



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.<sup>1</sup> 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

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<sup>1</sup> 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

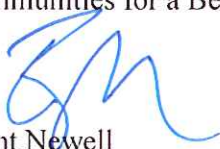
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should command ARB to enjoin “any further implementation of the measures contained in the Scoping Plan . . .” Therefore, Petitioners provide the Court with a Proposed Peremptory Writ of Mandate and a Proposed Alternate Writ of Mandate that allow the 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