

MAR 18 2011

CLERK OF THE COURT
BY: LINDA FONG
Deputy Clerk

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

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 issued a Tentative Statement of Decision on January 24, 2011, to which Petitioners and
7 Respondents submitted objections. The Court has considered the oral argument and the pleadings
8 and objections submitted by the parties, and issues this Statement of Decision granting in part
9 Petition for Writ of Mandate.

10 BACKGROUND

11 In 2006, the California Legislature passed the Global Warming Solutions Act of 2006
12 ("AB 32") in response to the dangers posed to California's environment by the release of man-
13 made Greenhouse Gases ("GHGs"). Health and Safety Code ("HSC") § 38500 *et seq.* The
14 Legislature designed this landmark statute to place California "at the forefront of national and
15 international efforts to reduce emissions of greenhouse gases." *Id.* at § 38501(c). AB 32 tasks the
16 California Air Resources Board ("ARB") with preparing and approving a Climate Change
17 Scoping Plan to create a regulatory path for reducing GHG emissions to 1990 levels by the year
18 2020. *Id.* at §§ 38501(a), 38550. AB 32 describes the process to be followed by ARB in creating
19 and implementing the Scoping Plan, and includes provisions for enforcement. *Id.* at §§ 38560-
20 38574, 38580.

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

1 failing to adequately evaluate the total cost and total benefits to the environment, economy and
2 public health before adopting the Scoping Plan; and (3) failing to consider all relevant
3 information regarding GHG emission reduction programs throughout the United States and the
4 World, as required by AB 32, prior to recommending a cap and trade regulatory approach.

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

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

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

25 Second, Petitioners' allegations that ARB violated CEQA are reviewed by the Court
26 pursuant to an abuse of discretion standard of review. The Court grants the Petition and issues a
27 Peremptory Writ of Mandate commanding ARB to set aside its certification of the FED and

1 enjoining the implementation of the Scoping Plan until ARB has come into complete compliance
2 with its obligations under its certified regulatory program and CEQA, as described herein.

3 **DISCUSSION**

4 **I. PETITIONERS' CHALLENGES UNDER AB 32**

5 **A. STANDARD OF REVIEW**

6 The degree of deference courts accord to an administrative agency's action depends on
7 whether the action is classified as quasi-legislative or interpretive. (*Yamaha Corp. of America v.*
8 *State Board of Equalization* (1998) 19 Cal.4th 1, 12 (“*Yamaha*”).) In *Yamaha*, the Court
9 described the two-step process to be followed when reviewing quasi-legislative administrative
10 actions. (See *Id.* at pp. 10-11.) First, the Court must determine whether the rule in question lay
11 within the lawmaking authority delegated by the Legislature. (*Id.* at p. 10.) In making that
12 determination, the Court, not the agency, has final responsibility for the interpretation of the law
13 under which the regulation was issued. (*Id.* at p. 11 fn. 4.) However, if the Court finds that the
14 Legislature intended to delegate interpretive authority to the administrative agency, or if the
15 agency possesses special "expertise" with regard to the legal or regulatory issues, the Court should
16 defer to the agency's interpretation. (*San Francisco Fire Fighters Local 798 v. City and County*
17 *of San Francisco* (2006) 38 Cal.4th 653, 670; *Yamaha*, supra, at p. 11.)

18 Once the Court is satisfied that the rule is within the scope of authority conferred, the
19 Court must determine whether the rule is reasonably necessary to implement the purpose of the
20 statute. (*Yamaha*, supra, 19 Cal.4th at p. 11.) Here, the Court's review is confined to the question
21 whether the classification is arbitrary, capricious or without reasonable or rational basis. (*Ibid.*)

22 Here, ARB's task under AB 32 is to create and implement the Scoping Plan to “create a
23 regulatory path for reducing GHG emissions to 1990 levels by the year 2020.” (HSC § 38550.)
24 AB 32 directs ARB to achieve this overall statutory goal through the use of “maximum
25 technologically feasible and cost-effective reductions,” but leaves the specifics of how to do so,
26 and how to balance a variety of competing concerns, up to the agency. (HSC §§ 38560.5.)

1 Furthermore, AB 32 expressly requires ARB to implement measures ARB “finds are necessary or
2 desirable” to achieve GHG emission reductions in the Plan. (HSC § 38561(b).)

3 Additionally, while the ultimate goal is to reduce emissions under AB 32, ARB must
4 utilize agency discretion to “minimize costs and maximize the total benefits... encourage early
5 action... not disproportionately impact low-income communities... receive appropriate credit for
6 early voluntary reductions... not interfere with efforts to achieve... air quality standards...
7 consider cost-effectiveness... consider overall societal benefits... minimize the administrative
8 burden... minimize leakage.” (HSC § 38562(b).)

9 Accordingly, the Court finds that the Legislature intended to delegate to ARB the authority
10 to interpret the GWSA and develop a set of measures to achieve AB 32's multiple substantive
11 goals. The Court will therefore defer to ARB's interpretation of AB 32's substantive mandates
12 unless it finds that the agency's actions are arbitrary, capricious or without reasonable or rational
13 basis.

14 **B. DISCUSSION**

15 **1. MAXIMUM TECHNOLOGICALLY FEASIBLE AND COST- 16 EFFECTIVE REDUCTIONS**

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

25 Petitioners allege that ARB’s analysis of the maximum technologically feasible and cost
26 effective measures is defective in three ways: (1) ARB improperly used AB 32’s statewide
27 emissions limit as a “floor” for measures in the Scoping Plan; (2) ARB failed to create criteria to

1 determine the cost effectiveness of the measures included in the Scoping Plan; and (3) ARB
2 excluded the agricultural and industrial sectors from regulations. As discussed below, Petitioners
3 challenge ARB's exercise of its statutory authority and discretion in compiling the measures in
4 the Scoping Plan.

5 **a. Petitioners Argue that the Scoping Plan Improperly Used the**
6 **Statewide Emissions Limit as the Target for the Amount of**
7 **Reductions to Be Achieved**

8 HSC section 38550 requires: “[b]y January 1, 2008, the state board shall. . . determine
9 what the statewide greenhouse gas emissions level was in 1990, and approve in a public hearing, a
10 statewide greenhouse gas emissions limit that is equivalent to that level to be achieved by 2020.”
11 This limit is to “remain in effect unless otherwise amended or repealed” and ARB is directed to
12 “make recommendations to the Governor and the Legislature on how to continue reductions” by
13 2020. (HSC § 38551.) ARB set the state emissions limit at 427 MMTCO₂E. (ARB026697.) AB
14 32 defines the “statewide emissions limit” as the “maximum allowable level of statewide GHG
15 emissions in 2020.” (HSC § 38505(n).)

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

21 When determining the rules and regulations for achieving the maximum technologically
22 feasible and cost effective GHG emissions reductions pursuant to HSC § 38561 it was appropriate
23 for ARB to use the state greenhouse gas emissions limit established pursuant HSC § 38550 as a
24 guide. ARB indicates throughout the Scoping Plan and the FED that it anticipates that the
25 measures included in the Plan will put California on a path towards an 80 percent reduction by
26 2050. (See, e.g., ARB026700, 26713, 26673, 27508.) It was not arbitrary and capricious or
27 without reasonable rational basis to set standards pursuant to HSCS 38561.

1 **b. Petitioners Argue that ARB Failed to Identify Clear Criteria**
2 **for Determining Cost-Effectiveness of all Maximum**
3 **Technologically Feasible Measures**

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

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

9 ARB's approach for analyzing cost-effectiveness, the "Cost of a Bundle of Strategies"
10 approach, is set forth on pages 84 and 85 of the Scoping Plan. (ARB026769-26770.) ARB
11 describes this strategy as analyzing the cost effectiveness of each of a number of methods to
12 reduce GHG, thereby establishing a range of cost effectiveness. A method within the range would
13 be satisfactory. (ARB010181.)

14 Petitioners claim the "Cost of a Bundle of Strategies" approach is flawed because ARB
15 determined the costs only of its chosen measures and used those measures to establish the range
16 of cost-effectiveness. This error results in the inability to make sound policy decisions and to
17 evaluate the cost-effectiveness of specific measures. Instead, ARB should have established the
18 range of cost-effectiveness before it chose its preferred measures.

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

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

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

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

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

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

19 ARB analyzed the potential for emissions reductions from the agricultural sector,
20 eventually determining that reducing emissions from agriculture is problematic because it is a
21 sector comprised of complex biological systems, diverse source types and a complex life cycle
22 analysis. (ARB005292, 5296-5302.) This decision was confirmed by the work conducted by the
23 Economic and Technology Advancement Advisory Committee (“ETAAC”) and the Agricultural
24 Working Group. (ARB001576.) Additionally, the Governor’s Climate Action Team estimated
25 that 82 percent of the greenhouse gas emissions from agriculture involve biological processes
26 associated with complex agro-ecosystems for which there is a substantial gap in scientific
27 knowledge and existing data. (ARB033775-33776.) As a result of the uncertain science, ARB
28 elected to rely primarily on “economic incentives such as marketable emissions reduction credits,

1 favorable utility contracts, or renewable energy incentives” and included a methane capture
2 measure to encourage investment in manure digesters at large dairies. (ARB026752.) “Monetary
3 incentives” are one of the categories of measures specified under HSC § 38561(d). Thus, under
4 the plain language of AB 32, ARB’s decision to proceed with an “incentive” approach is not an
5 exclusion of the agricultural sector.

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

11 Next, Petitioners argue ARB should have identified and recommended the maximum
12 technologically feasible and cost-effective emissions reduction measures in the industrial sector.
13 Petitioners note that while the Scoping Plan proposes direct emissions reduction measures that
14 result in reduction, they claim more significant reductions were available that were both
15 technologically feasible and cost-effective. Petitioners support this position by citing to Public
16 comments made on the October 28, 2008 Proposed Scoping Plan. (ARB023459-60.)

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

23 **2. CAP AND TRADE**

24 The Scoping Plan must facilitate the “achievement of the maximum feasible and cost
25 effective reductions of greenhouse gas emission by 2020.” (HSC § 38561(b).) ARB included a
26 cap and trade program among the comprehensive slate of emission reduction measures in its
27 Scoping Plan. Under a cap and trade program, the “cap” creates a limit on the total emissions

1 from a group of regulated sources, and generally imposes no particular limits on emissions from
2 any given firm or source. (ARB021872; (Stavin, “A Meaningful U.S. Cap-and-trade System to
3 Address Climate Change.” 32 Harv. Envtl. L. Rev. 293, 298 (2008).) The “trade” aspect of the
4 program allows the transfer or sale of permits (“allowances”) between the regulated businesses.
5 (*Id.*) If an individual source does not emit an amount equal to the amount of allowances it has, it
6 may bank them for future use or sell them to another source that emitted the pollutants in question
7 above the prescribed limits. (*Id.*)

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

14 As a preliminary matter, Respondents argue that this issue is moot because Petitioners
15 failed to properly plead it. A petition, like a civil complaint, serves to frame and limit the issues
16 and to apprise the defendant of the basis on which the plaintiff seeks recovery. (*See Hughes v.*
17 *Western MacArthur Co.* (1987) 192 Cal.App.3d 951.) Respondents argue that Petitioners relied
18 on two definitional sections of the HSC in making this challenge, sections 38505(b) and
19 38505(k)(2), yet failed to cite to these sections in their First Amended Petition.

20 While it is true that Petitioners did not cite those specific sections of the HSC in the First
21 Amended Petition, Petitioners properly plead their challenge to ARB’s inclusion of cap and trade
22 and banking system by citing to the requirements in HSC section 38561(b), which require that
23 measures and mechanisms recommended facilitate the achievement of maximum feasible and
24 cost-effective reductions. (FAC ¶¶ 104, 110.) Petitioners also properly challenged ARB’s
25 decision to join the Western Climate Initiative’s (“WCI”) system. (FAC ¶ 110.) Petitioners’
26 reference to sections 38505(b) and 38505(k) in their opening brief were simply to compare AB
27

1 32's alternative compliance with the market mechanism requirements. Thus, Petitioners properly
2 plead this challenge.

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

11 Furthermore, HSC section 38505(k)(2) defines a "market based compliance mechanism"
12 to include "banking" or other mechanisms "that result in the same greenhouse gas emission limit
13 or reduction, over the same time period, as direct compliance with greenhouse gas emission limit
14 or emission reduction measure adopted by the state board pursuant to this division." By
15 referencing "direct compliance" in the definition of § 38505(k)(2), the legislature anticipated
16 overlap between market-based mechanisms and direct regulatory measures adopted by ARB and
17 provided that the market-based mechanisms should accomplish at least the same reductions as the
18 adopted measure. There is no indication that the Legislature imposed a requirement on ARB to
19 compare market-based mechanisms and potential direct regulatory measures in the Scoping Plan.
20 This issue is separate from the CEQA imposed mandates to analyze alternative methods of GHG
21 control methods. The statute does not support the argument that ARB must demonstrate that cap
22 and trade will result in the same reductions as any direct regulation.

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

1 Finally, Petitioners argue ARB's decision to rely primarily on cap and trade for reducing
2 GHG emissions conflicts with ARB's own description of its regulatory approach to include
3 "complementary measures directed at emission sources that are included in the cap and trade
4 program." (ARB026704.) With the decision to use cap and trade as the main vehicle by which
5 emissions will be reduced, ARB skipped the determination that no other mechanisms facilitate the
6 achievement of maximum feasible and cost-effective emissions reductions. (ARB020836;
7 020842.) This argument speaks to analysis and consideration of alternate methods of GHG
8 reduction as mandated by CEQA.

9 However, ARB has not completely avoided reliance on direct emission reduction
10 measures and non-cap-and-trade reductions measures. In ARB's Scoping Plan, greenhouse gas
11 reductions are projected to come from nearly twenty non-cap-and-trade measures. (ARB026702.)
12 ARB found in the Scoping Plan that cap-and-trade was "necessary or desirable to facilitate the
13 maximum feasible and cost-effective reductions" by finding that a cap-and-trade program works
14 to compliment "direct regulations" to reduce emissions in the "capped sectors." (ARB026700-01.)
15 Given the latitude of ARB's quasi-legislative powers, it is within its discretion, right or wrong, in
16 interpreting AB 32, to choose cap and trade as the primary methodology.

17 3. PUBLIC HEALTH AND ENVIRONMENTAL ANALYSIS

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

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

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

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

7 The plain language of section 38561(d) indicates that the statute requires ARB to evaluate
8 the total costs and benefits of "the plan" itself. The time for ARB to analyze all the costs and
9 benefits of particular measures will be when ARB takes action to adopt such measures. (See HSC
10 § 38562.) This is not to suggest that ARB has license to explain every shortfall in its plan by
11 claiming it is in the program level stage and detail awaits project level planning and review.

12 However, AB 32 requires broad analysis of total potential costs and total potential
13 economic benefits of the plan but calls for more detailed consideration and analysis of the impacts
14 on low income communities, the impacts on achieving air quality standards, societal benefits and
15 other factors in the staff report of each proposed measure. (See HSC § 38562, (b)(2), (b)4 and
16 (b)(6).)

17 **a. Public Health and Environmental Impacts of the Voluntary or**
18 **Incentivized Reductions Measures**

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

25 However, Respondents counter that the administrative record contains evidence that ARB
26 analyzed the costs and benefits of potential voluntary or incentivized measures for agriculture.
27 ARB helped established the Agricultural Working Group that analyzed issues pertinent to

1 identifying and controlling greenhouse gas emissions from the agricultural sector. (ARB020826.)
2 Beyond the references to agriculture in Appendix H and the FED, the record includes a document
3 called “The Agriculture Sector Summary and Analysis.” (ARB 033775 – 033862.) This
4 document provides the Agricultural Working Group’s analysis of the sector, including evaluation
5 of the feasibility of mandating reductions as opposed to proposing voluntary or incentivized
6 measures. Ultimately, ARB proposed a voluntary approach for the agricultural sector reasoning
7 that it is a sector composed of complex biological systems, diverse source types, and complex
8 life-cycle analysis. (ARB033776.)

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

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

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

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

20 Petitioners assert that ARB’s analysis of the costs and benefits of direct regulatory and cap
21 and trade approaches was in violation of HSC § 38561(d). Petitioners argue that in evaluating the
22 public health impacts of AB 32, ARB only analyzes impacts on the State, the South Coast Air
23 Basin, and the City of Wilmington. (ARB021519-021525, ARB021534-021559.) ARB limited
24 its examination of air quality benefits to four sectors: Electricity, Fuel Combustion,
25 Transportation Fuels, and Industry. (ARB021536-37.) ARB further limited analysis by focusing
26 only on criteria air pollutants, such as NOx and fine particulate matter, and by not including toxic
27 air contaminants. (ARB021534-37.) This limited public health analysis is sharply contrasted by

1 the detailed economic analysis ARB conducted in the Scoping Plan. With respect to direct
2 regulations, ARB did not specifically assign emission reductions to individual facilities or
3 transportation corridors. (ARB021519.) ARB also admitted its estimations of statewide
4 emissions reductions were uncertain. (ARB021519.) Petitioners assert ARB had the ability to
5 estimate specific emission reductions and potential impacts from throughout the state and in other
6 regions, but failed to do so and that not including this analysis deprived decision-makers and the
7 public of important information in weighing total costs and benefits.

8 Respondents correctly assert that ARB's economic analysis does not establish any
9 requirement or standard against which to measure the public health analysis. Section 38561(d)
10 calls for ARB to conduct its analysis "using the best available economic models, emission
11 estimation techniques, and other scientific methods."

12 ARB's examination of air quality benefits was not limited to the sectors listed by
13 Petitioners, but also covered: water (ARB027323-325), recycling and waste management
14 (ARB027327-329), forests (ARB027329-330), high GWP gases (ARB027330-333) and
15 agriculture (ARB027333). AB 32 does not specify that analyses must be quantitative – as a
16 result, when it was not possible to quantify air quality benefits, a qualitative description of the
17 potential benefits was provided.

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

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

11 Petitioners' assertions are inaccurate inasmuch as ARB staff analyzed the impacts of the
12 cap and trade program, in conjunction with other measures in the Scoping Plan, in Wilmington, a
13 low-income community with a multitude of sources. (ARB027401.) One factor in choosing this
14 community is that it had a number of large industrial sources that were likely to be subject to any
15 future cap and trade regulation. ARB assumed emission reductions from cap and trade and other
16 measures could occur in a low income community like Wilmington to illustrate the potential
17 impacts of a cap and trade regulation and other Scoping Plan measures. However, ARB staff
18 made clear that their analysis showed that the benefits of these emission reductions would mostly
19 likely occur outside the community. As Appendix H states: "co-benefit emission reductions in the
20 study area [Wilmington] would produce regional health benefits. A relatively small portion of
21 these benefits would occur in the study area..." (ARB027412.)

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

1 **4. CONSIDERATION OF ALL RELEVANT INFORMATION**
2 **REGARDING OTHER GHG REDUCTION PROGRAMS**

3 HSC section 38561(c) provides that ARB “shall consider all relevant information
4 pertaining to greenhouse gas emission reduction programs in other states, localities, and nations,
5 including the northeastern states of the United States, Canada, and the European Union.” (HSC §
6 38561(c).)

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

16 Respondents counter that HSC § 38561(c) gives ARB discretion to determine what
17 information to consider regarding other GHG programs, by providing a non-exclusive list of
18 programs and leaving the determination of “relevance” to ARB. In general, a direction to
19 “consider” information, as here, is presumed to have been performed absent evidence to the
20 contrary. (Cal. Code. Evid., § 664 (“It is presumed that official duty has been regularly
21 performed.”).) Section 38561(c) does not dictate the content of the Scoping Plan – the
22 requirements for the content of the Scoping Plan are set forth in the prior section of AB 32, HSC
23 § 38561(b). Petitioners base their argument on selected excerpts of a single appendix to ARB’s
24 Scoping Plan. A review of the full record, including the entire Scoping Plan, demonstrates that
25 ARB did not abuse its discretion and gave consideration to problems experienced in other cap-
26 and-trade programs and incorporated solutions recommended by national experts. (See
27 Respondents’ Brief, 27: 1-16.) ARB’s written Responses to Public Comments on the Functional

1 Equivalent Document consider and address the same criticisms of existing cap-and-trade
2 programs that Petitioners raise. (See ARB027650-55.) Additionally, ARB conducted at least one
3 workshop and one board meeting specifically devoted to consideration of other jurisdictions'
4 programs to reduce GHG's. (See ARB005372 and ARB005389-404 [January 16, 2008
5 Workshop]; ARB009541-010174 [May, 28 2008 Board Meeting].) Petitioners may disagree with
6 ARB's conclusions, however the essential analyses were performed.

7 The Court agrees that Respondents' interpretation that Section 38561(c) leaves the
8 determination of "relevance" to ARB is overbroad. However, the record provides sufficient
9 evidence to demonstrate that ARB at least met its responsibilities under Section 38561(c).

10 C. CONCLUSION

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

15 II. PETITIONERS' CHALLENGES UNDER CEQA

16 A. STANDARD OF REVIEW

17 In a mandate proceeding to review an agency's compliance with CEQA, the Court reviews
18 the administrative record to determine whether the agency abused its discretion. (*California*
19 *Sportfishing Protection Alliance v. State Water Resources Control Bd.* (2008) 160 Cal.App.4th
20 1625, 1644.) Abuse of discretion is shown if (1) the agency's determination is not supported by
21 substantial evidence, or (2) the agency has not proceeded in a manner required by law. (*Ibid.*)

22 The substantial evidence standard of review is applied to the agency's factual
23 determinations. (*Save Our Peninsula Committee v. Monterey County Board of Supervisors*
24 (2001) 87 Cal.App.4th 99, 117-118.) For purposes of CEQA, substantial evidence means
25 "enough relevant information and reasonable inferences from this information that a fair argument
26 can be made to support a conclusion, even though other conclusions might also be reached." (Cal.
27 Code Regs, tit. 14, § 15384, subd. (a) (hereafter Guidelines).) "Argument, speculation,

1 unsubstantiated opinion or narrative, [or] evidence which is clearly erroneous or inaccurate ...
2 does not constitute substantial evidence." (*Ibid.*)

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

8 The FED is presumed legally adequate, however (*Al Larson Boat Shop, Inc. v. Board of*
9 *Harbor Commissioners* (1993) 18 Cal.App.4th 729, 740; Pub. Resources Code, § 21167.3.), and
10 the agency's certification of the EIR is presumed correct (*Sierra Club v. City of Orange* (2008)
11 163 Cal.App.4th 523, 530.) Petitioners therefore bear the burden of proving that the FED is
12 legally inadequate and that the agency abused its discretion in certifying it. (*Ibid.*; see also *Al*
13 *Larson Boat Shop*, supra, at p. 740.)

14 In reviewing an agency's actions under CEQA, the court must bear in mind that "the
15 Legislature intended the act 'to be interpreted in such manner as to afford the fullest possible
16 protection to the environment within the reasonable scope of the statutory language.'" (*Laurel*
17 *Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 390
18 (hereafter *Laurel Heights*)). "If CEQA is scrupulously followed, the public will know the basis
19 on which its responsible officials either approve or reject environmentally significant action, and
20 the public, being duly informed, can respond accordingly to action with which it disagrees." (*Id.*
21 at p. 392.) "The EIR process protects not only the environment but also informed self-
22 government." (*Ibid.*) "The court does not pass upon the correctness of the EIR's environmental
23 conclusions, but only upon its sufficiency as an informative document." (*Ibid.*)

24 B. DISCUSSION

25 1. CERTIFIED REGULATORY PROGRAM

26 State regulatory programs that meet certain environmental standards and are certified by
27 the Secretary of the Natural Resources Agency are exempt from CEQA's requirements for

1 preparation of EIRs. (Pub. Resources Code, § 21080.5; Guidelines, §§ 15250-15253.)
2 Environmental review documents prepared under the agency's own regulations are used instead of
3 the documents that would be required by CEQA. (Pub. Resources Code, § 21080.5, subd. (a);
4 Guidelines, § 15250.) When conducting its environmental review and preparing its
5 documentation, a certified regulatory program remains subject to other provisions of CEQA,
6 including CEQA's broad policy goals and substantive standards. (Guidelines, § 15250; *City of*
7 *Arcadia v. State Water Resources Control Bd.* (2006) 135 Cal.App.4th 1392, 1422.) These
8 include the duties to identify a project's adverse environmental effects, to mitigate those effects
9 through adoption of feasible alternatives or mitigation measures, and to justify its action based on
10 specific economic, social, or other conditions. (See *Sierra Club v. State Bd. of Forestry* (1994) 7
11 Cal.4th 1215, 1228, 1230-1231). Thus, the documentation required of a certified program
12 essentially duplicates what is required for an EIR. (See *Citizens for Non-Toxic Pest Control v.*
13 *Department of Food & Agriculture* (1986) 187 Cal.App.3rd 1575, 1586.) The CEQA Guidelines
14 governing the contents of EIRs do not, however, directly apply to an environmental document
15 prepared by a certified program. (*City of Arcadia*, supra, 135 Cal.App.4th at p. 1422.)

16 The documentation prepared under a certified program must address the "significant or
17 potentially significant effects" that a project might have on the environment. (Guidelines, §
18 15252, subd. (a)(2); *City of Arcadia*, supra, 135 Cal.App.4th at p. 1422.) Alternatives to the
19 proposed activity must also be described. (Pub. Resources Code, § 21080.5, subd. (d)(3)(A).)
20 Just as for EIRs, environmental documents prepared by certified programs must use scientific and
21 other empirical evidence to support their conclusions. (See *Ebbetts Pass Forest Watch v.*
22 *California Dept. of Forestry and Fire Protection* (2008) 43 Cal.4th 936.)

23 The standard of review applicable to a challenge to a certified program's environmental
24 documentation is the same as that applied to an EIR. (*California Sportfishing Protection*
25 *Alliance*, supra, 160 Cal.App.4th at p. 1644.) The court makes a limited inquiry into whether the
26 agency prejudicially abused its discretion; abuse of discretion is established if the decision was
27 not based on substantial evidence in the record or if the agency did not proceed in the manner

1 required by law in approving the environmental document. (*Ibid.*) In the absence of contrary
2 evidence in the record, the court will assume that the agency complied with its official duties
3 under the program. (*City of Sacramento v. State Water Resources Control Bd.* (1992) 2
4 Cal.App.4th 960, 976.)

5 ARB obtained certification of its regulatory program in 1978. (See Respondents' Request
6 for Judicial Notice (RJN), Exh. A.) The applicable provisions of the certified regulatory program
7 can be found at California Code of Regulations, title 17, sections 60005-60007.

8 **2. PROGRAM EIRS AND TIERING**

9 ARB characterizes its FED as a first-tier, programmatic document, to be followed by
10 subsequent rule-specific environmental review. (See Respondents' Brief (RB), pp. 32-36.)
11 Petitioners do not dispute the appropriateness of programmatic-level review. (See Petitioners'
12 Opening Brief (PB), p. 27: 5-7.)

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

21 Program EIRs are commonly used in conjunction with the process of tiering. (*In re Bay-*
22 *Delta Programmatic Environmental Impact Report Coordinated Proceedings* (2008) 43 Cal.4th
23 1143, 1170 (hereafter *In re Bay Delta*); Guidelines, § 15152, subd. (h)(3).) "'Tiering' refers to the
24 coverage of general matters in broader EIRs (such as general plans or policy statements) with
25 subsequent narrower EIRs." (*In re Bay Delta*, at p. 1170; Guidelines, § 15385.) At the first-tier
26 program stage, the environmental effects may be analyzed in general terms, without the level of
27 detail appropriate for second-tier review. (*In re Bay Delta*, at p. 1169.) The analysis in the EIR

1 should be tailored to the first tier of the planning process, with the understanding that additional
2 detail will be provided when specific second-tier projects are under consideration. (*Id.* at p.
3 1172.)

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

6 **3. COMPLIANCE WITH THE FUNCTIONAL EQUIVALENT OF CEQA**

7 **a. ARB's Discussion of Impacts Is Sufficiently Detailed for a** 8 **Program-Level FED**

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

18 "In addressing the appropriate amount of detail required at different stages in the tiering
19 process, the CEQA Guidelines state that "[w]here a lead agency is using the tiering process in
20 connection with an EIR for a large-scale planning approval, such as a general plan or component
21 thereof ..., the development of detailed, site-specific information may not be feasible but can be
22 deferred, in many instances, until such time as the lead agency prepares a future environmental
23 document in connection with a project of a more limited geographic scale, as long as deferral does
24 not prevent adequate identification of significant effects of the planning approval at hand.'" (*In re*
25 *Bay Delta*, supra, 43 Cal.4th at p. 1170; Guidelines, § 15252, subd. (c).) Tiering does not excuse
26 the lead agency from adequately analyzing reasonably foreseeable significant environmental
27 effects of the project and does not justify deferring such analysis to a later tier EIR or negative

1 declaration. (Guidelines, § 15152, subd. (b).) However, the level of detail contained in a first tier
2 EIR need not be greater than that of the program, plan, policy, or ordinance being analyzed.

3 (*Ibid.*) A more general analysis will suffice when the EIR evaluates a general policy or planning
4 proposal. (Guidelines, § 15146.)

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

18 An EIR must contain a sufficient degree of analysis regarding "reasonably anticipated
19 future projects" to provide decision makers with the information needed to make an intelligent
20 decision concerning the project's environmental consequences. (*Rio Vista*, supra, 5 Cal.App.4th
21 at p. 370; Guidelines, § 15151.) An evaluation of the environmental effects of a proposed project
22 need not be exhaustive, but the sufficiency of an EIR is to be reviewed in light of what is
23 reasonably feasible. (Guidelines, § 15151.) The courts have looked not for perfection but for
24 adequacy, completeness, and a good faith effort at full disclosure. (*Ibid.*) A reviewing court will
25 resolve any disputes regarding the adequacy of the analysis in favor of the lead agency if there is
26 any substantial evidence in the record supporting the EIR's approach. (*Laurel Heights*, supra, 47
27 Cal.3d at p. 409.) Substantial evidence includes facts, reasonable assumptions predicated on

1 facts, and expert opinion supported by facts, but does not include argument, speculation, or
2 unsubstantiated opinion. (Pub. Resources Code, §§ 21080, subd. (e), 21082.2, subd. (c).)

3 Petitioners first contend that ARB improperly deferred analysis of the impacts of potential
4 future biofuel production facilities, refineries and power plants to subsequent project-level FEDs.
5 (PB, p. 29: 3-16.) The FED estimates that as a result of the proposed LCFS identified in the
6 Scoping Plan, 10-30 new biofuel production facilities will be built in California. (ARB027517.)
7 The FED includes a map of current and proposed biofuel facilities in the state, and provides a
8 general description of where potential future facilities might be located. (ARB027519-027520.)
9 ARB concluded that the "conversion of biomass feedstocks into energy can result in air quality
10 impacts... [c]riteria and toxic pollutants, as well as greenhouse gas emissions, will need to be
11 assessed for these facilities during the siting and permitting processes." (ARB027518.)

12 Petitioners argue that because ARB knows where these facilities will likely be located, a
13 more detailed impacts analysis must be included in the Scoping Plan FED. (PB, p. 29: 11-16.) In
14 support of their arguments, Petitioners cite *Kings County Farm Bureau v. City of Hanford* (1990)
15 221 Cal.App.3d 692 and *Laurel Heights*, supra, 47 Cal.3d 376. (See PB, pp. 28-30.) However,
16 the factual findings in those cases are inapplicable here because they involve project-level EIRs
17 rather than program-level EIRs.

18 Instead, *Rio Vista*, supra, 5 Cal.App.4th 351, is instructive here. In *Rio Vista*, the court
19 considered the sufficiency of a program-level EIR for a county's hazardous waste management
20 plan. (*Id.* at p. 362.) At issue was whether the county had violated CEQA by failing to
21 adequately analyze the environmental impacts of constructing hazardous waste disposal facilities
22 at identified potential sites. (*Id.* at p. 373.) The Plan itself made no commitment to future
23 facilities, and instead merely furnished siting criteria and designated generally acceptable
24 locations. (*Id.* at p. 371.) Both the Plan and the EIR stated that no actual sites had been
25 recommended or proposed, and that subsequent project EIRs would be prepared in the event
26 specific facilities were proposed in the future. (*Ibid.*)

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

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

16 Similarly here, the FED discusses the potential impacts of future biofuel production
17 facilities in general terms, but defers more detailed discussion of environmental impacts to the
18 LCFS rulemaking stage. (ARB027518.) The Scoping Plan itself does not recommend or propose
19 any future facilities, and therefore a general discussion of potential impacts was sufficient.

20 Petitioners attempt to distinguish *Rio Vista* on the grounds that the plan in that case was an
21 initial working document to be updated and reviewed periodically. (See Petitioners' Reply Brief
22 (PRB), p. 18: 7-9.) Here, they argue, the Scoping Plan is the framework for fulfilling A.B. 32's
23 mandates, and therefore the FED must contain a more detailed analysis of impacts. (PRB, p. 18:
24 9-11.) However, Petitioners offer no evidence to support this distinction.

25 Also instructive here is *In re Bay-Delta*, supra, 43 Cal.4th 1143. In that case, the court
26 considered the sufficiency of a program-level EIR for a long-term water management plan. (*Id.* at
27 p. 1151.) At issue was whether CALFED had violated CEQA by failing to adequately analyze the

1 environmental impacts of proposed "second-tier" projects in the project-level EIR. (*Id.* at p.
2 1152.) The EIR described the Program as "a general description of a range of actions that will be
3 further refined, considered, and analyzed for site-specific environmental impacts as part of
4 second- and third-tier environmental documents prior to making a decision to carry out these later
5 actions. (*Id.* at pp. 1156-1157.)

6 The EIR provided a broad and comprehensive overview of the potential actions that could
7 be taken by the Program. (*In re Bay Delta*, supra, 43 Cal.4th at p. 1170.) It described, in general
8 terms, the overall and long-term environmental consequences of the potential proposed actions,
9 but did not analyze site-specific impacts of future projects at proposed locations. (*Id.* at pp. 1170,
10 1173, 1175.)

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

16 Similarly here, the Scoping Plan FED describes the environmental consequences of the
17 potential LCFS program, but does not analyze site-specific impacts of future facilities.
18 (ARB027518.) Such details were properly deferred to the environmental review process for the
19 LCFS rulemaking.

20 Petitioners attempt to distinguish the *Bay Delta* case by suggesting that the EIR in that
21 case was sufficient because it properly considered both statewide and regional impacts, unlike the
22 Scoping Plan FED, which did not consider regional impacts. (PRB, p. 21 fn. 7.) However, the
23 sufficiency of the EIR in *Bay Delta* did not depend on those facts.

24 Petitioners next contend that ARB's discussion of cumulative impacts is overly broad,
25 conclusory, and contradictory. (PB, p. 30: 6-11.) The FED states that overall, the Scoping Plan is
26 expected to "substantially improve air quality." (ARB027512.) Petitioners argue that this
27 conclusion is unsupported by facts or data and is contradicted by evidence in the record that some

1 of the Scoping Plan's proposed measures may actually cause localized pollution hotspots. (PB, p.
2 30: 10-11; ARB023434-35, 023450-53.)

3 In response, ARB argues that it analyzed cumulative impacts at numerous places,
4 including: aesthetics, air quality, agricultural resources, biological resources, cultural resources,
5 energy demand, geology and soils, from hazardous materials, land use, mineral resources, from
6 noise, population and housing, public services, recreation, solid waste, transportation, water
7 resources, and public health and safety. (RB, p. 38: 19-23, 39: 1; ARB027511-12, 027529,
8 027531, 027534-35, 027537-38, 027542, 027545-51, 027553, 027560.) More specifically, as to
9 the proposed cap and trade regulation, ARB concludes that "cap and trade ... is not expected to
10 result in adverse air quality impacts." (ARB027513.) ARB reaches this conclusion by observing
11 that there is nothing inherent in the cap and trade system which would "provide an incentive for
12 facilities to increase emissions beyond the levels expected in the absence of implementing A.B.
13 32." (ARB027514.) Additionally, as to the LCFS regulation, ARB recognizes that while the
14 cumulative impact of implementing the recommended measures may be to decrease emissions,
15 there could be localized air quality impacts in areas where future natural gas generation facilities
16 are sited. (ARB027512.)

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

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

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

26 ARB's certified regulatory program states that "staff reports ... shall address ... feasible
27 alternatives to the proposed action which would substantially reduce any significant adverse

1 impact identified." (Cal. Code Regs., tit. 17, § 60005, subs. (b).) When conducting its
2 environmental review and preparing its documentation under a certified regulatory program, an
3 agency must still comply with the broad policy goals and substantive standards of CEQA. (*City*
4 *of Arcadia*, supra, 135 Cal.4th at p. 1422.)

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

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

1 thereby protecting informed self-government." (*Kings County Farm Bureau*, supra, at p. 733;
2 *Laurel Heights*, supra, at p. 392.)

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

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

17 Petitioners contend that ARB's discussion of alternatives is unsupported by facts or data
18 and therefore gives the public no indication as to why ARB chose the Scoping Plan over the other
19 alternatives. (See PB, p. 31-34.)

20 The FED contains a discussion of five alternatives to the Scoping Plan. (ARB027562-
21 027578.) Alternative 1 describes the "no project" or "business as usual" alternative.
22 (ARB027563-027572.) Alternative 2 is a variation of the strategies and measures proposed by the
23 Scoping Plan. (ARB027573.) Alternatives 3, 4 and 5 are programs that rely primarily on cap and
24 trade, source-specific regulations, or a carbon fee. (ARB027573-027575.)

25 Alternative 1, or the "no project" alternative is described in ten pages of the FED. (See
26 ARB027563-027572.) In its discussion, ARB uses emissions data from past years in order to
27

1 forecast 2020 emissions from a variety of sectors in the absence of any regulations.

2 (ARB027563.)

3 Alternatives 2 through 5, by contrast, are collectively described in just over three pages of
4 the FED. (See ARB027572-027575.) In its discussion, ARB states that it "expect[s] that
5 environmental impacts (both positive and adverse) of all the alternatives would be similar to the
6 impacts expected from [the] mix of measures identified in the Scoping Plan" because they target
7 the same basic level of emissions reductions under AB 32. (ARB027572-027573.) However,
8 ARB provides little to no facts or data to support this conclusion, noting only that "[d]ifferent
9 approaches could mean more or less reduction activity in any given sector," and "[w]hile the
10 magnitude of impacts might increase or decrease, it would be speculative to try to estimate the
11 effects at this time, before the details of specific measures are developed." (ARB027572-
12 027573.)

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. (See ARB 027573, 027574, 027575.)

17 ARB argues that its discussion of alternatives was sufficiently detailed for a programmatic
18 document, and that it is inconsistent for the Court to find its discussion of impacts to be adequate,
19 yet insufficient as to alternatives. (RB, p. 41: 12-16.) Impacts and alternatives cannot be equated
20 given the facts of the instant case. As discussed in the *Rio Vista* and *Bay Delta* cases (see above),
21 detailed discussion of site-specific projects such as biofuel and waste treatment plants may be
22 deferred until such projects are actually planned and implemented. By contrast, consideration of
23 alternatives here is central to the analysis and decision-making process of determining GHG
24 reduction methodology. While a program-level EIR need not be as detailed as a project-level
25 EIR, ARB must still provide the public with a clear indication based on factual analysis as to why
26 it chose the Scoping Plan over the alternatives. ARB's extensive evaluation of the proposed cap
27 and trade program in Chapter II of the Scoping Plan provides the public with information about

1 cap and trade only. CEQA requires that ARB undertake a similar analysis of the impacts of each
2 alternative so that the public may know not only why cap and trade was chosen, but also why the
3 alternatives were not.¹

4 Most notably, the Scoping Plan fails to provide meaningful information or discussion
5 about the carbon fee (or carbon tax) alternative in the scant two paragraphs devoted to this
6 important alternative. The brief fifteen line reference to the carbon fee alternative consists almost
7 entirely of bare conclusions justifying the cap and trade decision. Informative analysis is absent.
8 ARB fails to describe what a carbon fee program consists of, how fees or taxes are established,
9 criteria for setting the amounts, what the California, United States and worldwide experience has
10 been, how it is administered and by whom, what are the alternatives for use of the revenue and
11 what sectors of the economy it should be considered for, or not, and why. It does not provide the
12 basic information necessary for ARB and the public to be informed about this alternative and its
13 place in California's massive effort to improve the environment pursuant to legislative mandate.

14 Although ARB need not discuss the site-specific or speculative impacts of each
15 alternative, it may not use the "programmatic" label to justify an analysis which is inadequate for
16 informed public review and informed decision making. Furthermore, ARB's assertion that a more
17 detailed analysis of alternatives will come later during the rulemaking stage (RB, p. 45 fn. 34) is
18 irrelevant to the Court's determination that more analysis is necessary at this stage. CEQA's
19 demand for meaningful information "is not satisfied by simply stating that it will be provided in
20 the future." (*Santa Clarita Organization for Planning the Environment v. County of Los Angeles*
21 (2003) 106 Cal.App.4th 715, 723.)

24 ¹ ARB cites a litany of statements found in the Scoping Plan and the Administrative Record which it claims to be facts
25 constituting substantial evidence in support of its conclusions. (See Respondent's Objections to the Tentative
26 Statement of Decision, pp. 5-10.) The Court finds that these statements are largely unexplained, generalized
27 assertions lacking in informative value and appearing in the context of justifying or promoting cap and trade. For
28 example, "[a] carbon fee, like a cap and trade program, is a way to price carbon." This merely states the obvious and
conveys no substantive information to the public. The Court also notes that the statements drawn from the multi-
thousand page, 19 CD Administrative Record lack accessibility by the interested public. The Court finds the
referenced statements do not constitute substantial evidence in support of ARB's conclusions.

1 ARB seeks to create a *fait accompli* by premature establishment of a cap and trade
2 program before alternatives can be exposed to public comment and properly evaluated by ARB
3 itself. ARB's discussion must include a factual analysis of each of the alternatives to the Scoping
4 Plan, not merely a discourse on cap and trade justification, and as Petitioners point out, data is
5 available to analyze. (See PB, p. 37: 7-22.) ARB could have, and should have used data from
6 existing programs, studies, and reports to analyze the potential impacts of the various
7 alternatives.²

8 The Court concludes that because ARB failed to adequately describe and analyze
9 alternatives sufficient for informed decision-making and public review, it failed to proceed in the
10 manner prescribed by law. Therefore, ARB abused its discretion in certifying the FED as
11 complete.

12 **c. ARB Improperly Approved the Scoping Plan Prior to**
13 **Completing Its Environmental Review**

14 Petitioners argue that ARB improperly approved and began implementing the Scoping
15 Plan prior to completing its obligation to review and respond to public comments. (See PB, pp.
16 38-41.) In support of this contention, Petitioners point to (1) the specific language of Resolution
17 08-47, (2) a public meeting that ARB held to discuss implementation of the Scoping Plan, and (3)
18 the fact that no changes were made to the FED or the Scoping Plan after the time Resolution 08-
19 47 was adopted.

20 On December 11, 2008, during a noticed public hearing, ARB adopted Resolution 08-47,
21 which stated that "subject to the Executive Officer's approval of written responses to
22 environmental issues that have been raised, the Board is initiating steps toward the final approval
23 of the Proposed Climate Change Scoping Plan and its Appendices." (ARB027612-027613.) The
24 Resolution further stated that ARB had prepared an FED for the Scoping Plan which indicated
25

26 ² ARB claims that such information from programs, studies and reports is not found in the Administrative Record.
27 (Respondent's Objections to the Tentative Statement of Decision, p. 14.) It was ARB's own decision not to include
28 such information in the Administrative Record, and consequently the Scoping Plan, and not to expose it to public
scrutiny and comparison.

1 that the project could have adverse environmental impacts but that these impacts were
2 speculative, and that it had not identified any feasible alternatives at this time. (ARB027611.)

3 After adopting Resolution 08-47, but prior to issuing its responses to public comments on
4 the FED, ARB held a public workshop to summarize the process to be followed in implementing
5 the Scoping Plan. (ARB014315-014316.) The notice for the January 29, 2009 workshop stated
6 that ARB had approved the Scoping Plan at its December, 2008 meeting. (ARB014315.)

7 Finally, on May 7, 2009, the Executive Officer signed Executive Order G-09-001,
8 approving the responses to comments on the FED and adopting the Scoping Plan. (ARB027689-
9 027692.) No changes were made to either the FED or the Scoping Plan as adopted by Resolution
10 08-47. (PB, p. 40: 2-3.)

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

17 ARB argues that it complied with the requirements of its certified regulatory program by
18 reviewing and responding to public comments prior to the Executive Officer's final approval of
19 the Scoping Plan on May 7, 2009. (See RB, pp. 47-50.) However, ARB has interpreted its
20 regulation in a way that undermines CEQA's goal of informed decision-making. "The written
21 response requirement ensures that members of the Commission will fully consider the
22 information necessary to render decisions that intelligently take into account the environmental
23 consequences." (*Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal.4th 105, 133.)
24 "It also promotes the policy of citizen input underlying CEQA." (*Ibid.*) "When the written
25 responses are prepared and issued after a decision has been made, however, the purpose served by
26 such a requirement cannot be achieved." (*Ibid.*)

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

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

13 C. SCOPE OF REMEDY

14 ARB argues that the Scoping Plan is not a condition precedent to the adoption of the
15 regulations it describes, because AB 32 provides independent rulemaking authority in Section
16 38562. (See Respondents' Objections to the Tentative Statement of Decision, p. 17: 16-19.)
17 Therefore, ARB argues, the Court may not issue an order enjoining "implementation of proposed
18 measures" even if it may issue an order requiring that ARB revise the FED to comply with
19 CEQA. (*Id.* at p. 16: 14-15.)

20 Under Public Resources Code section 21168.9, if a court finds that an agency's decision
21 has been made in violation of CEQA, and that a specific activity or activities will prejudice the
22 consideration of alternatives to the project, it may enjoin any or all activities that could result in
23 an adverse change to the physical environment until the agency has come into compliance with
24 CEQA.

25 As discussed in Part I.A. above, the Court, not the agency, has final responsibility for the
26 interpretation of the law under which the regulation was issued. (*Yamaha*, supra, 19 Cal.4th at p.
27 11 fn. 4.) Although the Court has deferred to ARB's expertise in interpreting AB 32's substantive

1 mandates, it cannot defer to ARB's erroneous interpretation of AB 32's procedural mandates. To
2 find that ARB's rulemaking authority under AB 32 is completely severable from its obligation to
3 prepare a Scoping Plan would render that obligation an expensive and meaningless waste of time.
4 Continued rulemaking and implementation of cap and trade will render consideration of
5 alternatives a nullity as a mature cap and trade program would be in place well advanced from the
6 premature implementation which has already taken place. In order to ensure that ARB adequately
7 considers alternatives to the Scoping Plan and exposes its analysis to public scrutiny prior to
8 implementing the measures contained therein, the Court must enjoin any further rulemaking until
9 ARB amends the FED in accordance with this decision.

10 **CONCLUSION**

11 **I. PETITIONERS' CHALLENGES UNDER AB 32**

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

14 **II. PETITIONERS' CHALLENGES UNDER CEQA**

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

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

23 Under Public Resources Code § 21168.9(b), this Court will retain jurisdiction over ARB's
24 proceedings by way of a return to this peremptory writ of mandate until the Court has determined
25 that ARB has complied with the provisions of CEQA.

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DATED: MAR 17 , 2011

ERNEST H GOLDSMITH

HON. ERNEST H. GOLDSMITH
Judge of the Superior Court

Superior Court of California
County of San Francisco

ASSOCIATION OF IRRITATED RESIDENTS,
an unincorporated association, et al.,

Petitioners and Plaintiffs,

vs.

CALIFORNIA AIR RESOURCES BOARD, et al.,

Respondents and Defendants.

Case No.: CPF-09-509562

CERTIFICATE OF MAILING
(CCP 1013a (4))

I, Linda Fong, a Deputy Clerk of the Superior Court of the County of San Francisco, certify that I am not a party to the within action.

On March 18, 2011, I served the attached **STATEMENT OF DECISION: ORDER GRANTING IN PART PETITION FOR WRIT OF MANDATE** by placing a copy thereof in a sealed envelope, addressed as follows:

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

Dated: March 18, 2011

T. MICHAEL YUEN, Clerk

By:


Linda Fong, Deputy Clerk