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DEPARTMENT OF JUSTICE



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April 22, 2011

Hand Delivered

The Honorable Ernest H. Goldsmith
San Francisco Superior Court
Department 613
400 McAllister Street
San Francisco, CA 94102

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 Judge Goldsmith:

Pursuant to the Court's Statement of Decision filed March 18, 2011, and California Rules of Court, Rule 3.1312, the parties have been in correspondence over the past week regarding the proposed writ and judgment in this matter. It is our understanding that Petitioners have forwarded their two competing sets of writs and judgments for the Court's consideration, along with a letter from Respondents to Petitioners dated April 18, 2011. In that letter, Respondents requested that Petitioners also include in their package to the Court Respondents' proposed writ and judgment. Petitioners have indicated that they are not willing to do so. For this reason, Respondents write to submit their proposed writ and judgment for the Court's consideration. Please find attached copies of the correspondence between the parties, as well as copies of the writ and judgment proposed by Respondents.

Sincerely,

A handwritten signature in black ink that reads "M. Poole".

For MARK POOLE
Deputy Attorney General

For KAMALA D. HARRIS
Attorney General

Encls.

cc: attached service list

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8 *California Air Resources Board, et al.*

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA

10 COUNTY OF SAN FRANCISCO

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13
14 **ASSOCIATION OF IRRITATED**
RESIDENTS, an Unincorporated
Association; CALIFORNIA
15 **COMMUNITIES AGAINST TOXICS, an**
Unincorporated Association;
16 **COMMUNITIES FOR A BETTER**
ENVIRONMENT, a Non-profit
17 **Corporation; COALITION FOR A SAFE**
ENVIRONMENT, a Non-profit
18 **Corporation; SOCIETY FOR POSITIVE**
ACTION, an Unincorporated Association;
19 **WEST COUNTY TOXICS COALITON, a**
Non-profit Corporation; ANGELA
20 **JOHNSON MESZAROS; CAROLINE**
FARRELL; HENRY CLARK; JESSE N.
21 **MARQUEZ; MARTHA DINA**
ARGUELLO; SHAVAKA HERU; TOM
22 **FRANTZ; in their Individual Capacities,**

23 Plaintiffs and Petitioners,

24 v.

25 **CALIFORNIA AIR RESOURCES BOARD,**
26 **MARY D. NICHOLS, in her official**
capacity as Chairman of the Board; and
27 **DANIEL SPERLING, KEN YEAGER,**
DORENE D'ADAMO, BARBARA
28 **RIORDAN, JOHN R. BALMES, M.D.,**

Case No. CPF-09-509562

**[PROPOSED] JUDGMENT DENYING IN
PART AND GRANTING IN PART
PEREMPTORY WRIT OF MANDATE**

Dept: 613
Judge: The Honorable Ernest H.
Goldsmith

Action Filed: June 10, 2009

1 **LYDIA H. KENNARD, SANDRA BERG,**
2 **RON ROBERTS, JOHN G. TELLES,**
3 **RONALD O. LOVERIDGE, in their official**
4 **capacities as members of the Air Resources**
5 **Board,**

6
7 Defendants and
8 Respondents.

9 This matter came before this Court on December 20, 2010, for a hearing on the merits.
10
11 Petitioners, Association of Irrigated Residents, California Communities Against Toxics,
12 Communities for a Better Environment, Coalition for a Safe Environment, Society for Positive
13 Action, West County Toxics Coalition, Angela Johnson Meszaros, Caroline Farrell, Henry Clark,
14 Jesse N. Marquez, Martha Dina Arguello, Shavaka Heru, Tom Frantz (collectively "Petitioners"),
15 were represented by Alegria De La Cruz and Brent Newell of the Center on Race, Poverty and the
16 Environment and Adrienne Bloch, of Communities for a Better Environment. Respondents
17 California Air Resources Board, et al., were represented by Mark W. Poole, Gavin G. McCabe
18 and David A. Zonana, Deputy Attorneys General. Timothy O'Connor appeared on behalf of
19 amicus Environmental Defense Fund.

20 The record of the administrative proceedings, along with the items of which judicial notice
21 was taken, having been received into evidence and examined by the Court, no additional evidence
22 having been received by the Court, arguments having been presented, and the Court having filed,
23 on March 18, 2011, a Statement of Decision: Order Granting in Part Petition for Writ of
24 Mandate,

25 IT IS ORDERED, ADJUDGED AND DECREED that, for the reasons stated in the Court's
26 Statement of Decision, the Verified First Amended Petition for Writ of Mandate is DENIED IN
27 PART AND GRANTED IN PART. Specifically, the First Amended Petition for Writ of Mandate
28 is DENIED as to the First, Second, Third, Fourth, Sixth and Seventh causes of action. The First
Amended Petition is GRANTED as to the Fifth and Eighth causes of action. The Statement of
Decision provides the Court's reasoning and is attached as Exhibit A and incorporated herein.

1 Accordingly, JUDGMENT is entered for Respondents on the First, Second, Third, Fourth, Sixth
2 and Seventh causes of action, and for Petitioners on the Fifth and Eighth causes of action.

3 In accordance with this JUDGMENT, a peremptory writ of mandate shall issue from this
4 Court, remanding the proceedings to Respondents and commanding Respondents to set aside the
5 certification of the Functional Equivalent Document ("FED") for the Scoping Plan, Executive
6 Order G-09-001, executed on May 7, 2009. The writ shall further command Respondents to
7 reconsider their action in light of the Court's Statement of Decision, and to take any further action
8 specially enjoined on Respondents by law but nothing in this JUDGMENT or WRIT shall
9 otherwise limit or control the discretion legally vested in Respondents.

10 Regarding the ongoing, individual rulemaking for the proposed Cap and Trade Rule being
11 conducted by the Air Resources Board pursuant to Health and Safety Code, section 38562,
12 Respondents are specifically enjoined from submitting the rulemaking package for the proposed
13 Cap and Trade Rule to the Office of Administrative Law until such time that Respondents have
14 come into compliance under their certified regulatory program and the California Environmental
15 Quality Act and from taking action in the Cap and Trade rulemaking which is likely to cause a
16 direct, adverse impact on the physical environment, consistent with this Court's Statement of
17 Decision.

18 Following completion of a supplemental alternatives analysis consistent with the Court's
19 Statement of Decision and following the certification by Respondents of the FED as
20 supplemented, the Air Resources Board shall separately consider the recertified FED containing
21 the supplemental alternatives analysis prior to taking final action to submit the rulemaking
22 package for the proposed Cap and Trade Rule to the Office of Administrative Law.

23 Respondents shall make and file a return to the writ within 15 months, setting forth what
24 Respondents have done to comply with the writ.

25 Costs of suit, subject to the filing of a memorandum of costs pursuant to California Rules of
26 Court, Rule 3.1700, and the resolution of any motion to strike or tax costs filed pursuant to Rule
27 3.1700, are awarded to Petitioners as the prevailing parties on the Fifth and Eighth Causes of
28 Action. Eligibility for any award of attorneys' fees under Code of Civil Procedure, section

1 1021.5, as prevailing parties on the Fifth and Eighth Causes of Action, and the amount of any
2 such award, shall be resolved by the filing of a motion for attorneys' fees.

3 IT IS SO ORDERED.

4
5 Dated: _____

6 HON. ERNEST H. GOLDSMITH
7 Judge of the Superior Court

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Attorneys for Defendants and Respondents
8 *California Air Resources Board, et al.*

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA

10 COUNTY OF SAN FRANCISCO

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13 **ASSOCIATION OF IRRITATED**
14 **RESIDENTS, an Unincorporated**
Association; CALIFORNIA
15 **COMMUNITIES AGAINST TOXICS, an**
Unincorporated Association;
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21 **MARQUEZ; MARTHA DINA**
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22 **FRANTZ; in their Individual Capacities,**

23 Plaintiffs and Petitioners,

24 v.

25 **CALIFORNIA AIR RESOURCES BOARD,**
26 **MARY D. NICHOLS, in her official**
capacity as Chairman of the Board; and
27 **DANIEL SPERLING, KEN YEAGER,**
DORENE D'ADAMO, BARBARA
28 **RIORDAN, JOHN R. BALMES, M.D.,**

Case No. CPF-09-509562

**[PROPOSED] PEREMPTORY WRIT OF
MANDATE**

Dept: 613
Judge: The Honorable Ernest H.
Goldsmith

Action Filed: June 10, 2009

1 **LYDIA H. KENNARD, SANDRA BERG,**
2 **RON ROBERTS, JOHN G. TELLES,**
3 **RONALD O. LOVERIDGE, in their official**
4 **capacities as members of the Air Resources**
5 **Board,**

6
7
8 Defendants and
9 Respondents.

10 To the California Air Resources Board, et al., Respondents:

11 WHEREAS ON _____, 2011, judgment having been entered in this action,
12 ordering that a peremptory writ of mandamus be issued from this Court,

13 YOU ARE HEREBY COMMANDED to set aside your certification of the Functional
14 Equivalent Document for the Scoping Plan ("FED"), Executive Order G-09-001, executed on
15 May 7, 2009, which proceedings are hereby remanded to you pursuant to Code of Civil Procedure
16 sections 1085 and 1087 to reconsider your certification of the FED consistent with this Court's
17 Judgment Denying in Part and Granting in Part Peremptory Writ of Mandamus and the Court's
18 Statement of Decision filed March 18, 2011. The writ further commands Respondents to
19 reconsider their actions in light of the Court's Statement of Decision, and to take any further
20 action specially enjoined on Respondents by law but nothing in this Judgment or Writ shall
21 otherwise limit or control the discretion legally vested in you.

22 Regarding the ongoing, individual rulemaking for the proposed Cap and Trade Rule being
23 conducted by the Air Resources Board pursuant to Health and Safety Code section 38562,
24 Respondents are specifically enjoined from submitting the rulemaking package for the proposed
25 Cap and Trade Rule to the Office of Administrative Law until such time that Respondents have
26 come into compliance under the certified regulatory program and the California Environmental
27 Quality Act and from taking action in the Cap and Trade rulemaking which is likely to cause a
28 direct, adverse impact on the physical environment, consistent with this Court's Statement of
Decision.

Following completion of a supplemental alternatives analysis consistent with the Court's
Statement of Decision and following the certification by Respondents of the FED as

1 supplemented, the Air Resources Board shall separately consider the recertified FED containing
2 the supplemental alternatives analysis prior to taking final action to submit the rulemaking
3 package for the proposed Cap and Trade Rule to the Office of Administrative Law.

4 YOU ARE FURTHER COMMANDED to make and file a return to this writ within 15
5 months, setting forth what you have done to comply.

6 Dated: _____, 2011

Clerk of the Superior Court

Deputy Clerk of the Superior Court

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April 18, 2011

VIA ELECTRONIC AND U.S. MAIL

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Center on Race, Poverty and the Environment
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San Francisco, CA 94108

Adrienne Bloch
Communities for a Better Environment
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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,



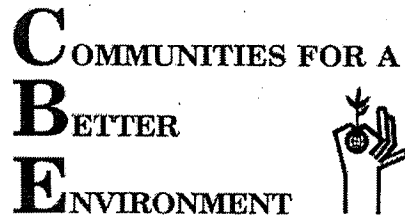
MARK W. POOLE
Deputy Attorney General

For KAMALA D. HARRIS
Attorney General

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

MP:
Enclosures

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April 21, 2011

Via Electronic Mail and U.S. Mail

Gavin McCabe
David Zonana
Mark Poole
Deputy Attorneys General
455 Golden Gate Avenue, Suite 11000
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 wayexcept 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.

//

Page 4 of 4

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

Very truly yours,

/s/

Adrienne Bloch
Senior Staff Attorney
Communities for a Better Environment

Brent Newell
General Counsel
Center on Race, Poverty & the Environment