 arguments, Petitioners cite *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d
21 692 and *Laurel Heights*, supra, 47 Cal.3d 376. However, the factual findings in those cases are
22 inapplicable here because they involve project-level EIRs rather than program-level EIRs.

23 Instead, *Rio Vista*, supra, 5 Cal.App.4th 351, is instructive here. In *Rio Vista*, the court
24 considered the sufficiency of a program-level EIR for a county's hazardous waste management
25 plan. (*Id.* at p. 362.) At issue was whether the county had violated CEQA by failing to
26 adequately analyze the environmental impacts of constructing hazardous waste disposal facilities
27 at identified potential sites. (*Id.* at p. 373.) The Plan itself made no commitment to future

1 facilities, and instead merely furnished siting criteria and designated generally acceptable
2 locations. (*Id.* at p. 371.) Both the Plan and the EIR stated that no actual sites had been
3 recommended or proposed, and that subsequent project EIRs would be prepared in the event
4 specific facilities were proposed in the future. (*Ibid.*)

5 The EIR described the Plan as a primary planning document for hazardous waste
6 management in the county, and noted that the Plan itself would have no direct adverse impacts on
7 the environment. (*Rio Vista*, supra, 5 Cal.App.4th at p. 365.) To the contrary, the EIR continued,
8 the Plan should result in beneficial impacts through improved and safer management of the
9 county's hazardous wastes. (*Id.* at p. 366.) The EIR recognized that the Plan could allow certain
10 projects, such as the hazardous waste disposal facilities, to proceed, and that such projects could
11 have adverse impacts. (*Ibid.*) The EIR discussed these potential impacts in general terms, but
12 deferred discussion of specific impacts of identified potential sites until such a time as the actual
13 future sites were proposed. (*Id.* at pp. 366-367.)

14 The court held that a general discussion of the environmental impacts of potential
15 hazardous waste disposal facilities was sufficient for a project-level EIR. (*Rio Vista*, supra, 5
16 Cal.App.4th at p. 375.) "Considering the speculative nature of any secondary effects from an
17 uncertain future facility, which will be subject to its own separate environmental review, we
18 conclude that no further findings on environmental impacts or the rationale for such findings was
19 reasonably required from the FEIR." (*Ibid.*)

20 Similarly here, the FED discusses the potential impacts of future biofuel production
21 facilities in general terms, but defers more detailed discussion of environmental impacts to the
22 LCFS rulemaking stage. The Scoping Plan itself does not recommend or propose any future
23 facilities, and therefore a general discussion of potential impacts was sufficient.

24 Petitioners attempt to distinguish *Rio Vista* on the grounds that the plan in that case was an
25 initial working document to be updated and reviewed periodically. Here, they argue, the Scoping
26 Plan is the framework for fulfilling A.B. 32's mandates, and therefore the FED must contain a
27

1 more detailed analysis of impacts. However, Petitioners offer no evidence to support this
2 distinction.

3 Also instructive here is *In re Bay-Delta*, supra, 43 Cal.4th 1143. In that case, the court
4 considered the sufficiency of a program-level EIR for a long-term water management plan. (*Id.* at
5 p. 1151.) At issue was whether CALFED had violated CEQA by failing to adequately analyze the
6 environmental impacts of proposed "second-tier" projects in the project-level EIR. (*Id.* at p.
7 1152.) The EIR described the Program as "a general description of a range of actions that will be
8 further refined, considered, and analyzed for site-specific environmental impacts as part of
9 second- and third-tier environmental documents prior to making a decision to carry out these later
10 actions. (*Id.* at pp. 1156-1157.)

11 The EIR provided a broad and comprehensive overview of the potential actions that could
12 be taken by the Program. (*In re Bay Delta*, supra, 43 Cal.4th at p. 1170.) It described, in general
13 terms, the overall and long-term environmental consequences of the potential proposed actions,
14 but did not analyze site-specific impacts of future projects at proposed locations. (*Id.* at pp. 1170,
15 1173, 1175.)

16 The court held that the EIR contained sufficient analysis for a first-tier document. (*In re*
17 *Bay Delta*, supra, 43 Cal.4th at pp. 1173, 1177.) It noted that "although later project-level EIRs
18 ... will require an independent determination and disclosure of significant environmental impacts
19 ... such details were properly deferred to the second tier of the CALFED Program, when specific
20 projects can be more fully described and are ready for detailed consideration. (*Id.* at p. 1173.)

21 Similarly here, the Scoping Plan FED describes the environmental consequences of the
22 potential LCFS program, but does not analyze site-specific impacts of future facilities. Such
23 details were properly deferred to the environmental review process for the LCFS rulemaking.

24 Petitioners attempt to distinguish the *Bay Delta* case by suggesting that the EIR in that
25 case was sufficient because it properly considered both statewide and regional impacts, unlike the
26 Scoping Plan FED, which did not consider regional impacts. However, the sufficiency of the EIR
27 in *Bay Delta* did not depend on those facts.

1 Petitioners next contend that ARB's discussion of cumulative impacts is overly broad,
2 conclusory, and contradictory. The FED states that overall, the Scoping Plan is expected to
3 "substantially improve air quality." Petitioners argue that this conclusion is unsupported by facts
4 or data and is contradicted by evidence in the record that some of the Scoping Plan's proposed
5 measures may actually cause localized pollution hotspots.

6 In response, ARB argues that it analyzed cumulative impacts at numerous places,
7 including: aesthetics, air quality, agricultural resources, biological resources, cultural resources,
8 energy demand, geology and soils, from hazardous materials, land use, mineral resources, from
9 noise, population and housing, public services, recreation, solid waste, transportation, water
10 resources, and public health and safety. More specifically, as to the proposed cap and trade
11 regulation, ARB concludes that "cap and trade ... is not expected to result in adverse air quality
12 impacts." ARB reaches this conclusion by observing that there is nothing inherent in the cap and
13 trade system which would "provide an incentive for facilities to increase emissions beyond the
14 levels expected in the absence of implementing A.B. 32." Additionally, as to the LCFS
15 regulation, ARB recognizes that while the cumulative impact of implementing the recommended
16 measures may be to decrease emissions, there could be localized air quality impacts in areas
17 where future natural gas generation facilities are sited.

18 As discussed above, the *Rio Vista* and *Bay Delta* cases are applicable here. Here, as in
19 those cases, ARB properly identified the potential adverse impacts of measures proposed by the
20 Scoping Plan and analyzed them to the extent feasible. Localized and site-specific impacts
21 associated with the cap and trade and LCFS programs were properly deferred to the rulemaking
22 stage.

23 The Court concludes that ARB's discussion of impacts is sufficiently detailed for a
24 program-level FED under both CEQA and ARB's certified regulatory program. Therefore, ARB
25 did not abuse its discretion in certifying the impacts portion of the FED as complete.

1 **b. ARB's Discussion of Alternatives Is Inadequate**

2 ARB's certified regulatory program states that "staff reports ... shall address ... feasible
3 alternatives to the proposed action which would substantially reduce any significant adverse
4 impact identified." (Cal. Code Regs., tit. 17, § 60005, subs. (b).) When conducting its
5 environmental review and preparing its documentation under a certified regulatory program, an
6 agency must still comply with the broad policy goals and substantive standards of CEQA. (*City*
7 *of Arcadia*, supra, 135 Cal.4th at p. 1422.)

8 CEQA requires that an EIR, in addition to analyzing the environmental effects of a
9 proposed project, also consider and analyze project alternatives that would reduce adverse
10 environmental impacts. (Pub. Resources Code, § 21061.) The CEQA Guidelines state that an
11 EIR must describe a reasonable range of alternatives to the project which would feasibly attain
12 most of the basic objectives of the project and evaluate the comparative merits of the alternatives.
13 (Guidelines, § 15126.6, subs. (a); *Rio Vista*, supra, 5 Cal.App.4th at pp. 377-378.) The discussion
14 of alternatives should include sufficient information about each alternative to allow evaluation,
15 analysis, and comparison with the proposed project. (Guidelines, § 15126.6, subs. (d).) Absolute
16 perfection is not required; what is required is the production of information sufficient to permit a
17 reasonable choice of alternatives so far as environmental aspects are concerned. (*Rio Vista*, supra,
18 at p. 378; *Laurel Heights*, supra, 47 Cal.3d at p. 406.) It is only required that the agency make an
19 objective, good-faith effort to comply. (*Rio Vista*, supra, at p. 378.)

20 The EIR "must reflect the analytic route the agency traveled from evidence to action."
21 (*Kings County Farm Bureau*, supra, 221 Cal.App.3d at p. 733; *Laurel Heights*, supra, 47 Cal.3d at
22 p. 404.) It "must contain facts and analysis, not just the bare conclusions of a public agency."
23 (*Kings County Farm Bureau*, supra, at p. 736; *Laurel Heights*, supra, at p. 404.) "An agency's
24 opinion concerning matters within its expertise is of obvious value, but the public and decision-
25 makers, for whom the EIR is prepared, should also have before them the basis for that opinion so
26 as to enable them to make an independent, reasoned judgment." (*Kings County Farm Bureau*,
27 supra, at p. 736.) "An EIR which does not produce adequate information regarding alternatives

1 cannot achieve the dual purpose served by the EIR, which is to enable the reviewing agency to
2 make an informed decision and to make the decisionmaker's reasoning accessible to the public,
3 thereby protecting informed self-government." (*Kings County Farm Bureau*, supra, at p. 733;
4 *Laurel Heights*, supra, at p. 392.)

5 As with the environmental impacts analysis, the degree of specificity required of the
6 alternatives analysis depends upon the degree of specificity involved in the underlying activity
7 described in the EIR. (Guidelines, § 15146; *Al Larson Boat Shop*, supra, 18 Cal.App.4th at p.
8 746.) The discussion of alternatives in an EIR for a planning level action need not be as precise
9 as the discussion for a specific development project. (Guidelines, § 15146; *Al Larson Boat Shop*,
10 supra, at p. 746.)

11 The sufficiency of an EIR is to be reviewed in light of what is reasonably feasible.
12 (Guidelines, § 15151.) The courts have looked not for perfection but for adequacy, completeness,
13 and a good faith effort at full disclosure. (*Ibid.*) A reviewing court will resolve any disputes
14 regarding the adequacy of the analysis in favor of the lead agency if there is any substantial
15 evidence in the record supporting the EIR's approach. (*Laurel Heights*, supra, 47 Cal.3d at p.
16 409.) Substantial evidence includes facts, reasonable assumptions predicated on facts, and expert
17 opinion supported by facts, but does not include argument, speculation, or unsubstantiated
18 opinion. (Pub. Resources Code, §§ 21080, subd. (e), 21082.2, subd. (c).)

19 Petitioners contend that ARB's discussion of alternatives is unsupported by facts or data
20 and therefore gives the public no indication as to why ARB chose the Scoping Plan over the other
21 alternatives.

22 The FED contains a discussion of five alternatives to the Scoping Plan. Alternative 1
23 describes the "no project" or "business as usual" alternative. Alternative 2 is a variation of the
24 strategies and measures proposed by the Scoping Plan. Alternatives 3, 4 and 5 are programs that
25 rely primarily on cap and trade, source-specific regulations, or a carbon fee.

1 Alternative 1, or the "no project" alternative is described in ten pages of the FED. In its
2 discussion, ARB uses emissions data from past years in order to forecast 2020 emissions from a
3 variety of sectors in the absence of any regulations.

4 Alternatives 2 through 5, by contrast, are collectively described in just over three pages of
5 the FED. In its discussion, ARB states that it "expect[s] that environmental impacts (both
6 positive and adverse) of all the alternatives would be similar to the impacts expected from [the]
7 mix of measures identified in the Scoping Plan" because they target the same basic level of
8 emissions reductions under AB 32. However, ARB provides little to no facts or data to support
9 this conclusion, noting only that "[d]ifferent approaches could mean more or less reduction
10 activity in any given sector," and "[w]hile the magnitude of impacts might increase or decrease, it
11 would be speculative to try to estimate the effects at this time, before the details of specific
12 measures are developed."

13 ARB makes similar assertions about each individual alternative; repeatedly stating that
14 measures ultimately adopted will depend on information that is learned in the future during the
15 development of each measure, and that it cannot predict in which sectors and what geographic
16 locations reductions might occur.

17 ARB argues that its discussion of alternatives was sufficiently detailed for a programmatic
18 document. However, while a program-level EIR need not be as detailed as a project-level EIR,
19 ARB must still provide the public with some indication based on factual analysis as to why it
20 chose the Scoping Plan over the alternatives. The "programmatic" label cannot be used to justify
21 an analysis which is inadequate for informed public review and informed decision making by the
22 ARB. Respondent has argued that more detailed analysis of alternative may come later during the
23 implementation process. This claim has no credibility because the ARB has already proceeded,
24 prematurely, with the implementation process. (See below). ARB seeks to create a *fait accompli*
25 by premature establishment of a cap and trade program before alternative can be exposed to
26 public comment and properly evaluated by the ARB itself. ARB's analysis provides no evidence
27 to support its chosen approach, and as Petitioners point out, data is available to analyze. ARB

1 argues Petitioners have not presented information on alternatives, particularly carbon fee
2 mechanisms. However, that is the ARB's responsibility. ARB could have, and should have used
3 data from existing programs, studies, and reports to analyze the potential impacts of the various
4 alternatives.

5 The Court concludes that because ARB did not include any facts or data to support the
6 conclusions stated in its alternatives analysis, it abused its discretion in certifying the FED as
7 complete.

8 **c. ARB Improperly Approved the Scoping Plan Prior to**
9 **Completing Its Environmental Review**

10 Petitioners argue that ARB improperly approved and began implementing the Scoping
11 Plan prior to completing its obligation to review and respond to public comments. In support of
12 this contention, Petitioners point to (1) the specific language of Resolution 08-47, (2) a public
13 meeting that ARB held to discuss implementation of the Scoping Plan, and (3) the fact that no
14 changes were made to the FED or the Scoping Plan after the time Resolution 08-47 was adopted.

15 On December 11, 2008, during a noticed public hearing, ARB adopted Resolution 08-47,
16 which stated that "subject to the Executive Officer's approval of written responses to
17 environmental issues that have been raised, the Board is initiating steps toward the final approval
18 of the Proposed Climate Change Scoping Plan and its Appendices." The Resolution further stated
19 that ARB had prepared an FED for the Scoping Plan which indicated that the project could have
20 adverse environmental impacts but that these impacts were speculative, and that it had not
21 identified any feasible alternatives at this time.

22 After adopting Resolution 08-47, but prior to issuing its responses to public comments on
23 the FED, ARB held a public workshop to summarize the process to be followed in implementing
24 the Scoping Plan. The notice for the January 29, 2009 workshop stated that ARB had approved
25 the Scoping Plan at its December, 2008 meeting.

1 Finally, on May 7, 2009, the Executive Officer signed Executive Order G-09-001,
2 approving the responses to comments on the FED and adopting the Scoping Plan. No changes
3 were made to either the FED or the Scoping Plan as adopted by Resolution 08-47.

4 ARB's certified regulatory program provides that: "[i]f comments are received during the
5 evaluation process which raise significant environmental issues associated with the proposed
6 action, the staff shall summarize and respond to the comments either orally or in a supplemental
7 written report. Prior to taking final action on any proposal for which significant environmental
8 issues have been raised, the decision maker shall approve a written response to each such issue."
9 (Cal. Code Regs., tit. 17, § 60007, subd. (a).)

10 ARB argues that it complied with the requirements of its certified regulatory program by
11 reviewing and responding to public comments prior to the Executive Officer's final approval of
12 the Scoping Plan on May 7, 2009. However, ARB has interpreted its regulation in a way that
13 undermines CEQA's goal of informed decision-making. "The written response requirement
14 ensures that members of the Commission will fully consider the information necessary to render
15 decisions that intelligently take into account the environmental consequences." (*Mountain Lion*
16 *Foundation v. Fish & Game Com.* (1997) 16 Cal.4th 105, 133.) "It also promotes the policy of
17 citizen input underlying CEQA." (*Ibid.*) "When the written responses are prepared and issued
18 after a decision has been made, however, the purpose served by such a requirement cannot be
19 achieved." (*Ibid.*)

20 ARB attempts to avoid CEQA's mandates by referring to the process under which a
21 decision is actually made as "adoption" rather than "approval." This is an empty distinction given
22 that the implementation has commenced. ARB was unable to make an informed decision at the
23 time it adopted Resolution 08-47 because it had not yet reviewed and responded to public
24 comments. Accordingly, any efforts to approve the Scoping Plan and implement its proposed
25 measures prior to completing the environmental review process were violations of both CEQA
26 and ARB's own certified regulatory program.

1 The Court concludes that ARB failed to comply with the informational requirements of
2 CEQA and its own certified regulatory program when it issued Resolution 08-47 and began
3 implementing the Scoping Plan at the January 29, 2009 public workshop without first completing
4 the environmental review process. Because it did not proceed in a manner required by law, ARB
5 abused its discretion.

6 CONCLUSION

7 I. PETITIONERS' CHALLENGES UNDER AB 32

8 Based upon the foregoing, the Court DENIES the Petition for Writ of Mandate as to all of
9 Petitioners' AB 32 causes of action.

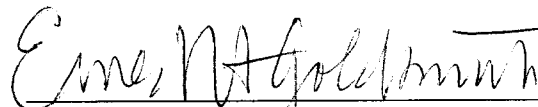
10 II. PETITIONERS' CHALLENGES UNDER CEQA

11 The Court GRANTS the Petition for Writ of Mandate as to the alternatives analysis and
12 timing causes of action. The Court DENIES the Petition for Writ of Mandate as to the impacts
13 analysis causes of action. Therefore, let a peremptory writ of mandate issue commanding ARB to
14 set aside its certification of the FED and enjoining any implementation of the Scoping Plan until
15 after Respondent has come into complete compliance with its obligations under its certified
16 regulatory program and CEQA.

17 Petitioner is ORDERED to prepare a Writ of Mandate consistent with the Court's ruling in
18 this case.

19 This Tentative Statement of Decision is the Court's Proposed Statement of Decision
20 pursuant to CRC 3.1590(g).

21
22 DATED: January 21, 2011



HON. ERNEST H. GOLDSMITH
Judge of the Superior Court

1 **CERTIFICATE OF SERVICE BY MAIL**

2 (Code Civ. Proc. 1013a(4))

3
4 I, LINDA FONG, a deputy clerk of the Superior Court for the City and
5 County of San Francisco, certify that:

6 1) I am not a party to this action;

7 2) On JAN 24 2011, I served the attached:

8 **TENTATIVE STATEMENT OF DECISION: ORDER GRANTING IN PART**
9 **PETITION FOR WRIT OF MANDATE**

10 by placing a copy thereof in a sealed envelope, addressed as follows:

11
12 Mark W. Poole, Esq.
13 Deputy Attorney General
14 455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102

Timothy O'Connor
Attorney at Law
1107 – 9th Street, Suite 540
Sacramento, CA 95819

15 Alegria De La Cruz, Esq.
16 Center on Race, Poverty and the Environment
17 47 Kearny Street, Suite 804
San Francisco, CA 94108

Caroline Farrell, Esq.
Center on Race, Poverty and the Environment
1302 Jefferson Street, Suite 2
Delano, CA 93215

18 and,

19 3) I then placed the sealed envelope in the outgoing mail at 400 McAllister Street,
20 San Francisco, CA 94102-4514 on the date indicated above for collection, attachment of required
prepaid postage, and mailing on that date following standard court practices.

21 DATED: JAN 24 2011

T. MICHAEL YUEN, Clerk

22
23
24 By:  , Deputy
25
26
27