ENVIRONMENTAL JUSTICE ADVOCATES FILE LAWSUIT TO FORCE CALIFORNIA TO FOLLOW THE LAW IN IMPLEMENTING THE AB 32 GLOBAL WARMING SOLUTIONS ACT

—Summary of Legal Claims—

AB 32 Background:

Passed in 2006, the AB 32 Global Warming Solutions Act creates the procedure, deadlines and substantive requirements for the creation and implementation of a comprehensive plan for reducing greenhouse gas (GHG) emissions across all sectors of California's economy. The plan must reduce statewide GHG emissions to the statewide limit of 1990 levels by 2020. AB 32 directs the California Air Resources Board (ARB) to prepare a "Scoping Plan" that identifies measures for achieving the maximum feasible and cost-effective reductions of GHG emissions. The Scoping Plan "will provide specific direction for the State's greenhouse gas emissions reduction program" and serves as a roadmap of the different emissions reduction measures that will be adopted by regulation no later than January 1, 2011.

California's legislature created two advisory committees in statute to advise ARB on AB 32 implementation, one of which is the AB 32 Environmental Justice Advisory Committee (EJAC) comprised of 21 environmental justice (EJ) advocates throughout the State. EJAC members represent the communities in California most impacted by air pollution and represent a broad cross-section of California's EJ movement. EJAC convened 15 meetings prior to ARB's action approving the final Scoping Plan, and after its advice and recommendations were largely ignored, several of the members are now filing a lawsuit to force ARB to comply with the law of AB 32 and procedural due process under the California Environmental Quality Act (CEQA).

Violations of AB 32 Law

AB 32 includes specific equity requirements for implementing regulations in order to avoid disproportionate impacts on low-income communities and communities of color. Relevant provisions related to environmental justice in the statute require ARB to:

> (1) "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;" (2) "ensure that activities undertaken to comply with [AB 32] do not disproportionately impact low-income communities;" (3) "consider the potential for direct, indirect, and cumulative emission impacts from [market-based compliance mechanisms], including localized impacts in communities that are already adversely impacted by air pollution;" (4) "design any market-based compliance mechanism to prevent any increase in the emissions of toxic air contaminants or criteria air pollutants;" and (5) "maximize additional environmental and economic benefits for California."

Plaintiffs allege that ARB's Scoping Plan:

1. Fails to achieve the maximum technologically feasible and cost-effective reductions. AB 32 directs ARB to achieve the "maximum feasible" emissions reductions. However, ARB treats the statewide emissions limit as a ceiling on the amount of reductions the Plan will achieve. The Plan proposes predominantly pre-existing measures to yield the exact amount of emissions reductions necessary to meet the emissions limit. But, by defining the statewide emissions limit as "the maximum allowable level of emissions in 2020," the statute sets a floor, not a ceiling, on the amount of GHG emission

reductions required. Meanwhile, in regard to "cost-effectiveness," the Scoping Plan identifies the estimated cost per ton of GHG emissions reduced by the measures recommended in the Plan. According to presentations by ARB staff, "any proposed regulation falling within this range would be considered cost-effective and would meet the AB 32 cost-effectiveness requirement." Yet, ARB did not adhere to this threshold in the Plan. Instead, the Plan arbitrarily excludes feasible measures whose cost-effectiveness lie between the identified range.

2. Fails to identify direct emissions reduction measures for significant sources of emissions, namely industry and agricultural sources. Industrial sources account for roughly 20% of the total global warming pollution emitted in California. Facilities such as power plants, cement plants, petroleum refineries and biofuel facilities also emit significant quantities of toxic co-pollutants that have severe local health impacts, and are located in areas of the State that suffer the greatest cumulative impacts from these facilities. Despite this, the Scoping Plan proposes direct emissions reduction measures for this sector that result in negligible reductions, where one new refinery project alone would add more than the total reduction required for the entire sector.

Agricultural sources account for roughly 5-6% of GHG emissions in California. Methane emissions from livestock waste have global warming potential over 23x that of CO2 and account for 54% of the state's methane inventory and 3% of the total GHG emission in the state. Cost-effective technologies that significantly decrease methane and volatile organic compound emissions at large confined animal facilities are already available and in use at many facilities in CA. However, the Scoping Plan does not propose any direct measures to reduce emissions from the agricultural sector at all.

3. Fails to set a "*de minimis*" threshold of GHG emissions. The Scoping Plan must "take into account the relative contribution of each source or source category of emissions and shall recommend a "de minimis" threshold of GHG emissions below which emission reduction requirements will not apply. The Scoping Plan wholly exempts agricultural sources and substantially excludes the industrial sector despite significant GHG emissions from these sectors.

4. Fails to prevent increases in criteria or toxics emissions. AB 32 requires ARB to "ensure that activities undertaken pursuant to the regulations complement, and do not interfere with, efforts to achieve and maintain federal and state ambient air quality and to reduce toxic air contaminant emissions." The Scoping Plan outlines a framework for AB 32 implementation that requires ARB to develop a regional a cap-and-trade (i.e. pollution trading) program that would include California, 7 western states and 70% of Canada's economy. ARB does not have jurisdiction to enforce California law in these 7 western states, when AB 32 explicitly requires that ARB must be able to enforce any market-based compliance mechanism. A regional cap-and-trade program could result in emission increases in California. Since all of California's major population and industrial centers currently fail to comply with many state and federal ambient air quality standards, and toxic air emissions accompany any activity that releases GHGs, the proposed regional cap-and-trade program would violate the requirements of AB 32. Meanwhile, the use of an "offsets program without geographic restrictions" would violate AB 32 requirements because ARB lacks jurisdiction to enforce any other state or region's activities within a regional market.

5. Does not discuss the failures of other GHG emission reduction or trading programs and fails to develop any policies to avoid these pitfalls. In determining the measures necessary to make emissions reductions, ARB must consider "all relevant information pertaining to greenhouse gas emission reduction programs in other states, localities and nations." The evidence on current and previous cap-and-trade programs reveals a history of failure to actually reduce emissions. ARB's proposed cap-and-trade program is substantially similar to prior models. The Plan does not propose policy options for avoiding the earlier failures and maximizing the emissions reductions generated in a manner that is

equitable for all Californians. ARB assumes without evidence that a cap-and-trade system will ensure that covered sources will actually reduce emissions by implementing the most cost-effective measures. However, because the carbon price is not yet set, an assertion that it will lead to actual reductions is speculative, as many sources may choose to comply by purchasing allowances and offsets.

6. Fails to address how ARB will monitor and enforce reductions in a regional market. ARB proposes that California join the Western Climate Initiative (WCI) cap-and-trade system that will feature a regional market, emissions trading, allowance banking and offsets. Participation in the WCI enables allowances to be traded across state and provincial boundaries. Because actual emissions could vary from the state's initial allowance budget, this jeopardizes the state's ability to achieve the maximum feasible reductions and maximize co-benefits within the state. Further, participation in the WCI violates AB 32's explicit requirement that all emissions reductions be enforceable by the state board. It will be impossible for the state to ensure that all emissions reductions achieved are "real, permanent, quantifiable, verifiable and enforceable by the state board" as required by statute.

7. Fails to evaluate total costs to California's public and environmental health. AB 32 requires ARB to evaluate the total potential cost and total potential economic and noneconomic benefits of the plan for reducing GHGs to California's economy, environment, and public health. Rather than evaluate the total potential benefits that can be achieved, ARB confined its analysis to quantifying the benefits of implementing the measures already included in the Plan. ARB's analysis included only best case scenarios of plan implementation. The analysis does not discuss the likelihood for disparate impacts, ignoring foreseeable impacts to overburdened communities due to known factors such as the location of facilities and the level of their emissions. In analyzing likely local impacts from industrial sector emissions, ARB assumes a 10% emissions reduction due to the cap-and-trade program that is not supported by any evidence. Based on this assumption, ARB concluded that in Wilmington, a city plagued by industrial emissions, Plan implementation would save 11 lives. Yet, this analysis is flawed because ARB acknowledges that it cannot predict where emission reductions will occur under the cap-and-trade program or whether a specific facility will choose to reduce its emissions at all.

8. Fails to assess the likely impacts of proposed policy choices and regulatory programs to ensure that they do not disproportionately impact already overburdened communities and to propose policies to ensure that they will not. AB 32 requires that prior to including any market-based compliance mechanism ARB must: (1) "Consider the potential for direct, indirect, and cumulative emission impacts from these mechanisms, including localized impacts in communities that are already adversely impacted by air pollution; (2) Design any market-based compliance mechanism to prevent any increase in the emissions of toxic air contaminants or criteria air pollutants; and (3) Maximize additional environmental and economic benefits for California, as appropriate. The Plan does not discuss the likely disparate impacts of its proposed cap-and-trade program. Evidence shows that such programs tend to exacerbate environmental injustice by creating toxic "hotspots," undermining public participation, and allowing the utilization of offsets, which do not result in emissions reductions at the facility. ARB's reliance on the cap-and-trade program for industrial sector emissions reductions means that it cannot assess where emissions reductions will occur or the likely impacts on already overburdened communities. ARB recognizes that emissions at a facility need not be reduced since the facility has the option to obtain allowances or offsets instead of reducing their emissions. In Los Angeles, the car-scrapping pollution trading program resulted in increased pollution in Latino communities near oil refineries as mobile pollution sources were retired. In light of this evidence, the Plan's failure to protect severely burdened communities from increased toxic hot spots or even to minimally evaluate this problem violates AB 32.

Violations of the California Environmental Quality Act (CEQA)

ARB prepared a "Functional Equivalent Document" (FED), in lieu of an Environmental Impact Report, to comply with CEQA's requirement to discuss potential environmental impacts of the Scoping Plan.

Plaintiffs allege that ARB violated CEQA in the following ways:

1. Approved the FED and took steps to implement the Scoping Plan before it had certified the FED**.** ARB approved and took steps to implement the Scoping Plan before it completed its CEQA review by certifying the FED. ARB approved the Scoping Plan on December 11, 2008, five months before it issued the Executive Order to approve the FED. ARB's actions not only violate the procedural requirements of CEQA, but also demonstrate ARB's unwillingness to use CEQA as a tool to foster informed governmental decision-making. Their actions demonstrate ARB's predetermination to adopt the Scoping Plan before engaging in a good faith environmental review of that decision and without regard to any significant environmental impacts.

2. Fails to comply with the requirements for programmatic review. The principal justification for undertaking programmatic review is that it can provide for a more exhaustive analysis of impacts and alternatives than would be possible by pursuing a group of individual environmental analyses. A general program-level analysis can allow lead agencies 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. The programmatic document should develop feasible mitigation measures and alternatives for agencies to incorporate into subsequent rule-making and implementing documents. In particular, ARB failed to provide adequate analysis of its policy decision to use a regional cap-and-trade program and an unbounded offsets program as part of the Scoping Plan, deferring the analysis until each individual rulemaking process.

3. Fails to analyze and mitigate the direct, indirect and cumulative impacts of the Plan. A regulatory program qualifies for certification insofar as the FED includes a description of mitigation measures that will minimize any significant or potentially significant adverse effects that the regulatory program will have on the environment. It is the State's policy that public agencies should not approve projects if feasible mitigation measures remain available to substantially lessen the significant environmental effects of those projects. A lead agency has failed to comply with CEQA when the success or failure of the mitigation measures it has relied upon in its environmental review depends largely on management plans that have not yet been formulated. Meanwhile, a lead agency is responsible for its own compliance with CEQA, and may not defer compliance or rely on other agencies to cure its failure to comply. ARB failed to analyze and mitigate many of the impacts of the Scoping Plan, instead deferring mitigation to future individual rule-making processes and permitting by local agencies. ARB failed to identify, analyze and mitigate the significant and potentially significant adverse environmental impacts that are likely to result from the cap-and-trade program. In particular, ARB failed to identify the significant or potentially significant impacts on air quality, including local impacts on environmental justice communities. Substantial evidence in the record establishes the significant adverse impacts that previous cap-and-trade programs have had on the communities that they affect. ARB had a duty to use that information to effectively anticipate likely impacts from the currently adopted program, and mitigate all impacts that are likely to be significant.

4. Fails to adequately analyze alternatives to the measures included in the Plan. ARB failed to adequately analyze alternatives to the regional cap-and-trade program, and other measures that were adopted to implement the Scoping Plan. A certified regulatory program that submits a FED must include a description of alternatives that minimize any significant adverse effects that the proposed regulatory action will potentially have on the environment. In its analysis of Alternative 2, ARB acknowledged that variations of measures adopted under the Scoping Plan may avoid or substantially

reduce potentially significant impacts, but deferred analysis of these variations to future rule-making. Deferring analysis is particularly ineffective for a programmatic document like the Scoping Plan, because future rule-making and project implementation cannot alter the broad policy decisions made during the adoption of the Scoping Plan. ARB's conclusion that the regional cap-and-trade program is the preferred alternative is legally deficient considering that its impacts are not discussed in any detail, and the analysis of each alternative fails to comply with CEQA.

5. Fails to provide for full public participation in the decision-making process. To comply with CEQA, lead agencies must provide for broad formal and informal public involvement to ensure that they are aware of the public's reactions to environmental issues related to the agency's activities. ARB violated its duty to provide for broad public participation at its public hearing in Sacramento on November 20, 2008. Seventy-six (76) residents of the San Joaquin Valley attended the hearing, and ARB took two actions that had the direct and anticipated effect of preventing those residents from giving public testimony.