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COUNTY OF SAN FRANCISCO

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TENTATIVE DECISION

SSOCIATION OF IRRITATED RESIDENTS et al VS. CALIFORNIA AIR RESOURCES BOAF

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SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

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

Petitioners and Plaintiffs,

vs.

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

Respondents and Defendants.

Case No. CPF-09-509562

TENTATIVE STATEMENT OF DECISION:

ORDER GRANTING IN PART PETITION FOR WRIT OF MANDATE

Judge: Hon. Ernest H. Goldsmith
Dept: 613

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

BACKGROUND

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

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

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

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

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

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

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

DISCUSSION

I. PETITIONERS' CHALLENGES UNDER AB 32

A. STANDARD OF REVIEW

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

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

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

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

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

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

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

B. DISCUSSION

1. MAXIMUM TECHNOLOGICALLY FEASIBLE AND COST-EFFECTIVE REDUCTIONS

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

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

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

HSC section 38550 requires: "[b]y January 1, 2008, the state board shall. . . determine what the statewide greenhouse gas emissions level was in 1990, and approve in a public hearing, a statewide greenhouse gas emissions limit that is equivalent to that level to be achieved by 2020." This limit is to "remain in effect unless otherwise amended or repealed" and ARB is directed to "make recommendations to the Governor and the Legislature on how to continue reductions" by 2020. (HSC § 38551.) ARB set the state emissions limit at 427 $MMTCO_2E$. (ARB026697.) AB

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. CAP AND TRADE

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

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

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

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

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

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

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

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

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

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

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

3. PUBLIC HEALTH AND ENVIRONMENTAL ANALYSIS

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

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

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

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

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

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

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

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

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

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

However an examination of the Agricultural Working Group's document "The Agriculture Sector Summary and Analysis" (ARB 033775 – 033862) reveals that the health evaluation merely consists of two sentences:

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

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

b. Public Health Evaluation of Cap and Trade

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. CONCLUSION

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

II. PETITIONERS' CHALLENGES UNDER CEQA

A. STANDARD OF REVIEW

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

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

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

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

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

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

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

B. DISCUSSION

1. CERTIFIED REGULATORY PROGRAM

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

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

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

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

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

2. PROGRAM EIRS AND TIERING

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

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

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

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

3. COMPLIANCE WITH THE FUNCTIONAL EQUIVALENT OF CEQA

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

b. ARB's Discussion of Alternatives Is Inadequate

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

I. PETITIONERS' CHALLENGES UNDER AB 32

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

II. PETITIONERS' CHALLENGES UNDER CEQA

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

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

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

DATED: January 21, 2011

HON. ERNEST H. GOLDSMITH
Judge of the Superior Court

CERTIFICATE OF SERVICE BY MAIL

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

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

1) I am not a party to this action;

2) On JAN 2 4 2011, I served the attached:

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

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

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Delano, CA 93215

and,

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

DATED: JAN 2 4 2011

T. MICHAEL YUEN, Clerk

By: _____, Deputy