

1 **I. INTRODUCTION**

2 1. In California, low-income communities and communities of color have the most  
3 significant exposure to air pollutants. If this pattern remains unaltered, these communities will  
4 be most severely impacted by both climate change and California’s regulatory response to  
5 climate change.  
6

7 2. Petitioners Association of Irrigated Residents, California Communities Against  
8 Toxics, Coalition for a Safe Environment, Communities for a Better Environment, Society for  
9 Positive Action, West County Toxics Coalition, Angela Johnson Meszaros, Caroline Farrell, Dr.  
10 Henry Clark, Jesse N. Marquez, Martha Dina Arguello, Shabaka Heru, and Tom Frantz  
11 (collectively “AIR” or “Petitioners”), petition this Court for a Writ of Mandate directing  
12 Respondent California Air Resources Board (“ARB”) to revise its Climate Change Scoping Plan  
13 and Appendices (“Scoping Plan” or “Plan”), including Appendix J, Functional Equivalent  
14 Document (“FED”) to comply with the California Global Warming Solutions Act of 2006,  
15 Health & Safety Code §§ 38500 *et seq.* (hereinafter “AB 32”), the California Environmental  
16 Quality Act (“CEQA”), Public Resources Code §§ 21000 *et seq.* and the CEQA Guidelines, 14  
17 California Code of Regulations §§ 15000 *et seq.* (“CEQA Guidelines”). As approved by ARB,  
18 the Scoping Plan does not comply with the requirements of AB 32 and the FED fails to comply  
19 with CEQA.  
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22 3. California’s legislature recognized that global warming is a serious threat to the  
23 state’s economic and environmental well-being, public health and natural resources. The  
24 legislature intended AB 32 implementation to place California at the forefront of the worldwide  
25 effort to reduce greenhouse gas emissions and build upon California’s tradition of environmental  
26

1 leadership both nationally and internationally. *See* Health & Safety Code § 38501. AB 32  
2 includes specific equity requirements for implementing regulations in order to avoid  
3 disproportionate impacts on low-income communities and communities of color. AB 32 intends  
4 for ARB to understand the overall environmental and economic impacts of its efforts to reduce  
5 greenhouse gas emissions before implementing its regulatory program.

7 4. ARB’s Scoping Plan, which outlines the regulatory pathway for the next five  
8 years, misses the opportunities AB 32 presents and more importantly, fails to adhere to the  
9 mandates of AB 32. The Plan (a) fails to achieve the maximum technologically feasible and  
10 cost-effective reductions; (b) fails to require emissions reduction measures for significant sources  
11 of emissions, namely industrial and agricultural sources; (c) does not develop any policies to  
12 avoid the pitfalls of other greenhouse gas emission trading programs and fails to address how  
13 ARB will monitor and enforce reductions in a regional market; (d) fails to assess the likely  
14 impacts of proposed policy choices and regulatory programs and fails to propose policies to  
15 ensure that compliance with chosen measures will not disproportionately impact already  
16 overburdened communities; and (e) fails to prevent increases in criteria and toxic co-pollutant  
17 emissions.

20 5. Instead, the Scoping Plan’s analysis acts as a *post hoc* rationalization for  
21 the policy decisions already chosen by ARB. ARB’s faulty analysis is in direct violation of its  
22 legislative mandate to transparently and collaboratively examine total potential costs and benefits  
23 of various policies, and to choose the measures that would maximize the total potential benefits  
24 for all of California.

26 6. In addition to violating AB 32’s mandates, ARB also violated CEQA by

1 certifying a FED that (1) fails to comply with the requirements for programmatic review; (2) fails  
2 to analyze the direct, indirect and cumulative impacts of the Plan; and (3) fails to adequately  
3 analyze alternatives to the measures included in the Plan.

4  
5 7. ARB also violated CEQA by (1) failing to provide for full public participation in  
6 the decision-making process; and (2) approving the FED and taking steps to implement the  
7 Scoping Plan before it had certified the FED.

8 8. Petitioners bring this action to require ARB to comply the law and fulfill the  
9 promise of AB 32 by living up to its legislative mandate: to achieve the maximum  
10 technologically feasible and cost-effective reductions of greenhouse gases by including reduction  
11 measures for all major sources of greenhouse gas emissions while maximizing the co-benefits of  
12 the Plan and ensuring that California's global warming policy does not disproportionately impact  
13 low-income communities and communities of color already burdened with a greater share of  
14 California's air pollution.

15  
16 9. Petitioners and the general public will suffer irreparable harm due to ARB's  
17 failure to fully assess and achieve the maximum feasible and cost-effective reductions of  
18 greenhouse gas emissions (and resultant reduction of toxic co-pollutants). Petitioners will also  
19 be harmed by ARB's failure to address the impacts suffered by those regions of the state with the  
20 most significant exposure to air pollutants unless this Court compels ARB to comply with its  
21 statutory duties. Petitioners hereby request that this Court issue a Writ of Mandate directing  
22 ARB to draft and approve a Scoping Plan and FED that meet the requirements of AB 32 and  
23 CEQA.  
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25

## 26 **II. PARTIES**

1           10.     Petitioner and Plaintiff ASSOCIATION OF IRRITATED RESIDENTS (“AIR”)  
2 is an unincorporated association that advocates for air quality and environmental health in the  
3 San Joaquin Valley. Members reside near large dairies and other polluting industries in Kern,  
4 Tulare, Kings, Fresno, and Stanislaus counties. AIR provided comments to ARB on the Scoping  
5 Plan and the early action measures to advocate for air quality.  
6

7           11.     Petitioner and Plaintiff CALIFORNIA COMMUNITIES AGAINST TOXICS  
8 (“CCAT”), a project of the Agape Foundation, is a California non-profit dedicated to protecting  
9 environmental health and justice in California. CCAT advocates in the public interest for clean  
10 air, clean water, and protective toxic site cleanups, as well as food quality and food security for  
11 local communities. CCAT distributes educational material and holds regular community  
12 trainings where residents can learn about the impact of pollution on their health and well-being.  
13 CCAT appears before federal, state and locals agencies to advocate for protective and just  
14 environmental policies. Jane Williams, the executive director of CCAT, serves as the co-chair of  
15 the Environmental Justice Advisory Committee (“EJAC”). CCAT provided testimony before  
16 ARB on the Scoping Plan and the early action measures.  
17

18           12.     Petitioner and Plaintiff COALITION FOR A SAFE ENVIRONMENT (“CSE”) is  
19 a non-profit environmental justice community organization headquartered in Wilmington, CA.  
20 CSE evaluates the Port of Los Angeles’s project proposals and environmental impact reports and  
21 provides oral testimony and submits written comments. CSE has members in Wilmington, San  
22 Pedro, Long Beach and Carson. CSE provided testimony before ARB on the Scoping Plan and  
23 the early action measures.  
24

25           13.     Petitioner and Plaintiff COMMUNITIES FOR A BETTER ENVIRONMENT  
26

1 “CBE”) is a 30-year old social justice organization focusing on environmental health and justice,  
2 with thousands of members statewide. Their members in working class communities of color  
3 live fence-line to toxic industry. These communities suffer from disproportionately high rates of  
4 asthma and respiratory illnesses, heart problems, cancer, low birthrates, and miscarriages. CBE  
5 submitted detailed comments to ARB on technical solutions to address climate change and  
6 environmental justice, and outlined several sets of recommendations voiced by the EJAC.  
7

8 14. Plaintiff and Petitioner SOCIETY FOR POSITIVE ACTION (“SPA”) is a non-  
9 profit grassroots community-based environmental justice organization founded in 1999 to  
10 achieve its mission of helping communities in the Los Angeles basin fight disproportionate  
11 impacts from local polluters. Society for Positive Action is led by and serves low-income  
12 communities in Los Angeles who would be significantly impacted by the measures included in  
13 ARB's Plan. SPA provided testimony before ARB on the Scoping Plan and the early action  
14 measures.  
15

16 15. Petitioner and Plaintiff WEST COUNTY TOXICS COALITION (WCTCT) is a  
17 California non-profit, multi-racial membership organization founded in 1986 to empower low  
18 and moderate-income residents to exercise greater control over environmental problems that  
19 impact their quality of life in Contra Costa County, particularly West Contra Costa County, in  
20 Northern California. WCTC provided testimony before ARB on the Scoping Plan and the early  
21 action measures.  
22

23 16. Petitioner and Plaintiff ANGELA JOHNSON MESZAROS is an environmental  
24 justice activist who has worked to protect communities of color from air pollution and other  
25 environmental assaults for more than 15 years. She is also co-chair of the EJAC and in that  
26

1 capacity commented extensively before the ARB regarding the Scoping Plan.

2 17. Petitioner and Plaintiff CAROLINE FARRELL is a resident of Bakersfield,  
3 California. Ms. Farrell is the Acting Executive Director of The Center on Race, Poverty and the  
4 Environment and has spent the last 10 years advocating for environmental justice communities to  
5 ensure that laws and regulations protect the most vulnerable communities' public health and their  
6 environment. Ms. Farrell also served on the EJAC, and commented before ARB on the Scoping  
7 Plan and the early action measures to advocate for environmental justice.  
8

9 18. Petitioner and Plaintiff JESSE N. MARQUEZ is a resident of Wilmington,  
10 California. Mr. Marquez is the founder and Executive Director of the Coalition for a Safe  
11 Environment. Mr. Marquez is a member of the Environmental Justice Advisory Committee and  
12 has appeared and submitted comments to the ARB Board in regard to ARB's Scoping Plan.  
13

14 19. Petitioner and Plaintiff DR. HENRY CLARK is a resident of Richmond,  
15 California. Dr. Clark has been the Executive Director of the West County Toxics Coalition for  
16 over 19 years. Dr. Clark previously served as the Co-Chair of the CALFED Environmental  
17 Justice Subcommittee. Dr. Clark also served on the EJAC, and has provided testimony before  
18 ARB on the Scoping Plan and the early action measures to advocate for public health protections.  
19

20 20. Petitioner and Plaintiff MARTHA DINA ARGUELLO is a resident of Los  
21 Angeles working to advance public health in California and a member of the EJAC. She  
22 provides Public Health Expertise and has provided testimony before ARB on the Scoping Plan  
23 and the early action measures to advocate for air quality.  
24

25 21. Petitioner and Plaintiff SHABAKA HERU is a resident of California and the  
26 County of Los Angeles. Mr. Heru is a resident and member of a South Los Angeles community  
27

1 that will be affected by the environmental impacts of ARB's Plan, including but not limited to air  
2 quality, biological resources, geological resources, hazardous materials, water quality, and  
3 cumulative impacts from various measures included in the Plan. Mr. Heru's personal health, life,  
4 well-being, safety, quality of life, and future economic sustainability may be significantly  
5 impacted by ARB's Scoping Plan to address GHG emissions. Mr. Heru is a member of the EJAC  
6 and has appeared and given verbal comments to the ARB Board in regard to ARB's Scoping  
7 Plan.  
8

9           22.     Petitioner and Plaintiff TOM FRANTZ is a resident of Shafter, California. Mr.  
10 Frantz serves as the President of the Association of Irrigated Residents, which engages in  
11 advocacy to ensure that environmental laws and regulations are protective of vulnerable  
12 communities' public health and the environment. He also serves as a member of the Executive  
13 and Advisory Boards of The Center on Race, Poverty and the Environment. Mr. Frantz serves on  
14 the EJAC, and has provided testimony before ARB on the Scoping Plan and the early action  
15 measures to advocate for air quality.  
16

17           23.     Respondent and Defendant CALIFORNIA AIR RESOURCES BOARD  
18 ("ARB") is part of the California Environmental Protection Agency. Its mission is to "promote  
19 and protect public health, welfare and ecological resources through the effective and efficient  
20 reduction of air pollutants while recognizing and considering the effects on the economy of the  
21 state." Mary D. Nichols is Chairman of the Board. The Chairman and Members comprise the  
22 eleven-member decision-making body of the ARB. The Governor appoints the Chairman and the  
23 Members with the consent of the Senate. James Goldstene is the Executive Officer of the ARB.  
24 AB 32 designates ARB as the lead agency for implementation of the statute.  
25  
26

1 **III. STATEMENT OF FACTS**

2 **A. Global Warming.**

3 24. Climate change threatens natural and managed ecosystems as well as human  
4 health and well-being. California’s Legislature stated:

5  
6 Global warming poses a serious threat to the economic well-being, public health, natural  
7 resources and the environment of California. The potential adverse impacts of global  
8 warming include the exacerbation of air quality problems, a reduction in the quality and  
9 supply of water to the state from the Sierra snowpack, a rise in sea levels resulting in the  
10 displacement of thousands of coastal businesses and residences, damage to marine  
11 ecosystems and the natural environment, and an increase in the incidences of infections  
12 diseases, asthma and other human health related problems.

13 Health and Safety Code § 38501.

14 25. The Legislature enacted AB 32 in 2006 to ensure that California act quickly to  
15 address the causes of climate change and to avoid or reduce the potentially catastrophic impacts  
16 of global warming.

17 **B. Air Pollution.**

18 26. Climate change will exacerbate air pollution and the public health impacts of air  
19 pollution. Weather conditions associated with warmer temperatures – high temperatures,  
20 sunlight and stable air masses occurring simultaneously – increase the formation of ozone and  
21 secondary organic carbon particles. Ozone is the primary component of smog. Smog operates to  
22 trap heat, causing areas with heavy smog to suffer more severe heat spikes than other regions of  
23 the state.

24 27. Much of California’s air pollution is caused by refineries, dairies, ethanol plants,  
25 power plants and mobile sources, which are all also major sources of greenhouse gases. Some  
26 co-pollutants emitted by sources of greenhouse gas emissions include ozone precursors and

1 PM2.5. These co-pollutants have severe public health effects, such as asthma and premature  
2 death.

3           28.     Inhalation of ozone can lead to inflammation and irritation of the tissues lining  
4 the airways, which can cause spasms and contractions, reducing the amount of air that can be  
5 inhaled. Ozone in sufficient doses can also increase the permeability of lung cells, making them  
6 more susceptible to damage from environmental toxins and infection. Ozone exposure is  
7 associated with an increase in hospital admissions and emergency room visits, particularly for  
8 lung problems such as asthma and chronic obstructive pulmonary disease. The elderly, children,  
9 adolescents, and adults who exercise or work outdoors are most susceptible to adverse impacts  
10 from ozone exposure.  
11

12           29.     Exposure to particulate matter (“PM”) aggravates a number of respiratory  
13 illnesses and may even cause premature death in people with existing heart and lung disease.  
14 Both long term and short term exposure can have adverse health impacts. Particulate matter less  
15 than 2.5 microns in diameter (“PM2.5”) poses an increased risk because it can deposit deep  
16 within lungs and contains substances that are particularly harmful to human health.  
17  
18

19           30.     In California, respiratory illnesses caused or made worse by airborne PM are  
20 responsible for approximately 9,300 deaths, 16,000 hospital visits, 600,000 asthma attacks and  
21 five million lost work days each year. PM pollution causes or contributes to the death of more  
22 Californians than car accidents, murder and AIDS combined. The eight-county San Joaquin  
23 Valley region is one of the top six worst areas of PM pollution in the country. The South Coast  
24 Air Basin is one of two PM2.5 nonattainment areas in the State, and the most serious in the  
25 nation. Its ozone levels are currently 50 percent above the federal standard, making it the  
26

1 nation's worst ozone area.

2 31. AB 32 recognizes that currently, certain "regions of the state . . . have the most  
3 significant exposure to air pollutants, including but not limited to, communities with minority  
4 populations, communities with low-income populations or both." Health & Safety Code §  
5 38561(g). The Scoping Plan further articulates that these "disproportionate impacts from poor  
6 air quality [are] due to the proximity to a concentration of pollution sources." Scoping Plan at H-  
7 13.  
8

9 32. Industrial sources account for roughly 20 percent of the total global warming  
10 pollution emitted in California. Facilities such as power plants, cement plants, petroleum  
11 refineries and bio-fuel facilities that also emit significant quantities of toxic co-pollutants, are  
12 located in areas of the state that suffer the greatest cumulative impacts from these facilities.  
13 These communities would experience the greatest benefits from reduced emissions at the  
14 facilities located in their neighborhoods.  
15

16 33. Much of the impact from industrial pollution is concentrated in the South Coast  
17 Region and Bay Area. The South Coast Air Basin is in severe non-attainment for ozone and the  
18 South Coast counties of San Bernardino, Riverside, and Los Angeles were ranked, respectively,  
19 as the first, third, and fifth most ozone-polluted counties in the U.S.  
20

21 34. Agricultural sources account for six percent of greenhouse gas emissions in  
22 California. Scoping Plan at 11. Methane emissions from livestock waste have a global warming  
23 potential over 23 times that of carbon dioxide and account for 54% of the state's methane  
24 inventory and 3% of the total greenhouse gas emissions in the state. Cost effective technologies  
25 that significantly decrease methane and volatile organic compound ("VOC") emissions at large  
26

1 confined animal facilities are already available and in use at many facilities in California and  
2 around the country.

3 35. Agricultural sources also emit PM10 and NOx, which have significant impacts on  
4 air pollution and the formation of ozone.  
5

6 36. Nitrous oxide (“N2O”) is also emitted from agricultural cropland where synthetic  
7 or manure fertilizer has been applied. Nitrous oxide is a Prop 65-listed reproductive toxin and  
8 has a global warming potential nearly 298 times greater than carbon dioxide.

9 37. Much of the impact from agricultural pollution is concentrated in California’s  
10 Central Valley, which has the most daily violations of the federal and state 8-hour ozone  
11 standard and fails to meet federal and state standards for fine PM 2.5.  
12

13 **C. AB 32's Statutory Framework.**

14 38. AB 32 creates the procedure, deadlines and substantive requirements for the  
15 creation and implementation of a comprehensive plan for addressing greenhouse gas emissions  
16 across all sectors of California’s economy. The plan must reduce statewide greenhouse gas  
17 emissions to the statewide limit of 1990 levels by 2020. The statewide limit is the maximum  
18 allowable level of statewide greenhouse gas emissions in 2020. Health & Safety Code §§  
19 38505(n), 38550.  
20

21 39. ARB is designated as the lead agency for implementation of the statute. Health &  
22 Safety Code § 38510; *see also* §§ 38501(f), (g), (h). ARB is required to plan for and design  
23 regulations to achieve the maximum technologically feasible and cost-effective reductions of  
24 greenhouse gas emissions in furtherance of achieving the statewide greenhouse gas emissions  
25 limit.  
26

1                   **1.       Legislative Intent.**

2                   40.       California enacted AB 32 to address the serious threat posed by global warming.

3                   41.       The program established by AB 32 is intended to continue California’s long  
4 tradition as a national and international leader in energy conservation and environmental  
5 stewardship efforts, “by placing California as the forefront of national and international efforts to  
6 reduce emissions of greenhouse gases.” Health & Safety Code § 38501(c).

7  
8                   42.       As California exercises a leadership role in the reduction of greenhouse gases, it  
9 will “position its economy, technology centers, financial institutions, and businesses to benefit  
10 from national and international efforts to reduce greenhouse gases.” Health & Safety Code §  
11 38501(e).

12  
13                  43.       The Legislature required ARB to “coordinate with state agencies and consult with  
14 the environmental justice community, industry sectors, business groups, academic institutions,  
15 environmental organizations and other stakeholders” in implementing the program required by  
16 AB 32. Health & Safety Code § 38501(f).

17  
18                  44.       The Legislature also created two advisory committees to advise ARB on AB 32  
19 implementation: the Environmental Justice Advisory Committee and the Economic and  
20 Technology Advance Advisory Committee. Health & Safety Code §§ 38591(a) and (d),  
21 respectively.

22                  45.       Section 38501(h) states the Legislature’s guidelines for implementation.

23  
24                       It is the intent of the Legislature that the State Air Resources Board design emissions  
25 reduction measures to meet the statewide emissions limits for greenhouse gases  
26 established pursuant to this division in a manner than minimizes costs and maximizes  
benefits for California’s economy, improves and modernizes California’s energy  
infrastructure and maintains electric system reliability, maximizes additional

1 environmental and economic co-benefits, and complements the state’s efforts to improve  
2 air quality.

3 Health & Safety Code § 38501(h).

4 **2. The Environmental Justice Advisory Committee.**

5 46. The Legislature recognized the significant adverse impacts of air pollution borne  
6 by environmental justice communities. Environmental justice communities are those regions of  
7 the state with “the most significant exposure to air pollutants, including but not limited to  
8 communities with minority populations, communities with low-income populations or both.”  
9 Health & Safety Code §§ 38591(a), 38561(g). AB 32 directs ARB to address impacts on these  
10 communities through implementation of the statute.

11  
12 47. The provisions in AB 32 addressing environmental justice require that ARB (1)  
13 “evaluate the total potential costs and total potential economic and noneconomic benefits of the  
14 plan for reducing greenhouse gases to California’s economy, environment and public health;” (2)  
15 “conduct...workshops in regions of the state that have the most significant exposure to air  
16 pollutants, including but not limited to, communities with minority populations, communities  
17 with low-income populations, or both;” (3) “ensure that activities undertaken to comply with  
18 [AB 32] do not disproportionately impact low-income communities;” (4) “direct public and  
19 private investment toward the most disadvantaged communities in California;” (5) “consider the  
20 potential for direct, indirect, and cumulative emission impacts from [market-based compliance  
21 mechanisms], including localized impacts in communities that are already adversely impacted by  
22 air pollution;” (6) “design any market-based compliance mechanism to prevent any increase in  
23 the emissions of toxic air contaminants or criteria air pollutants;” and (7) “maximize additional  
24  
25  
26

1 environmental and economic benefits for California.” Health & Safety Code §§ 38561(d),  
2 38561(g), 38562(b)(2), 38565, 38570(b).

3 48. To ensure that these aims are met, ARB must convene an Environmental Justice  
4 Advisory Committee. EJAC’s role is to advise ARB “in developing the scoping plan pursuant to  
5 Section 38561 and any other pertinent matter in the implementation of this division.” Health &  
6 Safety Code § 38591(a). EJAC members represent the communities in California most impacted  
7 by air pollution and represent a broad cross-section of California’s environmental justice  
8 movement.  
9

10 49. ARB appointed ten members and one alternate to EJAC at its January 25, 2007  
11 Board meeting. ARB appointed members based on nominations from environmental justice  
12 organizations and community groups, as required by Section 38591(b). The Committee now has  
13 ten members and eleven alternates.  
14

15 50. EJAC’s self-defined mission is to:

16 work cooperatively with all relevant bodies to provide the best possible advice to the  
17 California Air Resources Board on the development of the Scoping Plan called for by the  
18 Act and all other pertinent matters related to the implementation of the Act. Through this  
19 advice, the Committee seeks to provide helpful, workable recommendations on how best  
20 to ensure and encourage public engagement in the implementation of the Act and how  
21 best to reduce greenhouse gas emissions while maximizing the overall societal benefits,  
22 including reductions in other air pollutants, diversification of energy sources and other  
23 benefits to the economy, environment, and public health.

24 51. EJAC convened 15 meetings prior to ARB’s action approving and adopting the  
25 final Scoping Plan. Members heard presentations and updates from ARB staff as well as  
26 independent experts.

27 52. EJAC submitted seven documents containing comments and recommendations to

1 ARB regarding AB 32 implementation, including a joint list of initial areas of agreement  
2 submitted with ETAAC as requested by ARB during the November 20-21, 2008 hearing. EJAC  
3 also gave presentations at ARB hearings on June 21, 2007, May 28, 2008 and November 20,  
4 2008.  
5

6 53. The Scoping Plan does not reflect the advice and recommendations of the EJAC  
7 regarding environmental justice issues.

8 **3. The Economic and Technology Advancement Advisory Committee.**

9 54. The Economic and Technology Advancement Advisory Committee (“ETAAC”)  
10 was charged with advising the state “on activities that will facilitate investment in and  
11 implementation of technological research and development opportunities.” Health & Safety  
12 Code § 38590(d).  
13

14 55. In January 2007, ARB appointed 21 members to ETAAC based on their  
15 knowledge and expertise in the fields of business, technology research and development, climate  
16 change and economics. ETAAC is chaired by former ARB chairman and former Secretary of the  
17 California Environmental Protection Agency, Alan Lloyd, PhD.  
18

19 56. The Committee met nine times between March 1, 2007 and February 11, 2008  
20 before releasing a Final Report to ARB entitled “Recommendations on Technologies and  
21 Policies to Consider for Reducing Greenhouse Gas Emissions in California.” The Report  
22 included an array of emission reduction measures and priority actions for both the industrial and  
23 agricultural sectors.  
24

25 57. ETAAC met three additional times in 2008 and submitted a comment letter on the  
26 Draft Scoping Plan in September 2008 and a joint letter with EJAC in December 2008.

1                   **4.     The Scoping Plan.**

2                   58.     AB 32 directs ARB to prepare a Scoping Plan which identifies and makes  
3 recommendations on measures for achieving the maximum feasible and cost-effective reductions  
4 of greenhouse gas emissions.   Health & Safety Code § 38561.  
5

6                   59.     The Scoping Plan, as understood by ARB, “will provide specific direction for the  
7 State’s greenhouse gas emissions reduction program” and serves as a roadmap of the different  
8 emissions reduction measures that will be adopted by regulation by no later than January 1, 2011.

9                   The Plan must:

10                             identify and make recommendations on direct emissions reduction measures, alternative  
11 compliance mechanisms, market based compliance mechanisms, and potential monetary  
12 and nonmonetary incentives for sources and categories of sources that the state board  
13 finds are necessary or desirable to facilitate the achievement of the maximum feasible and  
cost-effective reductions of greenhouse gas emissions by 2020.

14                   Health & Safety Code § 38561(b).

15                   60.     In the Scoping Plan, ARB must conduct a preliminary analysis to evaluate  
16 whether its chosen regulatory plan will meet the requirements of AB 32. In making the required  
17 determinations as to which emissions reduction measures will be included in the Plan, ARB is  
18 required to “consider all relevant information pertaining to greenhouse gas emissions reductions  
19 programs in other states, localities, and nations . . . .” Health & Safety Code § 38561(d). ARB is  
20 also required to “evaluate the total potential costs and total potential economic and noneconomic  
21 benefits of the plan.” Health & Safety Code § 38561(d).  
22

23                   61.     AB 32 defines a greenhouse gas emissions source as any such source with  
24 emissions at a level of significance such that regulation of its emissions would enable ARB to  
25 “effectively reduce greenhouse gases.” Health & Safety Code § 38505(i). ARB may “take into  
26

1 account the relative contribution of each source or source category, and the potential for adverse  
2 effects on small businesses, and shall recommend a de minimis threshold of greenhouse gas  
3 emissions below which emission reduction requirements will not apply.” Health & Safety Code  
4 § 38561(e). AB 32 does not exempt significant greenhouse gas emission sources.  
5

6 62. ARB discussed possible environmental impacts from the proposed Scoping Plan  
7 in the form of a FED in lieu of an Environmental Impact Report, pursuant to Public Resources  
8 Code § 21080.5.

9 Scoping Plan Adoption Procedure

10 63. After consultation with the EJAC and ETAAC, in June 2008, ARB released a  
11 Draft Scoping Plan. Petitioners and members of the public submitted comments on the Draft.  
12

13 64. On August 15, 2008, the Environmental Justice Advisory Committee adopted  
14 three general comments and four recommendations on the Draft Scoping Plan. These were  
15 submitted in a comment letter to ARB on October 1, 2008. The committee expressed concern  
16 that “the public health and non-economic benefits and impacts of the Plan have not been  
17 adequately presented, analyzed or incorporated into the Scoping Plan.” The Committee also  
18 recommended, *inter alia*, that “[t]o ensure that the overall GHG reduction targets are met in  
19 2020, ARB should identify emissions reductions that total a significant number more than the  
20 minimum necessary reductions to allow for inevitable losses during rule-making and  
21 implementation phases.” The Committee criticized the Plan’s heavy reliance on a cap and trade  
22 system, in light of the highly publicized national and international failures of such a system.  
23 Instead, the Committee stressed the need for and demonstrated the effectiveness of direct  
24 regulation of industrial and agricultural sources of GHG emissions. Similarly, the ETAAC and  
25  
26

1 the Market Advisory Committee agreed that a cap and trade system cannot address all the GHG  
2 reduction and market issues, and that complementary measures and regulations were required to  
3 bolster any expected reductions.

4  
5 65. ARB reviewed the public comment and released its Proposed Scoping Plan in  
6 October 2008. ARB included the environmental analysis, the FED, as Appendix J of the Scoping  
7 Plan.

8 66. On November 10-11, 2008, ARB held a hearing to receive public comment on the  
9 Proposed Scoping Plan. Members of EJAC mobilized over 100 people to attend the ARB  
10 hearing, many who awoke in the early morning hours and traveled over four hours from the San  
11 Joaquin Valley and Los Angeles to testify. Members of EJAC and the public attended the  
12 hearing to challenge the inadequate analysis in the Scoping Plan, to provide additional  
13 information, and to demand assurances that the promise of AB 32 will be fulfilled by the  
14 regulatory pathway ARB laid out in the Scoping Plan.

15  
16 67. The structure of the hearings prevented the meaningful participation of the people  
17 representing environmental justice communities. The Sierra Room, where the hearing was held,  
18 could not accommodate the number of people in attendance. Community members who traveled  
19 furthest and arrived later were placed in a separate room and watched the proceedings by a  
20 television monitor where they could see the board but the board could not see them. ARB  
21 provided translation equipment, but some community members were unable to access it. ARB  
22 decided not to accommodate members of the public who expressed the need to leave early due to  
23 travel arrangements. Instead, ARB staff divided the members of the public based on staff  
24 members' arbitrary assessments of what they thought the testimony would be about.  
25  
26

1           68.     On December 11, 2008, ARB held a subsequent hearing at which it received  
2 additional written and oral public comments. The EJAC and Petitioners submitted additional  
3 comments on the Scoping Plan and ARB’s failure to comply with the requirements of AB 32 and  
4 the CEQA. (“Comments Regarding ARB’s Failure to Abide by the Law in its Proposed AB 32  
5 Scoping Plan and Functional Equivalent California Environmental Quality Act Document”, by  
6 AIR *et al.*, December 10, 2008, attached hereto as Appendix A). ARB approved the Scoping  
7 Plan at the conclusion of this hearing, although it had not yet responded to public comment on  
8 the Proposed Scoping Plan and Appendices. ARB’s resolution directed its Chief Executive  
9 Officer to respond to comments and submit any substantial changes needed to the Plan to the  
10 Board at a later date.  
11

12           69.     In late December 2008, ARB began implementing the Scoping Plan.  
13

14           70.     On May 7, 2009, ARB issued its response to comments finalizing the FED.  
15

16           71.     On May 11, 2009, ARB filed its Notice of Decision with the Office of Resources.  
17

### 18     **III.    JURISDICTION AND VENUE**

19           72.     On June 10, 2009, Petitioners filed this Petition for Writ of Mandate.  
20

21           73.     Petitioners have exhausted all available administrative remedies by submitting  
22 written comments to ARB and appearing before ARB to raise the issues raised in this petition.  
23

24           74.     Petitioners have complied with Public Resources Code § 21167.7 and Code of  
25 Civil Procedure § 388 by serving a copy of this petition on the Attorney General.  
26

27           75.     Petitioners have complied with Public Resources Code § 21167.5 by prior service  
of a letter upon ARB indicating their intent to file this petition, a copy of which is attached hereto  
as Appendix B.



1 to the regulations complement, and do not interfere with, efforts to achieve and maintain federal  
2 and state ambient air quality and to reduce toxic air contaminant emissions.” Health & Safety  
3 Code 38562(b)(4).

4  
5 83. The legislature chose to use the phrase “ensure that activities undertaken...do not  
6 interfere with, efforts to achieve and maintain federal and state ambient air quality and to reduce  
7 toxic air contaminant emissions.” *Id.* In this section, the legislature chose not to use the word  
8 “consider” used in other portions of this section of AB 32. This means that ARB must not only  
9 consider the likelihood or probability of an increase in emissions, but take all possible steps to  
10 “ensure” that the activities called for in the Scoping Plan do not cause any increase in criteria or  
11 toxic emissions.  
12

### 13 Cap and Trade Program

14 84. The Scoping Plan outlines a framework for AB 32 implementation that  
15 includes the development of a regional cap and trade program that would include California,  
16 seven western states and 70% of Canada’s economy. ARB expects to set the cap at 365  
17 MMTCO<sub>2</sub>E in 2020. ARB also anticipates that any other regulatory measure that falls short of  
18 its emissions reductions targets would be compensated for by the cap and trade program.  
19

20 85. The regional cap and trade program allows for emission increases in California.  
21 “Once California links with the other WCI Partner jurisdictions, allowances could be traded  
22 across state and provincial boundaries. As a result of trading, emissions in a state may vary from  
23 its allowance budget, although total regional emissions will not exceed the regional cap.”  
24 Scoping Plan at 33-34. The Plan calls for a regulation that would allow air pollution emissions  
25 in California to be higher at the end of any given reporting period than it was at the beginning.  
26

1           86.     Additionally, the cap and trade program’s use of offsets allows for emission  
2 increases in California. The Plan calls for an “offsets program without geographic restrictions.”  
3 Covered facilities may satisfy up to 49% of their compliance obligations through the purchase of  
4 international offsets. The offsets program will eviscerate ARB’s ability to meet targeted  
5 emissions reductions and will exacerbate pollution at the local level. Some plants will find it  
6 more cost-effective to purchase offsets from international projects rather than reduce emissions at  
7 the facility. Allowing facilities to use offsets to account for even 10 percent of their emissions  
8 could lead to no on-site reductions in the capped sectors beyond what is already required by other  
9 regulations.  
10

11           87.     ARB’s use of an “offsets program without geographic restrictions,” violates AB  
12 32's requirement that ARB must be able to enforce any market-based compliance mechanism  
13 because ARB lacks jurisdiction to enforce any other state or region’s activities within a regional  
14 market. Consequently, ARB’s offsets program not only allows an emissions increase in  
15 California, but does so without the ability to ensure that real emission reductions take place in  
16 regional partner jurisdictions.  
17

18           88.     All of the state’s major population and industrial centers currently fail to comply  
19 with many state and federal ambient air quality standards. Since toxic air emissions accompany  
20 any activity that releases greenhouse gases, this Plan should, but does not maximize co-benefits  
21 to the state by ensuring that greenhouse gas and co-pollutant emissions reductions occur in  
22 California. The use of regional allowances and offsets thwarts ARB’s ability to ensure that  
23 reductions will occur in California. ARB cannot ensure that its Plan complements attainment of  
24 state and local air quality standards, maximizes co-pollutant reductions and prevents  
25

1 communities already suffering disproportionate impacts of air pollution from increased emissions  
2 at the local level.

3 89. AB 32 explicitly prohibits ARB from adopting regulations that could interfere  
4 with efforts to meet and maintain federal and state ambient air quality standards and to reduce  
5 toxic air contaminant emissions. If left unchanged, the Scoping Plan obligates ARB to  
6 unlawfully adopt regulations in violation of Health and Safety Code Section 38562(b)(4).  
7

8 90. ARB's inclusion of a regional cap and trade program and a geographically  
9 unbounded offsets program is arbitrary and capricious, a prejudicial abuse of discretion, and not  
10 in accordance with the law. The proposed regional cap and trade program violates the  
11 requirements of AB 32.

12 Low Carbon Fuel Standard

13 91. The Low Carbon Fuel Standard ("LCFS") calls for an increase in the production  
14 of ethanol. This encourages ethanol production in the San Joaquin Valley, which will result in  
15 significant emissions of greenhouse gases, criteria pollutants, and toxic co-pollutants in an  
16 already over-polluted air basin.

17 **SECOND CAUSE OF ACTION**

18 **(Violation of Global Warming Solutions Act of 2006,**  
19 **Health & Safety Code §§ 38500 *et seq.*, Failure to Assess or Achieve the Maximum**  
20 **Technologically Feasible and Cost-Effective Reductions)**

21 92. Petitioners incorporate paragraphs 1 to 91 as though fully set forth herein.

22 93. AB 32 requires ARB to "adopt rules and regulations in an open public process to  
23 achieve the maximum technologically feasible and cost-effective greenhouse gas emission  
24 reductions from sources or categories of sources, subject to the criteria and schedules set forth in  
25 this part." Health and Safety Code § 38560. The Scoping Plan and every regulation adopted  
26 pursuant to AB 32 is required to achieve both "maximum technologically feasible" and "cost-

1 effective” reductions. *Id.*

2 94. Specifically, ARB must prepare and approve a scoping plan, “for achieving the  
3 maximum technologically feasible and cost-effective reductions in greenhouse gas emissions  
4 from sources and categories of sources of greenhouse gases by 2020.” Health & Safety Code  
5 38561(a).  
6

7 95. A “greenhouse gas emission source,” or “source,” is defined as “any source whose  
8 emissions are at a level of significance, as determined by the state board, that its participation in  
9 the program established under this division will enable the state board to effectively reduce  
10 greenhouse gas emissions.” Health & Safety Code § 38505(i). Accordingly, the Scoping Plan  
11 must “take into account the relative contribution of each source or source category . . . and shall  
12 recommend a de minimis threshold of greenhouse gas emissions below which emission reduction  
13 requirements will not apply.” Health & Safety Code § 38561(e).  
14

15 Maximum Technologically Feasible Reductions

16 96. The Scoping Plan does not identify and perform a comprehensive review of  
17 existing and projected technologies and strategies for greenhouse gas emissions reductions. AB  
18 32 requires ARB to achieve the maximum technologically feasible reductions by “rely[ing] upon  
19 the best available economic and scientific information and its assessment of existing and  
20 projected technological capabilities.” Health & Safety Code § 38562(e). ARB has a statutory  
21 duty to identify which measures are technologically feasible and then assess each feasible  
22 measure to determine its cost-effectiveness.  
23  
24

25 97. ARB treats the statewide emissions limit as a ceiling on the amount of reductions  
26 the Plan will achieve. The Plan proposes predominantly pre-existing measures to yield the exact

1 amount of emissions reductions necessary to meet the emissions limit. But, by defining the  
2 statewide emissions limit as “the maximum allowable level of emissions in 2020,” the statute  
3 sets a floor, not a ceiling, on the amount of greenhouse gas emission reductions required. The  
4 statute directs ARB to achieve the “maximum feasible” emissions reductions. Health & Safety  
5 Code § 38562(b).  
6

7 98. Only sources or categories of sources with emissions below the *de minimis*  
8 threshold are exempt from AB 32. Health & Safety Code § 38561(e). The Plan should achieve  
9 the maximum technologically feasible and cost-effective reductions for all other sources and  
10 categories with significant levels of greenhouse gas emissions. Health & Safety Code §§  
11 38561(a), 38561(i).  
12

### 13 Agriculture Sector

14 99. Greenhouse gas emissions from the agriculture sector today account for between  
15 five to six percent of the state’s total greenhouse gas emissions and are projected to account for  
16 an even greater share of California’s GHG emissions under business-as-usual conditions in 2020.  
17 The Plan contains control measures for refrigerants and other high global warming potential  
18 products even though their total greenhouse gas emissions are 50 percent lower than agricultural  
19 emissions. Yet the Plan contains no emissions reductions measures for agricultural sources  
20 despite their significant greenhouse gas emissions.  
21

22 100. ARB does not offer a valid reason for wholly excluding the agriculture sector  
23 from direct regulation while allowing it to be a source of offsets.  
24

25 101. Both EJAC and ETAAC addressed the significance of agricultural emissions and  
26 recommended many emissions reduction measures for this sector. Available controls include,  
27

1 *inter alia*: (1) manure composting and use as fertilizer; (2) electrification of agricultural internal  
2 combustion engines; (3) irrigation pump efficiency testing and improvements; (4) solar  
3 installations that replace local combustion sources such as irrigation pumps; (5) anaerobic  
4 digesters; (6) biogas recovery and barn enclosure; (7) reformulation of ruminant diets to reduce  
5 enteric fermentation and some methane emissions; (8) manure-to-energy facilities; and (9)  
6 agricultural biomass utilization.  
7

8 102. The Plan also fails to evaluate, mitigate and/or control Nitrous Oxide emissions  
9 from agricultural cropland. Because nitrous oxide is a reproductive toxin and has a global  
10 warming potential nearly 298 times greater than carbon dioxide, this failure is arbitrary and  
11 capricious.  
12

13 103. The Plan should assess all technologically feasible emissions control measures for  
14 agricultural sources and should achieve the maximum feasible reductions by adopting all  
15 technologically feasible and cost-effective measures. ARB's decision to exempt agricultural  
16 sources violates AB 32.  
17

### 18 Industrial Sector

19 104. Twenty percent of California's greenhouse gas emissions come from the  
20 industrial sector, and 40% of these emissions are generated by oil refineries. In addition to the  
21 significant level of greenhouse gas emissions, sources in this sector also emit high levels of toxic  
22 co-pollutants that have severe local health impacts. Despite this, the Scoping Plan proposes  
23 direct emissions reduction measures for this sector that result in the reduction of a mere 1.44  
24 million metric tons of carbon dioxide equivalent ("MMTCO<sub>2</sub>E"). One new refinery project will  
25 add 1.2 MMTCO<sub>2</sub>E alone, more than the total reduction required. Instead of requiring  
26

1 reductions, the Plan requires only an audit.

2 105. Additionally, these measures will have the scant co-benefit of reducing 0.8 tons  
3 per day (“tpd”) of NO<sub>x</sub>, 0.02 tpd of PM 2.5 and 1.6 tpd of VOC in 2020. In contrast, three  
4 categories of stationary industrial sources (fuel combustion, petroleum production and industrial  
5 processes) emit up to 744 tpd of total organic gases (“TOG”), including methane, and 278 tpd of  
6 VOC.  
7

8 106. During the Draft Scoping Plan phase, ARB considered measures for the industrial  
9 sector that would have reduced emissions up to 20 MMTCO<sub>2</sub>E. However, the final Plan does  
10 not include any of these measures.

11 107. Comments submitted to ARB by EJAC, ETAAC and others emphasized that  
12 greater, plant-specific reductions from the industrial sector are possible. They highlighted  
13 several measures that had the potential for curbing large methane emissions from industrial  
14 sources such as removing the methane exemption from the definition of VOCs in smog precursor  
15 control regulations, installing 20% solar-assisted pre-heating for refinery boilers, creating  
16 separate flare controls to eliminate non emergency flaring, and prohibiting venting from pressure  
17 relief devices.  
18

19 108. Instead of assessing currently feasible reduction measures, the sole measure ARB  
20 proposed for the industrial sector measure is an energy efficiency audit for large industrial  
21 sources that would allow each facility to determine its own potential reduction opportunities.  
22 This measure does not require implementing emissions reduction options identified through that  
23 audit. The audit does not cover all refineries, despite the fact that the smaller refineries may be  
24 the least efficient. Absent an emission reduction target, this sole industrial measure may actually  
25  
26

1 be counterproductive. For instance, audits could allow piecemeal evaluations of individual units;  
2 or if total energy use, high carbon feedstocks, and total emissions are left out, audits could allow  
3 unlimited emissions increases. ARB does not intend to start developing this audit rule until 2010.  
4 The audit's lack of specificity in design and its failure to require emission reductions negate any  
5 potential benefits from this measure.  
6

7 109. ARB assumes that the lion's share of industrial emissions reductions will occur  
8 by means of its proposed cap and trade program, but cannot ensure that this sector will achieve  
9 the maximum technologically feasible reductions.  
10

#### 11 Cost-Effectiveness

12 110. AB 32 defines "'cost-effective' or 'cost-effectiveness'" as "the cost per unit of  
13 reduced emissions adjusted for its global warming potential." Notably, ARB did not perform a  
14 cost-effective analysis. Health & Safety Code 38505(d).

15 111. The Scoping Plan identifies the estimated cost per ton of greenhouse gas  
16 emissions reduced by the measures recommended in the Plan. According to presentations by  
17 ARB staff, "any proposed regulation falling within this range would be considered cost-effective  
18 and would meet the AB 32 cost-effectiveness requirement." Yet ARB did not adhere to this  
19 threshold in the Plan. Instead, the Plan arbitrarily excludes feasible measures whose cost-  
20 effectiveness lie between the identified range.  
21

22 112. ARB summarily determines that energy diversity is a benefit that justifies a  
23 higher cost-per-unit, but provides no explanation for its disregard of other co-benefits such as  
24 energy savings and efficiency, or benefits to public health and the environment. Rather than this  
25 self-serving analysis, ARB should engage a thorough assessment of cost-effectiveness, explain  
26

1 each factor in the determination, and propose a valid and transparent cost-effectiveness threshold.

2 113. Without a valid cost-effectiveness threshold, the Plan fails to justify ARB's  
3 decision not to require emissions reductions from agriculture, direct reductions from industrial  
4 sources, and other significant sources or categories of sources of greenhouse gas emissions.  
5

### 6 **THIRD CAUSE OF ACTION**

#### 7 **(Violation of Global Warming Solutions Act of 2006, 8 Health & Safety Code §§ 38500 *et seq.*, Failure to Set and Apply 9 *De Minimis* Threshold)**

10 114. Petitioners incorporate paragraphs 1 to 113 as though fully set forth herein.

11 115. The Scoping Plan fails to develop, identify or apply a *de minimis* threshold,  
12 thereby violating AB 32 as a matter of law. Health & Safety Code § 38561(e). The Scoping Plan  
13 wholly exempts agricultural sources and substantially excludes the industrial sector despite  
14 significant greenhouse gas emissions from these sectors. *See* Health & Safety Code § 38505(i).  
15

### 16 **FOURTH CAUSE OF ACTION**

#### 17 **(Violation of Global Warming Solutions Act of 2006, 18 Health & Safety Code §§ 38500 *et seq.*, Failure to Achieve Maximum Feasible 19 Emissions Reductions)**

20 116. Petitioners incorporate paragraphs 1 to 115 as though fully set forth herein.

21 117. The Plan must “facilitate the achievement of the *maximum feasible* and cost-  
22 effective reductions of greenhouse gas emissions by 2020.” Health & Safety Code § 38561(b)  
23 (emphasis added). The Scoping Plan must determine which regulatory path will achieve the  
24 maximum feasible reductions. To make this determination, ARB must identify all feasible  
25 technologies, both existing and projected and assess their cost-effectiveness. This analysis is a  
26 condition precedent necessary to a valid determination of the proper regulatory path to achieve  
27

1 the maximum feasible reductions. ARB ignored this essential statutory standard for evaluating  
2 the measures in the Scoping Plan.

3 118. AB 32 does not suggest that once the 1990 emission level is achieved no further  
4 emission reductions are required. Instead, the “statewide greenhouse gas emissions limit [will]  
5 continue in existence and be used to maintain and continue reductions in emissions of  
6 greenhouse gases beyond 2020.” Health & Safety Code § 38551(b).

7  
8 119. By failing to assess or achieve the maximum technologically feasible and cost-  
9 effective emissions reductions measures, and failing to set a *de minimis* threshold and exclude  
10 only sources below the threshold, the Plan fails to achieve the maximum feasible reductions.

11 Cap and Trade Program

12  
13 120. Market-based compliance mechanisms may be included in the Plan only to the  
14 extent that they “facilitate the achievement of the maximum feasible and cost-effective  
15 reductions of greenhouse gas emissions by 2020.” Health & Safety Code § 38561(b). In  
16 determining the measures necessary to make such reductions, the ARB must consider “all  
17 relevant information pertaining to greenhouse gas emission reduction programs in other states,  
18 localities and nations.” Health & Safety Code § 38561(c). The cap and trade program included  
19 in the Plan is not reasonably calculated to result in such reductions.

20  
21 121. The evidence on current and previous cap and trade programs reveals a history of  
22 failure to actually reduce emissions. Despite the requirement that ARB consider all relevant  
23 information regarding other programs, the Scoping Plan ignores these failures. The cap and trade  
24 program proposed is substantially similar to prior models. ARB’s proposal is predicated on the  
25 unfounded belief that the cap and trade program will work in exactly the same manner as  
26

1 proposed. The Plan proposes no policy options for avoiding the earlier failures and maximizing  
2 the emissions reductions generated in a manner that is equitable for all Californians.

3           122. For instance, over-allocation of allowances plagues cap and trade programs.  
4 Allowances were grossly over-allocated during Phase 1 of the European Union emission trading  
5 system (“EU-ETS”) and the system did not achieve overall emissions reductions. Instead, the  
6 over-allocation led to windfall profits for corporations. Based on record evidence, even  
7 discounting over-allocation due to fraud, any over-inflation in calculating the baseline will lead  
8 to over-allocation of credits relative to desired emissions reductions. In the South Coast  
9 Regional Clean Air Incentives Market, credit supply so exceeded demand that during the  
10 program’s first three years, 85 percent of the credits were given away for free.

11           123. Cap and trade programs have also had significant problems in ensuring that any  
12 reductions generated through offset projects result in “additional” emissions reductions that  
13 would not have otherwise occurred. The Scoping Plan provides no policy to address this  
14 problem. Rather, ARB allows agricultural sources, which should already be required to reduce  
15 emissions, to constitute a source of offsets for the cap and trade program, undermining the  
16 additionality of these reductions. ARB has not justified its expectation of achieving equivalent  
17 and enforceable greenhouse gas and toxic co-pollutant reductions.

18           124. AB 32 also requires that any emission reductions be “real, permanent,  
19 quantifiable, verifiable, and enforceable by the state board.” Health & Safety Code §  
20 38562(d)(1). AB 32 also specifically requires that ARB be able to enforce any market-based  
21 compliance mechanism. Health & Safety Code § 38580(a).

22           125. ARB proposes that California join the Western Climate Initiative (“WCI”) cap  
23

1 and trade system. The WCI system will feature a regional market, emission trading, allowance  
2 banking and offsets. Participation in the WCI enables allowances to be traded across state and  
3 provincial boundaries. Because actual emissions could vary from the state's initial allowance  
4 budget, relying solely on reductions from the WCI jeopardizes the state's ability to achieve the  
5 maximum feasible reductions and maximize co-benefits within the state.  
6

7 126. Participation in the WCI violates AB 32's explicit requirement that all emissions  
8 reductions be enforceable by the state board. Although each WCI partner retains jurisdiction to  
9 enforce compliance within its own jurisdiction, because allowances and offsets can be traded  
10 between any of the partner jurisdictions, the state cannot ensure that all emissions reductions  
11 achieved are "real, permanent, quantifiable, verifiable and enforceable." Health & Safety Code §  
12 38562(d)(1).  
13

14 127. ARB did not justify its inclusion of the cap and trade program. ARB cannot show  
15 that the program will achieve the maximum feasible emissions reductions or maximize co-  
16 benefits for the state. Because the Plan does not analyze methods for ensuring that the program  
17 will work to reduce carbon emissions effectively, ARB cannot reasonably consider the cap and  
18 trade program necessary or desirable to achieve the maximum technologically feasible  
19 reductions. In addition, ARB assumes, with no evidence to support its assumption, that a cap and  
20 trade system will ensure that covered sources will actually reduce emissions by implementing the  
21 most cost-effective measures. Because the carbon price is not yet set, an assertion that it will  
22 lead to actual reductions is speculative, as many sources may choose to comply by purchasing  
23 allowances and offsets.  
24  
25

26 128. AB 32 also requires that prior to including any market-based compliance  
27

1 mechanism in the regulations, ARB must perform a number of specific activities. Health &  
2 Safety Code § 38570 (a)(b). ARB must: (1) “Consider the potential for direct, indirect, and  
3 cumulative emission impacts from these mechanisms, including localized impacts in  
4 communities that are already adversely impacted by air pollution;” (2) “Design any market-based  
5 compliance mechanism to prevent any increase in the emissions of toxic air contaminants or  
6 criteria air pollutants;” and (3) “Maximize additional environmental and economic benefits for  
7 California, as appropriate.” Health & Safety Code § 38570(b). The ARB declined to assess its  
8 proposed market program to determine whether it could meet these requirements or to propose  
9 policy specifically aimed at achieving these goals.  
10  
11

## 12 **FIFTH CAUSE OF ACTION**

### 13 **(Violation of Global Warming Solutions Act of 2006,** 14 **Health & Safety Code §§ 38500 *et seq.*, Failure to Adequately** 15 **Evaluate Total Costs and Benefits to Environment, Economy and Public Health)**

16 129. Petitioners incorporate paragraphs 1 to 128 as though fully set forth herein.

17 130. AB 32 requires ARB to evaluate “the total potential cost and total potential  
18 economic and noneconomic benefits of the plan for reducing greenhouse gases to California’s  
19 economy, environment, and public health.” Health and Safety Code § 38561(d). In making this  
20 evaluation, ARB “shall use the best available economic models, emission estimation techniques  
21 and other scientific methods.” Health & Safety Code § 38561(d).

22 131. The Scoping Plan should identify how ARB plans to accomplish the more  
23 detailed screenings that are required to determine whether each proposed regulation and market  
24 mechanism will comply with all the requirements of AB 32, e.g., the requirement that ARB  
25 evaluate the potential for localized effects before implementing market-based compliance  
26

1 mechanisms. *See* Health & Safety Code §§ 38562(b)(1-9) and 38570(b)(1-3). The Plan should  
2 also include (a) a clear schedule for developing and updating analytic tools and data sets that will  
3 be needed for these analyses, (b) acquiring outside technical expertise if needed, (c) gathering  
4 input from stakeholders, and (d) conducting the analyses.

#### 6 Public Health Impacts

7 132. ARB conducted a Public Health Analysis, found in Appendix H. Rather than  
8 evaluate the total potential benefits that can be achieved, ARB confined its analysis to  
9 quantifying the benefits of implementing the measures already included in the Plan.

10 133. ARB's analysis included only best case scenarios of plan implementation. The  
11 analysis does not discuss the likelihood for disparate impacts, ignoring foreseeable impacts to  
12 overburdened communities due to known factors such as the location of facilities and the level of  
13 their emissions.

14 134. In analyzing likely local impacts from industrial sector emissions, ARB assumes a  
15 ten percent emissions reduction due to the cap and trade program that is not supported by any  
16 evidence. Based on this assumption, ARB concluded that in Wilmington, a city plagued by  
17 industrial emissions, Plan implementation would save 11 lives. Yet this analysis is flawed  
18 because ARB acknowledges that it cannot predict where emission reductions will occur under the  
19 cap and trade program, nor whether a specific facility will choose to reduce its emissions at all.  
20 Under the current program design a facility could choose not to reduce emissions on-site,  
21 choosing instead to purchase allowances and offsets. ARB did not attempt to maximize benefits  
22 to public health by addressing the need for direct emissions reduction requirements at specific  
23 polluting facilities.  
24  
25  
26

1 Disparate Environmental Impacts

2 135. Despite acknowledging that air pollution levels are regional in nature, ARB failed  
3 to include readily available information regarding the location of heavy-polluting industries in its  
4 programmatic analysis. Although carbon dioxide emissions do not typically have localized  
5 impacts, populations living within six miles of industrial facilities disproportionately bear the  
6 impacts of co-pollutant emissions, such as particulate matter.  
7

8 136. Direct emissions control measures targeting certain highly polluting  
9 facilities have the potential to generate enormous co-benefits, which the Plan does not analyze.  
10 For example, five old (pre-1980) power plants contributed to more than one-quarter of total NOx  
11 emissions from all power plants in the state, and one refinery alone in Carson contributes over  
12 three percent of all PM emissions attributed to people of color in California.  
13

14 137. The Plan does not consider any unintended disparate impacts from recommended  
15 measures. For example, the Plan failed to acknowledge the foreseeable impact of its low carbon  
16 fuel standard (“LCFS”) on communities located near existing or proposed biofuel facilities. Not  
17 only is there strong evidence that LCFS actually increases greenhouse gas emissions because of  
18 greenhouse gases generated in clearing land and other land use changes, transport of corn across  
19 the U.S. and ethanol production, but additionally, ethanol increases smog, water pollution, food  
20 shortage, food price, and damage to wildlife. ARB also did not discuss methods to ensure that  
21 large scale composting measures do not negatively impact the communities that house them by  
22 increasing local air pollution and odors. ARB did not discuss best practices for composting or  
23 address the need for waste be treated near where it is generated rather than trucked to Central  
24 Valley communities.  
25  
26



1           142. Before approving a project that is subject to CEQA, a lead agency must consider  
2 its final CEQA document, in this case the final FED. CEQA Guidelines §§ 15004(a), 15090(a).  
3 In furtherance of this principle, a public agency shall not undertake actions concerning the  
4 proposed public project that would have a significant adverse effect or limit the choice of  
5 alternatives or mitigation measures before CEQA compliance is complete and total. CEQA  
6 Guidelines § 15004(b)(2).  
7

8           143. The rule that a lead agency shall not take action to implement a proposed project  
9 prior to completion of the CEQA process ensures that the State’s policies in implementing  
10 CEQA are respected. This procedure ensures that lead agencies successfully: 1) prevent  
11 significant, avoidable damage to the environment by requiring changes in projects through the  
12 use of alternatives or mitigation measures when the governmental agency finds that such changes  
13 are feasible; 2) disclose to the public the reasons why a government agency approved the project  
14 in the manner the agency chose if significant environmental effects are involved; 3) make  
15 informed and balanced decisions; and 4) operate in a manner that promotes informed self-  
16 government. CEQA Guidelines §§ 15002(a)(3), 15002(a)(4), 15003(j).  
17  
18

19           144. ARB approved the Scoping Plan on December 11, 2008, five months before it  
20 issued Executive Order G-09-001 approving the FED. ARB’s language in adopting the Scoping  
21 Plan was sufficiently ambiguous as to confuse the public on the issue of whether the Scoping  
22 Plan was, in fact, adopted in December 2008. However its unambiguous actions are as follows:  
23 ARB refers to Resolution 08-47, dated December 11, 2008, as its “final resolution” adopting the  
24 Scoping Plan; ARB has a link on its website to “Approval of the AB 32 Scoping Plan -  
25 December 12, 2008” and refers to the adoption date in all of its internet publications as  
26

1 December 12, 2008; ARB issued a press release on December 11, 2008 stating that, “The Air  
2 Resources Board today approved California’s plan to reduce the state’s greenhouse gas emissions  
3 to 1990 levels by 2020”; ARB initiated implementation of AB 32 through workshops on  
4 measures adopted under the Scoping Plan, including implementation of the Cap-and-Trade  
5 program, as early as February, 2009; responses to comments were not made public until May 7,  
6 2009; ARB does not refer to Executive Order G-09-001 as the final resolution on the Scoping  
7 Plan.  
8

9 145. ARB’s actions not only violate the procedural requirements of CEQA, but also  
10 demonstrate ARB’s unwillingness to use CEQA as a tool to foster informed governmental  
11 decision-making. These actions demonstrate ARB’s predetermination to adopt the Scoping Plan  
12 before engaging in a good faith environmental review of that decision.  
13

#### 14 SEVENTH CAUSE OF ACTION

##### 15 (Violation of California Environmental Quality Act, 16 Pub. Res. Code §§ 21000 *et seq.*, Failure to Comply With the Requirements for 17 Programmatic Review)

18 146. Petitioners incorporate paragraphs 1 to 145 as though fully set forth herein.

19 147. ARB failed to issue a FED that satisfies CEQA requirements for programmatic  
20 review.

21 148. To comply with CEQA, ARB prepared what it describes as a programmatic  
22 functional equivalent document, intending to tier subsequent rule-specific environmental analysis  
23 from this plan-level document. The primary advantage of programmatic review, and therefore  
24 the principal justification for undertaking programmatic review, is that it can provide for a more  
25 exhaustive analysis of impacts and alternatives than would be possible by pursuing a group of  
26

1 individual environmental analyses. CEQA Guidelines § 15168(b)(1). In addition, programmatic  
2 review can ensure consideration of cumulative impacts where such consideration may be slighted  
3 or significantly more difficult in a case-by-case analysis. CEQA Guidelines § 15168(b)(2).  
4 Moreover, a general program-level analysis can allow lead agencies “to consider broad policy  
5 alternatives and program-wide mitigation measures at an early time when the agency has greater  
6 flexibility to deal with basic problems or cumulative impacts.” CEQA Guidelines §15168(b)(4).  
7

8 149. Programmatic review is intended to aid the effective and efficient use of  
9 public resources by limiting the amount of work and paper required in the environmental review  
10 of subsequent activities. CEQA Guidelines § 15168. For this purpose, programmatic review is  
11 most helpful when it deals with the effects of the program as specifically and comprehensively as  
12 possible, with detailed analysis. CEQA Guidelines § 15168(c)(5). In particular, the  
13 programmatic document should develop feasible mitigation measures and alternatives for  
14 agencies to incorporate into subsequent rule-making and implementing documents. CEQA  
15 Guidelines § 15168(c)(3).  
16

17 150. ARB’s programmatic FED analysis complies with none of these guidelines  
18 for programmatic review. The FED failed to identify, analyze and mitigate reasonably  
19 foreseeable impacts of its policy choices and regulatory decisions, and dismissed alternatives  
20 without meaningful analysis. In particular, ARB failed to provide adequate analysis of its policy  
21 decision to use a regional cap-and-trade program and an unbounded offsets program as part of  
22 the Scoping Plan, deferring the analysis until each individual rulemaking process.  
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3 **EIGHTH CAUSE OF ACTION**

4 **(Violation of California Environmental Quality Act,**  
5 **Pub. Res. Code §§ 21000 *et seq.*, Failure to Identify, Analyze and Mitigate the Direct,**  
6 **Indirect and Cumulative Impacts)**

7 151. Petitioners incorporate paragraphs 1 to 150 as though fully set forth herein.

8 152. ARB failed to identify, analyze and mitigate the significant adverse affects that  
9 implementation of the Scoping Plan will have on the environment.

10 153. A regulatory program qualifies for certification insofar as the functional  
11 equivalent document includes a description of mitigation measures that will minimize any  
12 significant or potentially significant adverse effects that the regulatory program will have on the  
13 environment. Pub. Res. Code § 21080.5(d)(3)(A), CEQA Guidelines § 15252(a)(2)(A). A  
14 certified regulatory program is subject to additional CEQA provisions, in particular, “the policy  
15 of avoiding significant adverse effects on the environment where feasible.” CEQA Guidelines §  
16 15250. Additionally, it is the State’s policy that public agencies should not approve projects if  
17 feasible mitigation measures remain available to substantially lessen the significant  
18 environmental effects of those projects. Pub. Res. Code § 21002. A lead agency is required to  
19 use its best efforts to ascertain and disclose all information it reasonably can in preparing its  
20 environmental assessment. CEQA Guidelines § 15144.

21 154. A lead agency is responsible for its own compliance with CEQA, and may not  
22 defer compliance or rely on other agencies to cure its failure to comply. CEQA Guidelines §§  
23 15020, 15126.4(a)(1)(B). A lead agency has failed to comply with CEQA when the success or  
24  
25  
26

1 failure of the mitigation measures it has relied upon in its environmental review depends largely  
2 on management plans that have not yet been formulated. CEQA Guidelines § 15126.4(a)(1)(B).

3 155. ARB failed to mitigate many of the significant and potentially significant adverse  
4 impacts that the Scoping Plan will have on the environment. In some instances, ARB failed to  
5 identify these impacts. Having failed to identify the impacts, ARB did not complete the CEQA  
6 process by analyzing and mitigating them. At other times, ARB identified significant and  
7 potentially significant adverse impacts, but deferred the formulation of mitigation measures to  
8 future individual rule-making processes.  
9

10 **1. \_\_\_\_ Failure to Identify Significant and Potentially Significant Impacts.**

11 Regional Cap-and-Trade and Offsets Program

12 156. ARB failed to identify, analyze and mitigate the significant and potentially  
13 significant adverse environmental impacts that are likely to result from its decision to use a  
14 regional cap-and-trade program along with an offsets program with no regional boundaries. In  
15 particular, ARB failed to identify significant impacts on air quality, including local impacts on  
16 environmental justice communities.  
17

18 157. The FED, including numerous comments from the public, contains substantial  
19 evidence establishing the significant adverse impacts that previous cap-and-trade programs have  
20 had on the communities they affect. ARB had a duty to use that information to effectively  
21 analyze and mitigate impacts that are likely to result from its decision to use regional cap-and-  
22 trade along with a boundless offsets program. Instead, ARB committed itself only to deferred  
23 consideration and mitigation of impacts at the time that market mechanisms are recommended  
24 for regulations on a case-by-case basis.  
25  
26

1 Land Use

2 158. ARB failed to disclose, analyze or mitigate the potential impacts that the Water  
3 System Energy Efficiency and Increase Renewable Energy Induction components of the Scoping  
4 Plan will have on agricultural resources.  
5

6 Geology and Soils

7 159. ARB deferred analysis and mitigation of the impacts that the Low Carbon Fuel  
8 Standard and the Renewable Portfolio Standard will have on geology and soils. ARB knows  
9 where fuel and energy production facilities are currently located or proposed to be located, as  
10 well as where future proposed sites are likely to be located. This is sufficient information for  
11 ARB to discuss what types of impacts can be fairly anticipated from the construction and  
12 operation of these facilities. ARB similarly deferred consideration of impacts to geology and  
13 soils from programs for water recycling, water system energy efficiency, and reuse of urban  
14 runoff.  
15

16 Biological Resources

17 160. ARB deferred analysis and mitigation of the impacts that the Low Carbon Fuel  
18 Standard and the Renewable Energy Portfolio Standard will have on biological resources. ARB  
19 knows the location of currently operating and currently proposed fuel and energy production  
20 facilities, and has access to information on the impacts that those facilities have had, and will  
21 have, on biological resources. This is sufficient information for ARB to discuss what types of  
22 species are likely to be affected by the siting of new fuel and energy production facilities under  
23 the Low Carbon Fuel Standard and the Renewable Energy Portfolio Standard, and to mitigate  
24 those impacts. ARB also deferred consideration and mitigation of the potentially significant  
25  
26

1 impacts that programs for water recycling, water system energy efficiency, and reuse of urban  
2 runoff will have on biological resources.

3 Hazardous Materials

4  
5 161. ARB failed to disclose, analyze and mitigate the potentially significant impacts  
6 that will result from the disposal of naturally occurring radioactive material during the production  
7 of geothermal energy. This is an indirect impact of the Renewable Portfolio Standard.

8 Aesthetics

9  
10 162. ARB deferred analysis of the impacts that the Low Carbon Fuel Standard, the  
11 Renewable Portfolio Standard, and the Million Solar Roofs Project will have on aesthetics to  
12 future rule-making and subsequent local land-use decision-making processes.

13 Cultural Resources

14  
15 163. ARB deferred analysis and mitigation of potentially significant impacts to cultural  
16 resources from all of the measures contained in the Scoping Plan, despite the foreseeability of  
17 implementation measures that will have potentially significant impacts on cultural resources.

18 **2. Deferred Mitigation of Identified Significant and Potentially Significant**  
19 **Impacts.**

20  
21 164. ARB failed to analyze and mitigate many of the impacts of the Scoping Plan,  
22 instead deferring mitigation to future individual rule-making processes. In particular, ARB  
23 defers most of the analysis of localized impacts to local land use agencies to make at the time of  
24 future proposed project siting.

25 Air Quality

26  
27 165. ARB does not support its conclusion that the Scoping Plan will substantially

1 improve air quality in California. Even if this conclusion was supported, a project's likelihood of  
2 improving the state's overall air quality does not exempt a lead agency from analyzing the  
3 project's individually significant impacts. ARB recognized that the Scoping Plan may increase  
4 local air pollution in some areas, but defers mitigation of those impacts to future rule-making and  
5 permitting by local agencies.  
6

7 166. ARB failed to analyze and mitigate the significant impacts that the Scoping Plan  
8 will have on the occurrence of criteria pollutants in the State's ambient air, and to provide  
9 information on the health effects of those criteria pollutants. Additionally, ARB failed to identify  
10 and mitigate the cumulative impacts of the increased emissions in communities located in air  
11 basins classified as non-attainment for some criteria pollutants.  
12

13 167. ARB recognizes that the Renewable Portfolio Standard will result in potentially  
14 significant construction-related impacts on air quality. Despite having access to information on  
15 currently operating renewable energy facilities, ARB did not attempt to establish the likely  
16 impacts that the Renewable Portfolio Standard will have on reasonably foreseeable or presently  
17 proposed renewable energy facilities in the State. ARB also failed to mitigate those potentially  
18 significant impacts.  
19

20 168. ARB recognizes that the Scoping Plan's provision for redirected open burning of  
21 agricultural waste at biomass facilities may have a significant impact on air quality. ARB did not  
22 utilize available information on the location and air quality impacts of currently operating  
23 biomass facilities to assess the significance of the impacts of future biomass facilities. Instead,  
24 ARB concluded, without basis, that modern control technologies and good plant design will  
25 reduce NOx and PM emissions from these facilities. Modern control technologies and good  
26

1 plant design are not mitigation measures because they are not defined nor required under the  
2 Scoping Plan.

3 169. ARB's discussion of the Low Carbon Fuel Standard's air quality impacts defers  
4 any analysis and mitigation measures regarding the site specific impacts until subsequent rule-  
5 making and site specific local permitting. ARB did not attempt to establish the likely impacts  
6 that the Standard would have on reasonably foreseeable or presently proposed corn-based ethanol  
7 or other bio-fuel facilities.  
8

9 170. The Scoping Plan is likely to result in increased heat and power generation, which  
10 ARB recognizes may have significant local impacts on air quality if units are not installed  
11 properly. ARB failed to quantify or mitigate those impacts.  
12

### 13 Land Use

14 171. ARB recognizes that the siting of new fuel and energy production facilities  
15 pursuant to the Low Carbon Fuel Standard and the Renewable Portfolio Standard may have a  
16 significant impact on state classified agricultural land, but defers the analysis and mitigation of  
17 this impact to future rule-making and implementation.  
18

### 19 Energy Demand

20 172. ARB recognizes that linking the cap-and-trade program to the Western Climate  
21 Initiative Partner jurisdictions may cause a shift from the use of internal combustion engines to  
22 the use of electric engines, which would increase energy demand. ARB does not disclose the  
23 significance of this potential impact, nor does it address feasible mitigation measures to  
24 minimize the impact.  
25

26 ///

1 Hazardous Materials

2 173. ARB proposed the use of a non-toxic antifouling product on hulls as part of the  
3 commercial harbor craft measure as a means to reduce hazardous materials impacts. However,  
4 ARB does not require this measure. ARB must either make this measure mandatory and fully  
5 enforceable or implement other mitigation measures to reduce impacts from hazardous materials.  
6

7 Public Health

8 174. ARB limited its analysis of impacts on public health to a conclusory statement  
9 that the Scoping Plan will have a cumulatively beneficial impact on public health. Even if this  
10 statement was supported by evidence, a project’s likelihood of improving the State’s overall  
11 public health does not exempt the lead agency from its duty to analyze the project’s localized and  
12 individually significant impacts.  
13

14 **NINTH CAUSE OF ACTION**

15 **(Violation of California Environmental Quality Act,**  
16 **Pub. Res. Code §§ 21000 *et seq.*, Failure to Adequately Analyze Alternatives to**  
17 **Regional Cap-and-Trade)**

18 175. Petitioners incorporate paragraphs 1 to 174 as though fully set forth herein.

19 176. ARB failed to adequately analyze alternatives to the regional cap-and-trade  
20 program and other measures that were adopted to implement the Scoping Plan.

21 177. Certified regulatory programs that submit functional equivalent documents must  
22 include a description of alternatives that minimize the significant adverse effects that the  
23 proposed regulatory action will have on the environment. Pub. Res. Code § 21080.5(d)(3)(A),  
24 CEQA Guidelines § 15252. Certified regulatory programs are subject to other provisions in  
25 CEQA, in particular, “the policy of avoiding significant adverse effects on the environment  
26

1 where feasible.” CEQA Guidelines § 15250. Additionally, it is the policy of the state legislature  
2 that public agencies should not approve projects if feasible alternatives remain available to  
3 substantially lessen the significant environmental effects of those projects. Pub. Res. Code §  
4 21002. A lead agency is required to use its best efforts to ascertain and disclose all information it  
5 reasonably can in preparing its environmental assessment. CEQA Guidelines § 15144.  
6

7 178. The selection of alternatives should foster informed decision-making and public  
8 participation. Lead agencies must examine a reasonable range of alternatives that feasibly meet  
9 most of the project’s basic objectives while avoiding or substantially reducing the significant  
10 effects of the project. CEQA Guidelines § 15126.6(a). Reasonable alternatives should be  
11 considered even if they impede to some degree the attainment of the project objectives, or would  
12 be more costly. CEQA Guidelines § 15126.6(b). The alternatives analysis must include  
13 “sufficient information about each alternative to allow meaningful evaluation, analysis and  
14 comparison with the proposed project.” CEQA Guidelines § 15126.6(d).  
15

16 179. A lead agency is responsible for its own compliance with CEQA, and may not  
17 defer compliance or rely on other agencies to cure its failure to comply. CEQA Guidelines §§  
18 15020, 15126.4(a)(1)(B).  
19

20 **1. Alternative 2.**

21 180. In its analysis of Alternative 2, ARB acknowledged that variations of measures  
22 adopted under the Scoping Plan may avoid or substantially reduce potentially significant impacts,  
23 but it deferred analysis of these variations to future rule-making. Deferring analysis is  
24 particularly ineffective for a programmatic document like the Scoping Plan, because future rule-  
25

1 making and project implementation cannot alter the broad policy decisions made during the  
2 adoption of the Scoping Plan.

3 **2. Alternative 3.**

4  
5 181. Alternative 3 is a California-only cap and-trade-program, wherein emission  
6 reduction credits are traded statewide on the open market. ARB claimed that it would be  
7 impossible to determine where and in what sectors reductions would occur under Alternative 3,  
8 so it dispensed with an analysis of the benefits of this program, as well as foreseeable impacts  
9 and feasible mitigation measures.

10  
11 182. ARB did not use its best efforts to ascertain and disclose all information it  
12 reasonably could in assessing Alternative 3. The claim that ARB was unable to determine where  
13 significant impacts could be avoided or substantially reduced under a statewide cap-and-trade  
14 program is inconsistent with its ability to identify significant and potentially significant impacts  
15 that will result from a regional cap-and-trade program.

16 **3. Alternative 4.**

17  
18 183. Alternative 4 is a program based on source-specific regulatory requirements  
19 instead of cap-and-trade. As with Alternative 3, ARB claimed that it would be speculative to  
20 predict the impact of a source-specific regulatory requirements program, though ARB recognizes  
21 that this alternative would be a more aggressive implementation of AB 32. ARB claimed that an  
22 analysis would be speculative because no measures would ultimately be adopted until future  
23 regulatory implementation took place. However, regulations under a source-specific regulatory  
24 requirements program could be developed at the statewide level, making an evaluation of its  
25 foreseeable benefits and impacts relatively straightforward.  
26

1           184. The FED contains no evidence that ARB could not identify a source-specific  
2 program that would meet most of AB 32's basic objectives while avoiding or substantially  
3 reducing the significant effects of the adopted Scoping Plan. ARB failed to describe the basic  
4 components of such a program and analyze it in a manner that would allow for informed  
5 comparison with the currently adopted program, as well as current conditions.  
6

7           **4. Alternative 5**

8           185. Alternative 5 is a program based primarily on a carbon fee. ARB expects similar  
9 reductions from a carbon fee alternative as from the regional cap-and-trade program. This  
10 determination is not supported by fact, but is rather based on ARB's unsupported conclusion that  
11 it is similarly difficult to predict where reductions will occur under both programs, both in terms  
12 of sector and geography. Accordingly, ARB engaged in no inquiry reasonably likely to identify  
13 how a carbon fee alternative would avoid or substantially reduce impacts associated with the  
14 regional cap-and-trade program, or reasonably foreseeable impacts associated with the carbon fee  
15 alternative.  
16

17           **5. Failure to Analyze the Regulation of Agriculture as a Reasonable**  
18           **Alternative.**

19           186. Substantial evidence in the record establishes that agriculture is one of  
20 California's greatest contributors to greenhouse gas emissions. ARB's decision to adopt a  
21 program exempting agriculture from regulation while allowing it to generate offsets under the  
22 cap-and-trade program will have significant cumulative impacts on air quality, transportation,  
23 biological resources, water quality and water resources. A reasonable and feasible alternative  
24 that would avoid or substantially reduce these impacts, while still meeting most of the Scoping  
25  
26

1 Plan’s main objectives, would be to regulate the agricultural sector. Plaintiffs and other  
2 commentors encouraged ARB to consider regulating agriculture under the Scoping Plan. ARB  
3 failed to consider regulating agriculture as one of the reasonable alternatives to the adopted  
4 program.  
5

6 **6. ARB Failed to Adequately Analyze the Preferred Alternative.**

7 187. ARB’s conclusion that the regional cap-and-trade program is the preferred  
8 alternative is legally insufficient considering that its impacts are not discussed in any detail, and  
9 because the analysis of each alternative fails to comply with CEQA.  
10

11 188. ARB recommended regional cap-and-trade, claiming that the reduction measures  
12 of that program were developed to reduce greenhouse gas emissions from key sources while  
13 “improving public health, promoting a cleaner environment, preserving our natural resources and  
14 ensuring impacts of the reductions are equitable and do not disproportionately impact low-  
15 income communities and minority communities.” ARB provides no support for this claim  
16 because ARB has deferred any meaningful analysis to subsequent rule-making and permitting  
17 processes. In addition to being speculative, the description of the benefits of the regional cap-  
18 and-trade program would be true for any program adopted under the Scoping Plan, because AB  
19 32 requires it. There is no evidence in the record that alternatives 2 through 5 would not also  
20 achieve those improvements.  
21

22 **TENTH CAUSE OF ACTION**

23 **(Violation of California Environmental Quality Act, Pub. Res. Code §§ 21000 *et seq.*,  
24 Failure to Provide for Full Public Participation in the Decisionmaking Process)**

25 189. Petitioners incorporate paragraphs 1 to 187 as though fully set forth herein.  
26

1           190. ARB failed to provide for full public participation at the hearings held in  
2 Sacramento prior to the adoption of the Scoping Plan.

3           191. Public participation is a cornerstone of the CEQA process. To comply with  
4 CEQA, lead agencies must provide for broad formal and informal public involvement to ensure  
5 that they are aware of the public's reactions to environmental issues related to the agency's  
6 activities. CEQA Guidelines § 15201.

7           192. ARB violated its duty to provide for broad public participation at its public  
8 hearing in Sacramento on November 20, 2008. Seventy-six (76) residents of the San Joaquin  
9 Valley attended the hearing, and ARB took two actions that had the direct and anticipated effect  
10 of preventing those residents from giving public testimony.

11           193. ARB arbitrarily chose which speakers would be allowed to participate in the first  
12 portion of the hearing. The 61 speaker cards of San Joaquin Valley residents were turned in to  
13 ARB staff in the early morning along with 240 other speakers' cards. Those cards were not  
14 entered into the speaker list, but were segregated for separate treatment. Ultimately, 10 of the 61  
15 speakers were chosen to testify before 3:00 p.m., leaving 51 speakers unable to voice their  
16 opinions as members of the public.

17           194. Additionally, Spanish-speaking members of the public, who sought access to  
18 translation equipment, were forced to undergo a second sign-in procedure and produce  
19 identification in order to receive the translation equipment. English-speaking participants signed  
20 in once, and were not asked for identification. This policy intimidated and deterred Spanish-  
21 speakers from participating in the public comment process. The long wait for translation  
22 equipment meant that almost all of the seats in the hearing room were full by the time that  
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1 Spanish-speakers entered, resulting in their removal to an overflow room, limiting their ability to  
2 participate in the proceedings.

3 195. This behavior by ARB not only violates CEQA's public participation  
4 requirements, but also has a negative impact on environmental justice concerns, as San Joaquin  
5 Valley residents are among the environmental justice communities most negatively affected by  
6 the Scoping Plan.  
7

8 **PRAYER FOR RELIEF**

9 WHEREFORE, Petitioners pray for relief as follows:

10 A. For a peremptory writ of mandate directing Respondents to set aside and vacate  
11 certification of the Functional Equivalent Document and rescind the adoption of the Scoping  
12 Plan;  
13

14 B. For a peremptory writ of mandate directing Respondents to:

15 (1) adopt a Scoping Plan that complies with AB 32 and the Health & Safety Code;

16 (2) adopt a Scoping Plan that achieves the maximum technologically feasible and  
17 cost-effective reductions in greenhouse gas emissions from sources and categories of  
18 sources by 2020, at the same time that it maximizes co-benefits and does not prevent  
19 air basins from coming into attainment or cause violations of national ambient air  
20 quality standards;

21 (3) adopt a Scoping Plan that applies a *de minimis* threshold of greenhouse gas  
22 emissions below which emission reduction requirements shall not apply, and above  
23 which emission reduction requirements shall apply;  
24  
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26

1 (4) adopt a Scoping Plan that identifies all feasible existing and projected  
2 technologies to minimize greenhouse gas emissions, and assessing their cost-  
3 effectiveness; and

4 (5) adopt a Scoping Plan that uses the best available economic models, emissions  
5 estimation techniques, and other scientific methods to evaluate the total cost and the  
6 total economic and noneconomic benefits of the Scoping Plan;  
7

8 C. For a peremptory writ of mandate directing Respondents to comply with CEQA, to  
9 prepare an adequate Functional Equivalent Document, to recirculate such adequate Functional  
10 Equivalent Document for public comment, and to take any other action required by Sections  
11 21168.9 and 21080.5 of the Public Resources Code prior to certification of the Functional  
12 Equivalent Document;  
13

14 D. For a peremptory writ of mandate directing Respondents to prepare a Functional  
15 Equivalent Document that:

16 (1) satisfies requirements for programmatic review, in particular, but not limited to, a  
17 full consideration of cumulative impacts that may foreseeably result from the  
18 implementation of a regional cap-and-trade program and an offsets program with no  
19 geographic boundaries;  
20

21 (2) adopts adequate Findings of significant impacts of the Scoping Plan, and  
22 identifies, evaluates and adopts feasible alternatives and/or mitigation measures that  
23 will avoid or substantially lessen the significant impacts of the Scoping Plan; and  
24

25 (3) provides for full public participation in the discussion and adoption of the  
26 recirculated Functional Equivalent Document;

1 E. For a permanent injunction enjoining Respondents, their agents, employees, officers  
2 or representatives, and all persons acting in concert or participating with them from  
3 implementing the Scoping Plan for AB 32 unless and until the California Air Resources Board  
4 adopts an adequate new Scoping Plan that complies with AB 32 and the Health & Safety Code,  
5 and a Functional Equivalent Document that complies with CEQA;  
6

7 F. For a Declaration that the Respondents:

8 (1) violated AB 32 and the Health & Safety Code by failing to adopt a Scoping Plan  
9 that achieves both the maximum technologically feasible and cost-effective reductions  
10 in greenhouse gas emissions from sources or categories of sources;  
11

12 (2) violated AB 32 and the Health & Safety Code by failing to adopt a Scoping Plan  
13 that establishes and applies a *de minimis* threshold for greenhouse gas emissions;

14 (3) violated AB 32 and the Health & Safety Code by failing to adopt a Scoping Plan  
15 that identifies and assesses the cost-effectiveness of all feasible existing and projected  
16 technologies to minimize greenhouse gas emissions, and that uses that information in  
17 deciding which implementation measures to adopt;  
18

19 (4) violated AB 32 and the Health & Safety Code by failing to adopt a Scoping Plan  
20 that uses the best available economic models, emissions estimation techniques, and  
21 other scientific methods to evaluate the total cost and the total economic and  
22 noneconomic benefits of the Scoping Plan;

23 (5) violated AB 32 and the Health & Safety Code by adopting a Scoping Plan that  
24 fails to maximize co-benefits and that interferes with efforts to achieve and maintain  
25  
26

1 state and national ambient air quality standards and reductions in toxic air  
2 contaminant emissions;  
3 (6) violated CEQA by failing to certify the Functional Equivalent Document before  
4 adopting and beginning to implement to Scoping Plan;  
5 (7) violated CEQA by failing to produce a programmatic Functional Equivalent  
6 Document that satisfies CEQA requirements for program-level environmental  
7 documents;  
8 (8) violated CEQA by failing to analyze significant impacts, feasible alternatives and  
9 mitigation measures that minimize the significant impacts of the Scoping Plan; and  
10 (9) violated CEQA by failing to provide for full public participation at the hearings  
11 held in Sacramento on November 20, 2008;

14 G. For attorneys fees pursuant to Section 1021.5 of the California Code of Civil  
15 Procedure;

16 H. For costs of suit incurred herein; and

17 I. For such other and further relief as the court deems just and proper.  
18

19 Dated: June 10, 2009

20 Respectfully Submitted,  
21 CENTER ON RACE, POVERTY & THE ENVIRONMENT

22 \_\_\_\_\_  
23 Marybelle Nzegwu  
24 Jennifer Giddings  
25 Caroline Farrell  
26 Alegría De La Cruz

27 Attorneys for Petitioners and Plaintiffs Attorneys for  
Plaintiffs Association of Irritated Residents,

Coalition for a Safe Environment, Society for Positive  
Action, West County Toxics Coalition, Angela Johnson-  
Meszaros, Henry Clark, Jesse Marquez, Shabaka Heru, Tom  
Frantz

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1 **VERIFICATION**

2 I, MARYBELLE NZEGWU, am an attorney, in good standing, duly admitted and  
3 licensed to practice law in this State. I have my office at 47 Kearny St., Suite 804, San  
4 Francisco, CA 94108.  
5

6 I am the attorney of record for petitioners in this action. I make this verification because I  
7 am more familiar with all of the facts than are any one of the parties.

8 I have read the foregoing petition and know the contents thereof. The same is true of my  
9 own personal knowledge, except for those allegations based on information, and belief, as to  
10 those allegations, I believe them to be true and correct.  
11

12 I declare under penalty of perjury that the foregoing is true and correct.  
13 Executed at San Francisco, CA this 10th day of June 2009.  
14

15 \_\_\_\_\_  
16 MARYBELLE NZEGWU  
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