



April 22, 2011

Honorable Judge Ernest Goldsmith
San Francisco Superior Court
Dept 613
400 McAllister Street
San Francisco, CA 94102-4514

Re: Association of Irrigated Residents v. California Air Resources Board, Case No. CPF-09-509562

Pursuant to the Statement of Decision: Order Granting in Part Petition for Writ of Mandate (“Decision”) and Rule of Court 3.1312, Petitioners and Plaintiffs Association of Irrigated Residents, Communities for a Better Environment, California Communities Against Toxics, Coalition for a Safe Environment, Society for Positive Action, West County Toxics Coalition, Angela Johnson Meszaros, Caroline Farrell, Dr. Henry Clark, Jesse Marquez, Martha Dina Arguello, Shabaka Heru, Tom Frantz (collectively “Petitioners”) hereby submit the following: (1) Proposed Order Granting Petition for Writ of Mandate and Proposed Alternate Order Granting Petition for Writ of Mandate, attached as Exh. 1; (2) Proposed Judgment and Proposed Alternate Judgment, attached as Exh. 2; and (3) Proposed Peremptory Writ of Mandate and Proposed Alternate Peremptory Writ of Mandate, attached as Exh. 3. Petitioners submit alternate versions of these documents that would limit the scope of the injunction to include only the development and implementation of cap and trade. For the reasons set forth below, Petitioners believe that the Court has the discretion to enter the alternate judgment and peremptory writ of mandate. Petitioners refer to all six documents collectively as “Proposed Documents.”

Petitioners served the Proposed Documents to Respondent and Defendant Air Resources Board *et al* (collectively “ARB”) on April 13, 2011. ARB sent a letter to Petitioners on April 18, 2011 stating eight objections.¹ After considering the objections, Petitioners agreed to resolve two of the eight issues. In summary, ARB complained that the proposed Writs did not include language regarding ARB’s ability to exercise its discretion in complying with the Writ, even though the proposed Judgments did include such language. In response, Petitioners mirrored the language from the proposed Judgments into the proposed Writs. ARB also argued that although the Judgments state that the Court will determine the amount of attorneys’ fees and expenses to be paid based on a motion filed in accordance with Code of Civil Procedure 1021.5 and California Rules of Court, it should be made plain that the Court will also determine whether

¹ ARB’s letter is attached as Exhibit 4. Petitioners’ letter in response is attached as Exhibit 5.

Petitioners are entitled to attorneys' fees. Accordingly, Petitioners revised this section to clarify that the Court will decide both the entitlement to fees as well as the appropriate amount of such fees.

The remaining six objections were not fully resolved. The thrust of ARB's objections are that Petitioners' request for relief is too broad. However, Petitioners' Proposed Documents are fully consistent with the Court's Decision.

ARB claims that as to the Proposed Peremptory Writ of Mandate, the injunction is overly broad because it would essentially enjoin the entire Scoping Plan. However, the Decision states that, "[t]herefore, let a peremptory writ of mandate issue . . . enjoining any further implementation of the measures contained within the scoping plan until after Respondent has come into compliance with its obligations under the certified regulatory program and CEQA," which supports such a broad injunction. (*See* Decision p. 35.) However, for clarity, Petitioners replaced one sentence to more closely track the language in the Court's Decision.

As to both Proposed Writs, ARB urges that activities in furtherance of Cap and Trade should not be enjoined; the Writ should be limited to enjoining ARB from "submitting the pending Cap and Trade draft rule to the Office of Administrative Law until after ARB" completes the alternatives analysis. As an initial matter, the issue of whether ARB's rulemaking authority under AB 32 is severable from its obligation to prepare a Scoping Plan was fully briefed and decided by this Court. (Decision p. 35.) Second, in addition to being inconsistent with this Court's Decision, ARB's proposal undermines the integrity of CEQA and is inconsistent with Public Resource Code 21168.9, which provides for the relief requested by Petitioners. ARB's proposal is inconsistent with Public Resources Code § 21168.9(b) because to limit the relief requested, the Court would have to find that "(1) the portion or specific project activity or activities are severable, (2) severance will not prejudice complete and full compliance with this division, and (3) the court has not found the remainder of the project to be in noncompliance with this division." Here, ARB's ability to engage in activities in furtherance of Cap and Trade is not severable and would prejudice compliance with the requirement to perform a genuine alternatives analysis, in compliance with CEQA. As this Court observed,

Under Public Resources Code section 21168.9, if a court finds that an agency's decision has been made in violation of CEQA, and that a specific activity or activities will prejudice the consideration of alternatives to the project, it may enjoin any or all activities that would result in an adverse change to the physical environment until the agency has come into compliance with CEQA. . . . Continued rulemaking and implementation of cap and trade will render considerations of alternatives a nullity as a mature cap and trade program would be in place well advanced from the premature implementation which has already taken place.

(Decision at 35.) If ARB simultaneously engages in an alternatives analysis while it continues to

implement and develop all of the components of a Cap and Trade program, then the Court-ordered alternatives analysis will be nothing more than an exercise to justify that which ARB has sought to accomplish without regard to alternatives.

ARB also argues that the language to set aside Board Resolution 08-47 adopting the Scoping Plan goes beyond the scope of the Statement of Decision. While the Decision does not specifically set aside the Scoping Plan itself, this relief in the Proposed Writ is based on the language in the Decision, which finds:

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 regulatory program. (Decision p. 34.)

In this context, setting aside the Scoping Plan is consistent with the Court's decision, and appropriate and necessary to remedy Petitioners' Fifth Cause of Action. It will further allow ARB to properly adopt the Scoping Plan after it considers responses to comments on the new alternatives analysis.

ARB also made three comments not related to the scope of the relief. ARB argued that costs should not include costs that were not actually incurred – preparation of the administrative record – and that this section on costs should clarify that Petitioners did not prevail on all of their claims. Petitioners reminded ARB that it can file a motion to tax costs if appropriate once a memorandum was filed.

ARB also argued that Judgment should be entered for both parties. However, ARB provides no support for this approach and the proposed Judgments already reflect the fact that the Order was granted in part and denied in part.

Finally, ARB objected to presenting the Court with two different proposed writs, but did not cite any law or policy prohibiting Petitioners from doing so. Given the public interest in allowing the non-Cap and Trade components of the Scoping Plan to continue to operate alongside the interest in ensuring that ARB performs a meaningful alternatives analysis and “exposes its analysis to public scrutiny,” Petitioners believe it is proper to present the Court with two writs in this case.

Limiting the injunction only to Cap and Trade is consistent with this Court's Decision because the Court found that premature consideration and implementation of Cap and Trade in particular would jeopardize meaningful consideration of alternatives. In this sense, ARB's violation is severable. Enjoining only Cap and Trade activities will not jeopardize ARB's consideration of other project alternatives. At the same time, the Decision states that the writ

Honorable Judge Ernest Goldsmith
San Francisco Superior Court
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Page | 4

should command ARB to enjoin “any further implementation of the measures contained in the Scoping Plan . . .” Therefore, Petitioners provide the Court with a Proposed Peremptory Writ of Mandate and a Proposed Alternate Writ of Mandate that allow the Court to provide appropriate remedies that will ensure that the Court’s intention is effectuated.

Very truly yours,

Adrienne Bloch
Communities for a Better Environment

Brent Newell
Center on Race, Poverty & the Environment
Attorneys for Petitioners

cc: Mark Poole, Attorney for Respondents

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9 Coalition for a Safe Environment, Dr. Henry Clark, Jesse N. Marquez, Tom Frantz, Society
10 for Positive Action, Shabaka Heru, and West County Toxics Coalition.

11 (caption continued on next page)

12 SUPERIOR COURT OF THE STATE OF CALIFORNIA

13 IN AND FOR THE COUNTY OF SAN FRANCISCO

14 ASSOCIATION OF IRRITATED RESIDENTS, an
15 unincorporated association, CALIFORNIA
16 COMMUNITIES AGAINST TOXICS, an
17 unincorporated association, COMMUNITIES FOR A
18 BETTER ENVIRONMENT, a nonprofit corporation,
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20 nonprofit corporation, SOCIETY FOR POSITIVE
21 ACTION, a nonprofit corporation, WEST COUNTY
22 TOXICS COALITION, a nonprofit corporation,
23 ANGELA JOHNSON MESZAROS, CAROLINE
24 FARRELL, DR. HENRY CLARK, JESSE N.
25 MARQUEZ, MARTHA DINA ARGUELLO,
26 SHABAKA HERU, TOM FRANTZ, in their
27 individual capacities,

28 Petitioners,

v.

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, and RONALD O. LOVERIDGE,
in their official capacities as members of the Board,

Respondents

CASE NO.: CP-509562

**[PROPOSED] ORDER GRANTING
PETITION FOR WRIT OF MANDATE**

Place: Department 613

Judge: Honorable Ernest Goldsmith

Action Filed: June 10, 2009

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9 for Positive Action, Shabaka Heru, and West County Toxics Coalition.

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Attorneys for Petitioners California Communities Against Toxics, Caroline Farrell, Martha
Dina Arguello

1 This matter came on regularly for hearing on December 20, 2010 in Department 613
2 before the Honorable Ernest H. Goldsmith. Petitioners were represented by Alegría De La Cruz
3 and Brent Newell of the Center on Race, Poverty & the Environment, and by Adrienne Bloch of
4 Communities for a Better Environment. Respondents were represented by Mark Poole, Gavin
5 McCabe, and David Zanona of the Office of the Attorney General of California.

6 The Court having reviewed the pleadings, declarations, evidentiary exhibits,
7 administrative record, and other papers submitted by counsel, heard the oral arguments of
8 counsel, reviewed the record again in light of those arguments; the matter having been
9 submitted for decision; and as set forth fully in the Statement of Decision: Order Granting In
10 Part Petition for Writ of Mandate (“Order”), the Court finds that

11 a. ARB committed a prejudicial abuse of discretion when it failed to proceed
12 in a manner require by law by inadequately describing and analyzing Project alternatives
13 sufficient for informed decisionmaking and public participation;

14 b. ARB committed a prejudicial abuse of discretion when it failed to proceed
15 in a manner require by law by violating the informational requirements of CEQA and its
16 own certified regulatory program when it adopted Resolution 08-47 and began
17 implementing the Scoping Plan without first responding to comments, completing the
18 environmental review process, and approving the Project.

19 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:
20

21 1. JUDGMENT BE ENTERED in favor of Petitioners and Plaintiffs Association
22 of Irritated Residents, Communities for a Better Environment, California Communities
23 Against Toxics, Coalition for a Safe Environment, Society for Positive Action, West County
24 Toxics Coalition, Angela Johnson Meszaros, Caroline Farrell, Dr. Henry Clark, Jesse
25 Marquez, Martha Dina Arguello, Shabaka Heru, Tom Frantz (collectively “AIR” or
26 “Petitioners”) and against Respondents and Defendants California Air Resources Board, *et*
27 *al.* (collectively “ARB” or “Respondents”), on Petitioners’ Verified First Amended Petition
28 for Writ of Mandate and Complaint for Declaratory and Injunctive Relief, alleging that ARB

1 violated the California Environmental Quality Act (“CEQA”), Public Resources Code
2 section 21000 et seq., by preparing a Functional Equivalent Document (“FED”) for the
3 Climate Change Scoping Plan (“Project”) that did not comply with CEQA.

4 2. A peremptory writ of mandate directed to Respondents issue under seal of this
5 Court, ordering that:

6 a. ARB shall **set aside** Board Resolution 08-47 and Executive Order G-09-001
7 adopting and approving the *Climate Change Scoping Plan to Reduce Greenhouse Gases in*
8 *California* (“Project”).

9 b. ARB shall **set aside** Executive Order G-09-001 certifying the Functional
10 Equivalent Document (“FED”).

11 c. ARB shall **take no action** in reliance on the Scoping Plan and FED until ARB
12 has come into complete compliance with ARB’s obligations under its certified
13 regulatory program and CEQA, consistent with the Court’s Order.

14 d. The Writ shall **enjoin** ARB from any further implementation of the measures
15 contained in the Scoping Plan until ARB has comes into complete compliance with ARB’s
16 obligations under its certified regulatory program and CEQA, consistent with the Court’s
17 Order. This includes any further rulemaking and implementation of cap and trade,
18 specifically but not limited to any action in furtherance of California Cap and Trade
19 Program Resolution 10-42.
20

21 DATED:
22

23
24 _____
25 HON. ERNEST GOLDSMITH
26 JUDGE OF THE SUPERIOR COURT
27
28

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JOHN G. TELLES, and RONALD O. LOVERIDGE,
in their official capacities as members of the Board,

Respondents

CASE NO.: CP-509562

**[PROPOSED ALTERNATE] ORDER
GRANTING PETITION FOR WRIT OF
MANDATE**

Place: Department 613

Judge: Honorable Ernest Goldsmith

Action Filed: June 10, 2009

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4 Communities for a Better Environment. Respondents were represented by Mark Poole, Gavin
5 McCabe, and David Zanona of the Office of the Attorney General of California.

6 The Court having reviewed the pleadings, declarations, evidentiary exhibits,
7 administrative record, and other papers submitted by counsel, heard the oral arguments of
8 counsel, reviewed the record again in light of those arguments; the matter having been
9 submitted for decision; and as set forth fully in the Statement of Decision: Order Granting In
10 Part Petition for Writ of Mandate (“Order”), the Court finds that

11 a. ARB committed a prejudicial abuse of discretion when it failed to proceed
12 in a manner require by law by inadequately describing and analyzing Project alternatives
13 sufficient for informed decisionmaking and public participation;

14 b. ARB committed a prejudicial abuse of discretion when it failed to proceed
15 in a manner require by law by violating the informational requirements of CEQA and its
16 own certified regulatory program when it adopted Resolution 08-47 and began
17 implementing the Scoping Plan without first responding to comments, completing the
18 environmental review process, and approving the Project.

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20 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

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24 Toxics Coalition, Angela Johnson Meszaros, Caroline Farrell, Dr. Henry Clark, Jesse
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1 violated the California Environmental Quality Act (“CEQA”), Public Resources Code
2 section 21000 et seq., by preparing a Functional Equivalent Document (“FED”) for the
3 Climate Change Scoping Plan (“Project”) that did not comply with CEQA.

4 2. A peremptory writ of mandate directed to Respondents issue under seal of this
5 Court, ordering that:

6 a. ARB shall **set aside** Board Resolution 08-47 and Executive Order G-09-001
7 adopting and approving the *Climate Change Scoping Plan to Reduce Greenhouse Gases in*
8 *California* (“Project”) as it relates to cap and trade.

9 b. ARB shall **set aside** Executive Order G-09-001 approving and certifying the
10 Functional Equivalent Document (“FED”).

11 c. ARB shall **take no action** in reliance on the FED and the Scoping Plan, as it
12 relates to cap and trade, until ARB has come into complete compliance with its
13 obligations under its certified regulatory program and CEQA, consistent with the Court’s
14 Order.

15 d. The Writ shall specifically **enjoin** ARB from engaging in any cap and trade-
16 related Project activity that could result in an adverse change to the physical environment
17 until ARB has comes into complete compliance with ARB’s obligations under its certified
18 regulatory program and CEQA, consistent with the Court’s Order. This includes any further
19 rulemaking and implementation of cap and trade, specifically but not limited to any action in
20 furtherance of California Cap and Trade Program Resolution 10-42.
21

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23 DATED:

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26 HON. ERNEST GOLDSMITH
27 JUDGE OF THE SUPERIOR COURT
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[PROPOSED] JUDGMENT

Place: Department 613

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1 The Court having reviewed the pleadings, declarations, evidentiary exhibits,
2 administrative record, and other papers submitted by counsel, heard the oral arguments of
3 counsel, reviewed the record again in light of those arguments; the matter having been
4 submitted for decision; and the Court having issued the Order Granting In Part Petition for Writ
5 of Mandate (“Order”) that judgment and a peremptory writ of mandate issue in this proceeding,
6 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

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3 California (“Project”).

4 b. ARB shall **set aside** Executive Order G-09-001 certifying the Functional
5 Equivalent Document (“FED”).

6 c. ARB shall **take no action** in reliance on the Scoping Plan and FED until ARB
7 has come into complete compliance with ARB’s obligations under its certified
8 regulatory program and CEQA, consistent with the Court’s Order.

9 d. The Writ shall **enjoin** ARB from any further implementation of the measures
10 contained in the Scoping Plan until ARB has come into complete compliance with ARB’s
11 obligations under its certified regulatory program and CEQA, consistent with the Court’s
12 Order. This includes any further rulemaking and implementation of cap and trade,
13 specifically but not limited to any action in furtherance of California Cap and Trade
14 Program Resolution 10-42.

15 3. The Court expressly **RETAINS JURISDICTION** over ARB’s proceedings by
16 way of a return to peremptory writ of mandate and any subsequent return proceedings until
17 the Court has determined that Respondents have complied with the California Environmental
18 Quality Act. The writ shall be returned by ARB within fifteen (15) months of its issuance.

19 4. The Court does not direct ARB to exercise its lawful discretion in any
20 particular way with respect to the Project except as specifically set forth herein.

21 5. The Court awards Petitioners, as prevailing parties, costs of suit. The Court
22 retains jurisdiction to determine the amount of such costs pursuant to a memorandum of costs
23 filed pursuant to Rule 3.1700 of the California Rules of Court.

24 6. This Court expressly **RETAINS JURISDICTION** to determine any motion by
25 Petitioners for the recovery of attorneys’ fees and other costs incurred as a result of this
26 litigation brought after entry of this judgment in accordance with the criteria set forth in Code
27 of Civil Procedure section 1021.5 and the procedures set forth in the corresponding
28

1 provisions of the California Rules of Court.

2

3

4 DATED:

5

6

HON. ERNEST GOLDSMITH
JUDGE OF THE SUPERIOR COURT

7

8

9 Approved as to form:

10

11 Dated: April ____, 2011

CENTER ON RACE POVERTY &
THE ENVIRONMENT

12

13

14

15

Brent Newell
Attorney for Petitioners Angela Johnson
Meszaros, Association of Irrigated
Residents, Coalition for a Safe
Environment, Dr. Henry Clark,
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21 Dated: April ____, 2011

COMMUNITIES FOR A BETTER
ENVIRONMENT

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Adrienne Bloch
Attorney for Petitioner Communities for
a Better Environment

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Dated: April ____, 2011

LAW OFFICES OF ANGELA
JOHNSON MESZAROS

Angela Johnson Meszaros
Attorney for Petitioners California
Communities Against Toxics, Caroline
Farrell, Martha Dina Arguello

Dated: April ____, 2011

KAMILA HARRIS
Attorney General of California
ROBERT W. BYRNE
Supervising Deputy Attorney General

Mark Poole
Deputy Attorney General
Attorney for Respondents

Mark Poole
Deputy Attorney General
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9 Coalition for a Safe Environment, Dr. Henry Clark, Jesse N. Marquez, Tom Frantz, Society
10 for Positive Action, Shabaka Heru, and West County Toxics Coalition.

11 (caption continued on next page)

12 SUPERIOR COURT OF THE STATE OF CALIFORNIA

13 IN AND FOR THE COUNTY OF SAN FRANCISCO

14 ASSOCIATION OF IRRITATED RESIDENTS, an
15 unincorporated association, CALIFORNIA
16 COMMUNITIES AGAINST TOXICS, an
17 unincorporated association, COMMUNITIES FOR A
18 BETTER ENVIRONMENT, a nonprofit corporation,
19 COALITION FOR A SAFE ENVIRONMENT, a
20 nonprofit corporation, SOCIETY FOR POSITIVE
21 ACTION, a nonprofit corporation, WEST COUNTY
22 TOXICS COALITION, a nonprofit corporation,
23 ANGELA JOHNSON MESZAROS, CAROLINE
24 FARRELL, DR. HENRY CLARK, JESSE N.
25 MARQUEZ, MARTHA DINA ARGUELLO,
26 SHABAKA HERU, TOM FRANTZ, in their
27 individual capacities,

28 Petitioners,

v.

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, and RONALD O. LOVERIDGE,
in their official capacities as members of the Board,

Respondents

CASE NO.: CP-509562

[PROPOSED ALTERNATE] JUDGMENT

Place: Department 613

Judge: Honorable Ernest Goldsmith

Action Filed: June 10, 2009

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9 for Positive Action, Shabaka Heru, and West County Toxics Coalition.

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30 Attorneys for Petitioners California Communities Against Toxics, Caroline Farrell, Martha
31 Dina Arguello

1 The Court having reviewed the pleadings, declarations, evidentiary exhibits,
2 administrative record, and other papers submitted by counsel, heard the oral arguments of
3 counsel, reviewed the record again in light of those arguments; the matter having been
4 submitted for decision; and the Court having issued the Order Granting In Part Petition for Writ
5 of Mandate (“Order”) that judgment and a peremptory writ of mandate issue in this proceeding,

6 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

7 1. JUDGMENT BE ENTERED in favor of Petitioners and Plaintiffs Association
8 of Irritated Residents, Communities for a Better Environment, California Communities
9 Against Toxics, Coalition for a Safe Environment, Society for Positive Action, West County
10 Toxics Coalition, Angela Johnson Meszaros, Caroline Farrell, Dr. Henry Clark, Jesse
11 Marquez, Martha Dina Arguello, Shabaka Heru, Tom Frantz (collectively “AIR” or
12 “Petitioners”) and against Respondents and Defendants California Air Resources Board, *et*
13 *al.* (collectively “ARB” or “Respondents”), on Petitioners’ Verified First Amended Petition
14 for Writ of Mandate and Complaint for Declaratory and Injunctive Relief, alleging that ARB
15 violated the California Environmental Quality Act (“CEQA”), Public Resources Code
16 section 21000 *et seq.*, by preparing a Functional Equivalent Document (“FED”) for the
17 Climate Change Scoping Plan (“Project”) that did not comply with CEQA.

18 a. ARB committed a prejudicial abuse of discretion when it failed to proceed in
19 a manner require by law by inadequately describing and analyzing Project alternatives
20 sufficient for informed decisionmaking and public participation;

21 b. ARB committed a prejudicial abuse of discretion when it failed to proceed in
22 a manner require by law by violating the informational requirements of CEQA and its
23 own certified regulatory program when it adopted Resolution 08-47 and began
24 implementing the Scoping Plan without first responding to comments, completing the
25 environmental review process, and approving the Project.

26 2. A peremptory writ of mandate directed to Respondents issue under seal of this
27 Court, ordering that:
28

1 a. ARB shall **set aside** Board Resolution 08-47 and Executive Order G-09-001
2 adopting and approving the *Climate Change Scoping Plan* to Reduce Greenhouse Gases in
3 California (“Project”) as it relates to cap and trade.

4 b. ARB shall **set aside** Executive Order G-09-001 approving and certifying the
5 Functional Equivalent Document (“FED”).

6 c. ARB shall **take no action** in reliance on the FED and the Scoping Plan, as it
7 relates to cap and trade, until ARB has come into complete compliance with its
8 obligations under its certified regulatory program and CEQA, consistent with the Court’s
9 Order.

10 d. The Writ shall specifically **enjoin** ARB from engaging in any cap and trade-
11 related Project activity that could result in an adverse change to the physical environment
12 until ARB has comes into complete compliance with ARB’s obligations under its certified
13 regulatory program and CEQA, consistent with the Court’s Order. This includes any further
14 rulemaking and implementation of cap and trade, specifically but not limited to any action in
15 furtherance of California Cap and Trade Program Resolution 10-42.

16
17 3. This Court expressly **RETAINS JURISDICTION** over ARB’s proceedings by
18 way of a return to peremptory writ of mandate and any subsequent return proceedings until
19 the Court has determined that Respondents have complied with the California Environmental
20 Quality Act. The writ shall be returned by ARB within fifteen (15) months of its issuance.

21 4. The Court does not direct ARB to exercise its lawful discretion in any
22 particular way with respect to the Project except as specifically set forth herein.

23 5. The Court awards Petitioners, as prevailing parties, costs of suit. The Court
24 **RETAINS JURISDICTION** to determine the amount of such costs pursuant to a memorandum
25 of costs filed pursuant to Rule 3.1700 of the California Rules of Court.

26 6. This Court expressly **RETAINS JURISDICTION** to determine any motion by
27 Petitioners for the recovery of attorneys’ fees and other costs incurred as a result of this
28 litigation brought after entry of this judgment in accordance with the criteria set forth in Code

1 of Civil Procedure section 1021.5 and the procedures set forth in the corresponding
2 provisions of the California Rules of Court.

3
4 DATED:

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6
7 HON. ERNEST GOLDSMITH
8 JUDGE OF THE SUPERIOR COURT

9 Approved as to form:

10
11
12 Dated: April ____, 2011

CENTER ON RACE POVERTY &
THE ENVIRONMENT

13
14
15 Brent Newell
16 Attorney for Petitioners Angela Johnson
17 Meszaros, Association of Irrigated
18 Residents, Coalition for a Safe
19 Environment, Dr. Henry Clark,
20 Jesse N. Marquez, Tom Frantz,
21 Society for Positive Action,
22 Shabaka Heru, and
23 West County Toxics Coalition.

24
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26 Dated: April ____, 2011

COMMUNITIES FOR A BETTER
ENVIRONMENT

27 Adrienne Bloch
28 Attorney for Petitioner Communities for
a Better Environment

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Dated: April ____, 2011

LAW OFFICES OF ANGELA
JOHNSON MESZAROS

Angela Johnson Meszaros
Attorney for Petitioners California
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Farrell, Martha Dina Arguello

Dated: April ____, 2011

KAMILA HARRIS
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ROBERT W. BYRNE
Supervising Deputy Attorney General

Mark Poole
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Attorney for Respondents

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11 (caption continued on next page)

12 SUPERIOR COURT OF THE STATE OF CALIFORNIA

13 IN AND FOR THE COUNTY OF SAN FRANCISCO

14 ASSOCIATION OF IRRITATED RESIDENTS, an
15 unincorporated association, CALIFORNIA
16 COMMUNITIES AGAINST TOXICS, an
17 unincorporated association, COMMUNITIES FOR A
18 BETTER ENVIRONMENT, a nonprofit corporation,
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20 nonprofit corporation, SOCIETY FOR POSITIVE
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24 FARRELL, DR. HENRY CLARK, JESSE N.
25 MARQUEZ, MARTHA DINA ARGUELLO,
26 SHABAKA HERU, TOM FRANTZ, in their
27 individual capacities,

28 Petitioners,

v.

CALIFORNIA AIR RESOURCES BOARD, MARY
D. NICHOLS, in her official capacity as Chairman of
the Board, and DANIEL SPERLIN, 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 Board,

Respondents

CASE NO.: CP-509562

**[PROPOSED] PEREMPTORY WRIT OF
MANDATE**

Place: Department 613

Judge: Honorable Ernest Goldsmith

Action Filed: June 10, 2009

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Attorneys for Petitioners California Communities Against Toxics, Caroline Farrell, Martha
Dina Arguello

1 Judgment having been entered in this proceeding, ordering that a peremptory writ of
2 mandate be issued from this Court,

3 IT IS ORDERED that, immediately on service of this writ, Respondents, CALIFORNIA AIR
4 RESOURCES BOARD, MARY D. NICHOLS, in her official capacity as Chairman of the
5 Board, and DANIEL SPERLING, KEN YEAGER, DORENE D'ADAMO, BARBARA
6 RIORDAN, JOHN R. BALMES, M.D., LYDIA H. KENNARD, SANDRA BERG, RON
7 ROBERTS, JOHN G. TELLES, and RONALD O. LOVERIDGE, in their official capacities
8 as members of the Board:

- 9 1. **Set aside** Board Resolution 08-47 adopting and approving the *Climate Change Scoping*
10 *Plan* to Reduce Greenhouse Gases in California (“Project”) and certifying the
11 Functional Equivalent Document (“FED”).
- 12 2. **Set aside** Executive Order G-09-001 approving and certifying the Functional
13 Equivalent Document (“FED”).
- 14 3. **Take no action** in reliance on the Scoping Plan and FED until Respondents have
15 come into complete compliance with Respondents’ obligations under Respondents’
16 certified regulatory program and the California Environmental Quality Act
17 (“CEQA”), consistent with the Court’s Order.

18 Respondents are hereby **enjoined** from any further implementation of the measures
19 contained in the Scoping Plan until Respondents have come into complete compliance with
20 Respondents’ obligations under Respondents’ certified regulatory program and CEQA,
21 consistent with the Court’s Order. This includes any further rulemaking and implementation
22 of cap and trade, specifically but not limited to any action in furtherance of California Cap
23 and Trade Program Resolution 10-42.

24 Pursuant to Public Resources Code § 21168.9(c), this Court does not direct
25 Respondents to exercise their discretion in any particular way with respect to the Project
26 except as specifically set forth herein.

27 This Court expressly **RETAINS JURISDICTION** over Respondents’ proceedings by
28

1 way of a return to peremptory writ of mandate and any subsequent return proceedings until
2 the Court has determined that Respondents have complied with CEQA. The writ shall be
3 returned by ARB within fifteen (15) months of its issuance.

4 Date:

5
6 _____
7 Clerk of the Court

8
9 _____
10 Deputy Clerk of the Court

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Respondents

CASE NO.: CP-509562

**[PROPOSED ALTERNATE]
PEREMPTORY WRIT OF
MANDATE**

Place: Department 613

Judge: Honorable Ernest Goldsmith

Action Filed: June 10, 2009

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Attorneys for Petitioners California Communities Against Toxics, Caroline Farrell, Martha
Dina Arguello

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2 mandate be issued from this Court,

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- 9 1. **Set aside** Board Resolution 08-47 and Executive Order G-09-001 adopting and
10 approving the *Climate Change Scoping Plan* to Reduce Greenhouse Gases in California
11 (“Project”) as it relates to cap and trade.
- 12 2. **Set aside** Executive Order G-09-001 approving and certifying the Functional
13 Equivalent Document (“FED”).
- 14 3. **Take no action** in reliance on the FED and Scoping Plan, as it relates to cap and
15 trade, until Respondents have come into complete compliance with Respondents’
16 obligations under Respondents’ certified regulatory program and the California
17 Environmental Quality Act (“CEQA”), consistent with the Court’s Order.

18 Respondents are hereby **enjoined** from engaging in any cap and trade-related Project
19 activity that could result in an adverse change to the physical environment until Respondents
20 have come into complete compliance with Respondents’ obligations under Respondents’
21 certified regulatory program and CEQA, consistent with the Court’s Order. This includes
22 any further rulemaking and implementation of cap and trade, specifically but not limited to
23 any action in furtherance of California Cap and Trade Program Resolution 10-42.

24 Pursuant to Public Resources Code § 21168.9(c), this Court does not direct
25 Respondents to exercise their discretion in any particular way with respect to the Project
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28 way of a return to peremptory writ of mandate and any subsequent return proceedings until

1 the Court has determined that Respondents have complied with CEQA. The writ shall be
2 returned by ARB within fifteen (15) months of its issuance.

3

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Date:

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Clerk of the Court

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Deputy Clerk of the Court

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KAMALA D. HARRIS
Attorney General

State of California
DEPARTMENT OF JUSTICE



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April 18, 2011

VIA ELECTRONIC AND U.S. MAIL

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Adrienne Bloch
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Oakland, CA 94612

RE: Assn. of Irrigated Residents, et al. v. Air Resources Board, et al.
Superior Court of California, County of San Francisco, Case No. CPF-09-509562

Dear Counsel:

We are in receipt of your two proposed writs and two proposed judgments. Thank you for the opportunity to review and comment on them pursuant to California Rules of Court, Rule 3.1312. Between Petitioners' two proposed writs and judgments, Respondents have fewer problems with the "Alternate" writ and judgment. However, as outlined below, both proposed writs and judgments are flawed and therefore, Respondents have prepared the attached proposed writ and judgment to be submitted to the Court along with Petitioners' submission.

In Respondents' view, the Petitioners' proposed writs and judgments go beyond the intended scope of the Court's Statement of Decision, the Court's comments during the hearings in this matter, and the Court's December 9, 2010 Order Denying the TRO. The reasons for Respondents' disapproval of Petitioners' two proposed writs and judgments are as follows:

- First, it is unusual in our experience that more than one writ and judgment per side is submitted to the Court. This does a disservice to the Court by adding unnecessary paper to an already burdened department and runs the risk of creating confusion. Accordingly, Respondents have prepared a single version of a proposed writ and judgment.

- Second, both petitioners' proposed writs and judgments go beyond the scope of the Court's Statement of Decision by seeking to command Respondents to set aside Board Resolution 08-47 adopting the Scoping Plan, in addition to Executive Order G-09-001 which is the document that certified the Functional Equivalent Document. This is inappropriate as the Court's Statement of Decision is explicitly conditioned on vacating the "certification of the FED" only. (Statement of Decision, March 18, 2011, at 35:18, 18:13-14.) Therefore, Respondents' proposed writ commands ARB to set aside Executive Order G-09-001.
- Third, the language in Petitioners' first proposed writ and judgment is overly broad. For example, Petitioners proposed language that ARB "take no action in reliance on the Scoping Plan," and is "hereby enjoined from engaging in any Project-related activity", "including any further implementation of any of the measures contained in the Scoping Plan," is so overbroad that, as a practical matter, it would bring AB 32 to a halt. As you know, some measures mentioned in the Scoping Plan are already in effect (e.g., building efficiency standards, the Low Carbon Fuel Standard, and the Pavley greenhouse gas emission standards for automobiles), some of which even predate the Scoping Plan. Respondents do not believe the Court intends for the writ to extend this broadly. Nor do Respondents believe that is a lawful extension of the Court's authority in the present case. Moreover, this language extends beyond the scope of Petitioners' Eighth Cause of Action which is explicitly pled as ARB's "Failure to Adequately Analyze Alternatives to Regional Cap-and-Trade." It is inappropriate to attempt to extend Petitioners' petition for writ of mandate to include matters beyond the specific claim upon which the writ is granted. (See First Amended Petition, pp. 36-40.)
- Fourth, Petitioners' proposed writs and judgments go beyond the intended reach of the Court's Decision and authority by attempting to halt all staff work on the pending Cap and Trade draft rule. This case is not a challenge to the Cap and Trade rulemaking, a judicial remedy that Petitioners will have at their disposal at a future date. Attempting to extend the Court's Statement of Decision to the day-to-day work of ARB staff goes beyond what is allowed by administrative law and separation of powers principles. Respondents' recognize that the Court has concerns about "further implementation" of the Scoping Plan. Respondents read that to mean that the final adoption of new regulations and the implementation of those finalized regulations on affected regulated parties are to be enjoined pending Respondents' compliance with CEQA consistent with the Court's Statement of Decision. As argued at oral argument in this case, Respondents believe that there are serious legal questions about extending the writ to reach ongoing rulemakings noticed under Health and Safety Code section 38562. However, in an attempt to reflect the Court's Statement of Decision, Respondents' proposed writ and judgment contain language specifically enjoining ARB from submitting the pending Cap and Trade draft rule to the Office of Administrative Law until after ARB has considered the Scoping Plan's supplemental alternatives analysis and the recertified FED. Under Respondents'

proposed writ, only then, if it chooses to do so, will ARB be allowed to finalize the Cap and Trade rulemaking.

- Fifth, both of Petitioners' proposed writs exclude language regarding ARB's exercise of discretion in complying with the writ, despite including such language in Petitioners' proposed judgments. Respondents' proposed writ includes such language.
- Sixth, regarding Petitioners' draft judgments, both should explicitly reference that the First Amended Petition for Writ of Mandate was Denied in Part and Granted in Part. Judgment should be entered for both parties accordingly. Respondents' proposed judgment accurately describes the "split" nature of the Court's Decision.
- Seventh, Petitioners' proposed judgments both include statements regarding an award of costs. Respondents are agreeable to the concept of including a statement that recognizes an award of costs subject to the Memorandum of Costs and Motion to Strike/Tax procedure. However, it should be noted that Petitioners never paid the costs of preparation of the administrative record in this case, despite requests from counsel for Respondents to do so. As a result, any award of costs should not include the costs of the administrative record. It should also be clear that Petitioners prevailed on just two of their eight claims.
- Eighth, Petitioners' proposed judgments improperly jump the gun on an award of attorneys' fees. As Petitioners' counsel are well aware, Code of Civil Procedure section 1021.5 explicitly requires that awards of attorneys' fees can only be made "upon motion." (Code Civ. Proc., § 1021.5.) There are multiple findings that the Court must make to determine whether Petitioners are entitled to an award of attorneys' fees but Petitioners must move the Court first. Respondents' proposed judgment makes this clear.

Based on the above, Respondents have prepared a proposed writ and proposed judgment that Respondents believe more accurately capture the Court's decision and conform to applicable principles of administrative law. While Respondents believe that their proposed writ and judgment better reflect the Court's intent, in the event that the Court disagrees, Respondents wish to make clear that they prefer Petitioners' Alternate Writ and Judgment to the overly broad proposed writ and judgment.

Respondents request that you include this letter along with the attached proposed writ and judgment when forwarding your materials to the Court. We would appreciate receiving our service copy of the entire package electronically.

April 18, 2011

Page 4

Please feel free to contact me if you have any questions about this letter or its attachments.

Sincerely,



MARK W. POOLE
Deputy Attorney General

For KAMALA D. HARRIS
Attorney General

Attorneys for Respondents,
California Air Resources Board, et al.

MP:
Enclosures

SF2009404245
20436582.doc



April 21, 2011

Via Electronic Mail and U.S. Mail

Gavin McCabe
David Zonana
Mark Poole
Deputy Attorneys General
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San Francisco, CA 94102-7004

Re: AIR v. ARB, Case No. CPF- 09-509562, San Francisco Superior Court –
Proposed Writ and Judgment

Dear Counsel,

Thank you for your comments on Petitioners' proposed Writ of Mandate and proposed alternate Writ of Mandate, and proposed Judgment and proposed alternate Judgment ("proposed documents"). While we did make some changes to the proposed documents based on your comments, we found that several of your comments reflected an objection to the Court's Statement of Decision ("Decision") rather than to Petitioners' proposed documents themselves. Petitioners respond to each of your comments below:

1. ARB proposes that rather than present the court with two versions of the proposed documents, Petitioners should present a third proposal – the one that ARB has prepared. ARB's proposed writ and judgment are unacceptable and Rules of the Court section 3.1312 does not require Petitioners as prevailing parties to submit responses to such unsolicited proposed writs and judgments. Moreover, we disagree that giving the Court two clear choices would be a disservice and confusing, and you have provided no authority disallowing it.
2. ARB argues that the language to set aside Board Resolution 08-47 adopting the Scoping Plan goes beyond the scope of the Statement of Decision. Petitioners disagree; the Decision finds:

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 regulatory program. (Decision p. 34.)

In this context, setting aside the Scoping Plan is consistent with the Court's decision, and appropriate and necessary to remedy Petitioners' Fifth Cause of Action. It will further allow ARB to properly adopt the Scoping Plan after it considers response to comments on the new alternatives analysis.

3. ARB claims that the proposed Writ of Mandate and proposed Judgment are overly broad because they would enjoin the entire Scoping Plan. A writ to enjoin the entire Scoping Plan is consistent with the Court's decision, which states:

Therefore, let a peremptory writ of mandate issue . . . enjoining any further implementation of the measures contained within the scoping plan until after Respondent has come into compliance with its obligations under the certified regulatory program and CEQA.
(Decision p. 35.)

Moreover, the Eighth Cause of Action, which involves a substantive rather than procedural CEQA requirement, justifies such a broad injunction. However, Petitioners agree to replace the current language with language that more closely tracks the language in the Court's Decision.

4. ARB argues that the writ should not halt all staff work on the pending Cap and Trade draft rule. This issue was fully briefed and argued at trial and in our papers, and the Court clearly resolved this argument in favor of Petitioners. The Decision states:

ARB argues that the Scoping Plan is not a condition precedent to the adoption of the regulations it describes, because AB 32 provides independent rulemaking authority in Section 38562. (Citation omitted.) Under Public Resources Code section 21168.9, if a court finds that an agency's decision has been made in violation of CEQA, and that a specific activity or activities will prejudice the consideration of alternatives to the project, it may enjoin any or all activities that would result in an adverse change to the physical environment until the agency has come into compliance with CEQA. . . . Continued rulemaking and implementation of cap and trade will render considerations of alternatives a nullity as a mature cap and trade program would be in place well advanced from the premature implementation which has already taken place. In order to ensure that ARB adequately considers alternatives to the Scoping Plan and exposes its analysis to public scrutiny prior to implementing the measures contained therein, the Court must enjoin further rulemaking until ARB amends the FED in accordance with this decision.
(Decision pp. 34-35.)

This current process – reviewing the proposed Writ of Mandate – is an inappropriate channel to further pursue this issue on which your clients did not prevail.

5. ARB complains that the proposed writ does not include language regarding ARB's exercise of discretion in complying with the writ. However, the Judgment states, "[t]he Court does not direct ARB to exercise its lawful discretion in any particular way ...except as specifically set forth herein." To assuage any concern here, Petitioners will add this language to the proposed Writs.
6. ARB argues that Judgment should be entered for both parties. However, ARB provides no support for this approach and Petitioners have not used such an approach in the past. The proposed Judgment and proposed alternate Judgment both already reflect the fact that the Order was granted in part and denied in part.
7. ARB argues that costs should not include costs (for the administrative record) that were not actually incurred and should be clear that Petitioners did not prevail on all of their claims. This comment is frivolous and not relevant to the proposed writ or judgment, which merely allows Petitioners to file a memorandum of costs pursuant to CRC section 3.1700. Nothing prevents ARB from filing a motion to tax costs, if appropriate.
8. ARB argues that Petitioners must move the court to determine whether it is entitled to any attorneys fees. Although the proposed Judgment and proposed alternate Judgment state that "[t]his Court expressly RETAINS JURISDICTION to determine the amount of such fees and expenses, through an appropriate noticed motion in accordance with the criteria set forth in Code of Civil Procedure section 1021.5 and the procedures set forth in the California Rules of Court," ARB would like it made more plain that the Court must determine that Petitioners are entitled to a fee award. Petitioners agree to change the language in the proposed Judgments for clarification.
9. The Court specifically ordered Petitioners to prepare a Writ of Mandate. Rule of Court 3.1312 requires Petitioners to summarize ARB's comments when we submit the proposed documents to the Court. To ensure that our summary is accurate, we will attach your letter. However, we do not believe it is appropriate to submit your proposed writ and judgment. We do agree with ARB's proposed writ only insofar as ARB believes that the entire FED should be vacated even if the injunction is narrowly tailored. We have made that change as well to our proposed alternate Judgment and proposed alternate Writ of Mandate. We will send you a service copy of the entire package electronically when we file with the Court, as you have requested.

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Please let us know immediately if you have any further comments or questions.

Very truly yours,

/s/

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