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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

THE UNITED STATES OF AMERICA, Plaintiff, v. THE STATE OF CALIFORNIA; GAVIN C. NEWSOM, in his official capacity as Governor of the State of California; THE CALIFORNIA AIR RESOURCES BOARD; MARY D. NICHOLS, in her official capacity as Chair of the California Air Resources Board and as Vice Chair and a board member of the Western Climate Initiative, Inc.; WESTERN CLIMATE INITIATIVE, INC.; JARED BLUMENFELD, in his official capacity as Secretary for Environmental Protection and as a board member of the Western Climate Initiative, Inc.; KIP LIPPER, in his official capacity as a board member of the Western Climate Initiative, Inc., and RICHARD BLOOM, in his official capacity as a board member of the Western Climate Initiative, Inc., Defendants.	2:19-cv-02142-WBS-EFB **STATE DEFENDANTS' NOTICE OF CROSS-MOTION AND CROSS-MOTION FOR SUMMARY JUDGMENT** Date: March 9, 2020 Time: 1:30 PM Courtroom: 5 Judge: Honorable William B. Shubb Trial Date: Not Set Action Filed: 10/23/2019

[1] The State Defendants are State of California; Gavin C. Newsom, in his official capacity as Governor of the State of California; the California Air Resources Board; Mary D. Nichols, in her official capacity as Chair of the California Air Resources Board; and Jared Blumenfeld, in his official capacity as Secretary for Environmental Protection.

NOTICE OF MOTION

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on March 9, 2020 at 1:30 p.m., or at the Court's convenience thereafter, in Courtroom 5 (the Honorable William B. Shubb presiding), located at 501 I Street, Sacramento, California, State Defendants will and hereby do move for summary judgment in favor of Defendants on Plaintiff's First and Second causes of action in its Amended Complaint.

CROSS MOTION FOR SUMMARY JUDGMENT

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, State Defendants move for summary judgment on Plaintiff's Treaty Clause and Compact Clause claims, as alleged in Plaintiff's Amended Complaint as the First and Second causes of action, on the grounds that there is no genuine issue as to any material fact as to either claim, and that State Defendants are entitled to judgment as a matter of law on these claims.

This motion is supported by the State Defendants' Memorandum in Support of State Defendants' Cross-Motion for Summary Judgment and Opposition to Plaintiff's Summary Judgment Motion, Statement of Undisputed Facts, Response to Plaintiff's Statement of Undisputed Facts, Request for Judicial Notice, the Declaration of Michael S. Dorsi and attached exhibits, the Declaration of Rajinder Sahota, other material submitted in this case, any evidence and/or arguments that State Defendants may offer at the hearing on this motion, and any other matter the Court may consider.

Dated: February 10, 2020

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

THE UNITED STATES OF AMERICA, Plaintiff, v. THE STATE OF CALIFORNIA; GAVIN C. NEWSOM, in his official capacity as Governor of the State of California; THE CALIFORNIA AIR RESOURCES BOARD; MARY D. NICHOLS, in her official capacity as Chair of the California Air Resources Board and as Vice Chair and a board member of the Western Climate Initiative, Inc.; WESTERN CLIMATE INITIATIVE, INC.; JARED BLUMENFELD, in his official capacity as Secretary for Environmental Protection and as a board member of the Western Climate Initiative, Inc.; KIP LIPPER, in his official capacity as a board member of the Western Climate Initiative, Inc., and RICHARD BLOOM, in his official capacity as a board member of the Western Climate Initiative, Inc., Defendants.	2:19-cv-02142-WBS-EFB **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF STATE DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFF'S SUMMARY JUDGMENT MOTION** Date: March 9, 2020 Time: 1:30 PM Courtroom: 5 Judge: Honorable William B. Shubb Trial Date: Not Set Action Filed: 10/23/2019

[1] The State Defendants are State of California; Gavin C. Newsom, in his official capacity as Governor of the State of California; the California Air Resources Board; Mary D. Nichols, in her official capacity as Chair of the California Air Resources Board; and Jared Blumenfeld, in his official capacity as Secretary for Environmental Protection.

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INTRODUCTION

In its motion for partial summary judgment, the United States (Plaintiff) challenges a 2017 agreement between California and Quebec under two rarely invoked constitutional provisions: Article I's Treaty Clause and the Compact Clause. The Treaty Clause categorically bars States from entering into "any Treaty, Alliance, or Confederation," while the Compact Clause requires congressional approval for "any Agreement or Compact with another State, or with a foreign Power." These Clauses apply only to a narrow range of state agreements. In fact, although States have entered into hundreds of agreements with other States and with foreign governments, few have been submitted for congressional approval or challenged in court. Indeed, the Supreme Court has rarely addressed these Clauses and has only once found an agreement—the Civil War Confederacy—unconstitutional under them. The 2017 agreement falls well outside the two narrow categories of Article I Treaties and Compacts and fits instead in the much larger third category—the "many matters … that can in no respect concern the United States." *Virginia v. Tennessee*, 148 U.S. 503, 518 (1893).

California and Quebec have chosen to link their respective cap-and-trade programs in order to expand compliance flexibility and cost-reduction opportunities for businesses regulated under their respective programs. Contrary to Plaintiff's suggestion, neither this link nor the 2017 agreement address emission levels. Also contrary to Plaintiff's suggestion, the link between the programs was established not by the 2017 agreement but by regulatory amendments adopted independently by each jurisdiction.

The agreement, signed after the linkage regulations were adopted, expresses the parties' intentions to continue communicating with each other regarding possible changes to their respective programs. This limited agreement to coordinate regarding locally adopted and locally applicable regulatory programs does not violate the Treaty Clause or the Compact Clause because it does not implicate the weighty matters, such as preserving national unity or protecting federal supremacy against an expansion of state power, at which those Clauses are aimed. Indeed, in *United States Steel Corporation v. Multistate Tax Commission*, 434 U.S. 452 (1978), the Supreme Court upheld a formalized, multi-state agreement created to advance a strikingly similar

objective—increased uniformity in state taxation of multi-state corporations—against such a constitutional challenge. The 2017 agreement is neither a Treaty nor a Compact, and Plaintiff's summary judgment motion should be denied.

Defendants' cross-motion for summary judgment should be granted for the same reasons and also because Plaintiff's Compact Clause challenge to the regulatory linkage provisions adopted by the California Air Resources Board (CARB) fails as a matter of law. (Plaintiff does not allege these provisions constitute a Treaty.) This claim, too, is foreclosed by *United States Steel Corporation*, which held that a more consequential agreement concerning taxation of interstate businesses fell outside the Compact Clause because the agreement (1) did not allow States to exercise any powers that they did not already possess, (2) did not delegate any state regulatory power, and (3) allowed states unfettered withdrawal. The same is true of the linkage regulations. California is exercising only authority it already possessed: to expand compliance options for California businesses regulated under a California air pollution control program. The linkage regulations do not delegate any regulatory power away from California, and each jurisdiction retains its full, independent, sovereign authority to modify its own program, as California has done through regulatory amendments adopted since linkage occurred. Each jurisdiction likewise retains its unfettered authority to repeal its linkage regulations and thereby effectively withdraw, as demonstrated by Ontario (which had once linked its program to California's and Quebec's) having done exactly that.

Moreover, neither the agreement nor the linkage regulations encroach upon federal power with respect to foreign affairs. Plaintiff asserts that the 2017 agreement (or perhaps the linkage regulations) reduces the federal government's diplomatic leverage in some unspecified fashion by eliminating some unidentified option. These assertions are incorrect and insufficient as a matter of law, and Plaintiff's repeated quotations from *American Insurance Association v. Garamendi*, 539 U.S. 396 (2003), do nothing to aid its Compact Clause claim. This case is a far cry from the state statute in *Garamendi* that (1) established an approach to settling Holocaust-era insurance claims that directly conflicted with the particular mechanism the federal government had expressly adopted to settle those same claims and (2) threatened substantial economic sanctions—

exclusion from the State's market—to enforce the State's approach. Far from threating economic sanctions, the linkage here is intended to *ease* compliance pressure on California businesses subject to California regulations, and the federal government has not identified or even suggested any conflicting mechanism. Indeed, although the linkage with Quebec has been operational for more than six years, Plaintiff has produced no evidence of any impact whatsoever on the federal government or anything else.

Plaintiff's summary judgment motion should be denied, and summary judgment should be entered for Defendants on both the Treaty Clause and Compact Clause causes of action.

BACKGROUND

I. FACTUAL BACKGROUND

A. Cap-and-Trade Is a Well-Established, Market-Based Approach to Pollution Control Regarded by U.S. EPA, and Others, as Particularly Appropriate for Greenhouse Gas Emissions

Cap-and-trade programs are market-based approaches to regulation under which pollution is controlled by an aggregate "cap" on the emissions of entities regulated by the program. *See* Declaration of Michael S. Dorsi (Dorsi Decl.), Exh. 1 at 1-1, 1-2. The implementing agency issues compliance instruments, often called "allowances," that represent an authorization "to emit a specific quantity (e.g., 1 ton) of a pollutant." *Id.* at 1-2. To ensure emissions do not exceed the cap, "[t]he total number of allowances [issued] equals the level of the cap," and regulated entities "must surrender allowances equal to [their] actual emissions." *Id.*

Allowances are tradeable; they may be bought and sold. Accordingly, regulated entities that can reduce their emissions inexpensively may sell "excess allowances." *Id.* at 1-3. Other regulated entities will, generally, purchase allowances when the cost of doing so "is lower than the cost to reduce a unit of pollution at their facility." *Id.* at 1-3. Thus, the ability to trade allowances provides each regulated entity with the flexibility to "design its own compliance strategy," using whatever combination of "emission reductions and allowance purchases or sales … minimize[s] its compliance cost." *Id.* at 1-2.

In short, the "cap" provides certainty concerning overall emissions levels, while the "trade" allows regulated entities to determine the most cost-effective ways to achieve those levels. *See*

id. at 1-2, 1-3. For these reasons, cap-and-trade programs are regarded by the United States Environmental Protection Agency (EPA) and others as providing both "a greater level of environmental certainty" and "significant economic benefits" as compared to more traditional environmental regulations. *Id.* at 1-2, 1-3.

In 2003, EPA published a guide to designing cap-and-trade programs, in which it stated that "[t]he theory of emission trading and the potential benefits of market-based incentives relative to more traditional environmental policy approaches are well-established in the economic and policy literature." *Id.* at 1-1. EPA described its own cap-and-trade program to reduce sulfur dioxide emissions—a program required by a federal statute enacted in 1990—as "highly effective from an environmental and an economic standpoint." *Id.* EPA also observed that "emissions trading mechanisms are increasingly considered and used worldwide for the cost-effective management of national, regional, and global environmental problems, including … climate change." *Id.* By 2006, one cap-and-trade program for greenhouse gas emissions—the European Union's Emission Trading System—was set up, and another—the Regional Greenhouse Gas Initiative involving several northeastern States—was publicly under development. *See* State Defendants' Request for Judicial Notice (RJN), Part I, ¶¶1–2.

B. CARB Adopted a Cap-and-Trade Regulation, to Reduce Statewide Greenhouse Gas Emissions

In 2006, in Assembly Bill 32 (AB 32), the California Legislature found that climate change "poses a serious threat to the economic well-being, public health, natural resources, and the environment of California." Cal. Health & Safety Code § 38501(a); *see also id.* § 38501(a), (b) (finding, *inter alia*, risks to water supplies and water quality, threats to public health, and impacts on "some of California's largest industries"). Recognizing that greenhouse gas emissions cause climate change and, thus, create and exacerbate these threats to California, the Legislature mandated that the State reduce its greenhouse gas emissions to 1990 levels by 2020. *Id.* § 38550. In 2016, the Legislature took the additional step of mandating that California reduce its emissions to 40 percent below 1990 levels by the end of 2030. *Id.* § 38566.

The Legislature tasked CARB with developing a plan and promulgating regulations to achieve the mandated statewide emissions reductions. *Id*. §§ 38561, 38560. The Legislature authorized CARB to design and adopt a cap-and-trade program as one of the regulations it would promulgate to reduce greenhouse gas emissions. *Id.* § 38562(c)(2).

In 2008, CARB prepared and finalized a Scoping Plan to "outlin[e] the State's strategy to achieve the 2020 greenhouse gas emissions limit" established by the Legislature. Dorsi Decl., Exh. 2 at ES-1; *see also* Cal. Health & Safety Code § 38561(a). Based on extensive research and public participation, Dorsi Decl., Exh. 2 at E-2, E-3, 9, CARB concluded that achieving the statewide emissions limits could "best be accomplished through a cap-and-trade program along with a mix of complementary strategies that combine market-based regulatory approaches, other regulations, voluntary measures, fees, policies, and programs." *Id.* at 15. Following the Scoping Plan, CARB promulgated several regulatory measures to reduce greenhouse gas emissions from a variety of sources, including a Low Carbon Fuel Standard, more stringent emissions standards for various types of vehicles and engines, and a cap-and-trade regulation. Declaration of Rajinder Sahota (Sahota Decl.) ¶ 9.

CARB proposed its cap-and-trade regulation in October 2010, drawing on design recommendations from the Western Climate Initiative[2] and other information gathered from research, public participation, and consultation with experts from diverse fields. Sahota Decl., ¶¶ 15-19; Dorsi Decl., Exh. 3 at 2. Subsequently, the Board adopted the cap-and-trade regulation in October 2011. Sahota Decl., ¶20; Dorsi Decl., Exh. 4. The program's compliance obligations for regulated sources began on January 1, 2013. Cal. Code Regs., tit. 17, § 95840(a).

California's cap-and-trade program reflects the general cap-and-trade program structure described above. CARB establishes yearly caps, called "budgets," for the total greenhouse gas emissions of all regulated sources (called "covered entities"). *Id.* §§ 95841, 95802(a). These emission budgets decline each year in order to require emission reductions from covered entities.

[2] This Initiative, which is distinct from Defendant Western Climate Initiative, Inc. (a non-profit corporation), was a somewhat informal "collaboration of independent jurisdictions working together … to tackle climate change." Sahota Decl., ¶ 13. The Initiative produced design recommendations for cap-and-trade programs. Sahota Decl., ¶ 15.

See id. § 95841.[3] CARB issues allowances—"authorization[s] to emit up to one metric ton of carbon dioxide equivalent" greenhouse gases—in quantities equal to the emissions budget for a given year. *Id.* §§ 95802(a), 95802(a)(1). Covered entities may trade these allowances and other compliance instruments and are required to acquire and surrender eligible compliance instruments equivalent to the metric tons of greenhouse gases they emit. *Id.* §§ 95850(b), 95856(a).[4]

C. CARB's Cap-and-Trade Regulation Includes Several Features, Including the Ability to Link to Other Programs, that Facilitate Cost-Effective Emission Reductions

Beyond the flexibility provided by the ability to trade allowances, CARB's cap-and-trade regulation contains additional cost-containment features. Sahota Decl., ¶¶ 24-25. For example, it allows the "banking" of allowances, meaning covered entities can acquire allowances in earlier years (when prices may be lower) and use them for compliance in later years (when prices may be higher due to more stringent emission budgets). Sahota Decl., ¶ 24; *see also* Cal. Code Regs., tit. 17, § 95922.

Another cost-containment measure is the aspect of the program at issue in this case: the ability to expand the market(s) for compliance instruments by linking to other, similar cap-and-trade programs. When it adopted its cap-and-trade regulation in 2011, CARB concluded that a California-only program would function well but recognized, at the same time, that linking with other, similar programs would "provide an additional cost containment mechanism" for covered entities. *See* Dorsi Decl, Exh. 5 at 193. Accordingly, CARB designed California's cap-and-trade regulation to include a "framework for linkage" which would allow CARB to link to another jurisdiction's program through a later rulemaking proceeding. *Id.*; Cal. Code Regs., tit. 17,

[3] The budget set by CARB in 2015 was actually larger than the 2014 budget, but this enlargement did not indicate an increase in emissions. Rather, it reflected expansion of the program to include suppliers of natural gas and transportation fuels in the program (and the budget) beginning in 2015. *See* Cal. Code of Regs., tit. 17, §§ 95841, 95851(b).

[4] Covered entities may surrender "offsets" for a small portion (four to eight percent) of their compliance obligation. Cal. Code of Regs., tit. 17, §§ 95821, 95854. Like an allowance, an "offset" authorizes a metric ton of emissions, but, unlike an allowance, an offset corresponds to emissions reductions by a source not covered by the program. *See* Cal. Code Regs., tit. 17, § 95802(a). In essence, an offset is a mechanism that allows a covered entity to pay a non-covered entity to reduce or remove emissions. Because the use of offsets is limited under California's program, and for purposes of brevity and simplicity, the discussion here focuses on allowances.

§ 95940. The regulation adopted in 2011 included this framework for future linkage but did not actually link to any other program. *Id.*

Under this framework, linkage means (1) that CARB would accept the allowances (or other compliance instruments) issued by the linked jurisdiction as essentially equivalent to CARB-issued instruments and (2) that CARB would conduct coordinated allowance auctions with the other jurisdiction. Cal Code Regs., tit. 17, §§ 95940, 95942(a), (e), 95911(a)(5). Linkage would not alter anything else about the programs, including their caps (or emissions budgets). Sahota Decl., ¶ 25. Because linkage would expand the available cost-reduction opportunities, many covered sources supported CARB's inclusion of the framework for linkage and urged CARB to actually link to other programs quickly. Sahota Decl., ¶ 26; *see also* Dorsi Decl., Exh. 5 at 142, 167, 175, 191, 192.

After CARB adopted the linkage framework, but before CARB had linked to any other program, the California Legislature "establish[ed] new oversight and transparency over [cap-and-trade] linkages." Cal. Gov. Code § 12894(a)(2). Accordingly, California law provides that CARB may not link to another program "unless [CARB] notifies the Governor that [it] intends to take such action and the Governor, acting in his or her independent capacity, makes [four] findings," including that "[t]he jurisdiction with which the state agency proposes to link has adopted program requirements for greenhouse gas reductions … that are equivalent to or stricter than those required" by California's Legislature. *Id.* § 12894(f).[5]

D. California Linked Its Program with Quebec's Program by a Rulemaking Proceeding Completed in 2013

On April 19, 2013, after the Governor made the requisite findings described above and after a public rulemaking proceeding, CARB adopted amendments to its cap-and-trade regulation to

[5] This finding is important, from a cap-and-trade design perspective, because programs with less stringency that are less constraining will tend to have lower allowance prices (due to excess supply and/or lower demand). Sahota Decl., ¶ 30. Lower allowance prices blunt incentives to reduce emissions. *Id.* Also, if regulated sources in jurisdictions with stringent caps could simply buy allowances cheaply from jurisdictions with much less stringent caps, it would undermine the more stringent cap and the degree of emissions constraint it was intended to provide. *Id.* This finding, thus, protects the environmental integrity of the programs. *See id.*

link to a similar program adopted by Quebec. Sahota Decl., ¶¶ 33-34, 40; Dorsi Decl., Exh. 6; *see also* Cal. Code Regs., tit. 17, § 95943(a)(1).[6] By operation of these regulatory amendments, the linkage with Quebec took effect January 1, 2014. Cal. Code Regs., tit. 17, § 95943(a)(1). As a result, for the last six years, CARB has accepted Quebec-issued compliance instruments for compliance with CARB's cap-and-trade program, and parties regulated under either program may buy and sell allowances and other compliance instruments with each other. *Id.*; *see also id.* § 95940. CARB and Quebec also conduct joint allowance auctions. *Id.* § 95911.[7]

Nothing about this linkage otherwise altered either jurisdiction's program or either jurisdiction's authority to amend its program or to terminate linkage. Sahota Decl., ¶¶ 42-43. CARB remains the agency to which the California Legislature has delegated rulemaking authority for California's cap-and-trade program and upon which the Legislature imposed certain criteria regarding any such program. Cal. Health & Safety Code §§ 38560, 38562, 38570.

In September 2013, approximately five months after it adopted the regulatory amendments linking to Quebec's program, CARB and California's Governor signed an agreement with Quebec, reflecting both jurisdictions' intentions to continue coordinating with regard to their respective cap-and-trade programs. *See* Am. Compl., ¶ 57; *see also* Dorsi Decl., Exh. 8. The agreement expressly recognized that each jurisdiction's program would continue to be governed by its regulations, noting particularly that linkage activities—including acceptance of each other's compliance instruments, joint auctions, and cross-program trading—would occur "as provided for under their respective cap-and-trade program regulations." Dorsi Decl., Exh. 8 (Articles 6, 7, 8). The agreement also expressly recognized that it did not "modify any existing laws and regulations" and that each party retained its "sovereign right and authority to adopt, maintain,

[6] These amendments were approved by the California Office of Administrative Law and filed with the California Secretary of State on June 24, 2013 and, by operation of California Government Code Sections 11343.4, became effective on October 1, 2013. Dorsi Decl., Exh 7. As noted, however, pursuant to the text of the regulation, the linkage became operational on January 1, 2014. Cal. Code Regs., tit. 17, § 95943(a)(1).

[7] The auctions are conducted jointly in the sense that California and Quebec make their respective allowances available at the same time, and in the same auction venue, and conform their bidding and winning parameters. Sahota Decl., ¶ 52. However, there is no joint account where allowances are held prior to distribution to winning bidders. *Id.* After each auction, California and Quebec separately transfer their respective allowances into the winning bidders' accounts. *Id.*

modify or repeal any of their respective program regulations." *Id.* (Article 13 and 14th WHEREAS clause).

As reflected in the agreement, CARB and Quebec use the technical and administrative services of the Western Climate Initiative, Inc. (WCI, Inc.), a non-profit corporation formed in 2011 by the then-participants in the Western Climate Initiative, to support their cap-and-trade programs. Sahota Decl., ¶¶ 50-51, 53, 55, 57; Dorsi Decl., Exh. 12. WCI, Inc. developed and administers a technical platform that CARB and Quebec use to jointly auction allowances.[8] Sahota Decl., ¶ 51. WCI, Inc. also developed and maintains a computer system that, like banking software, keeps track of allowances and other compliance instruments. *Id.* WCI, Inc. provides these services under contract and for remuneration, and CARB had begun using WCI, Inc.'s services in 2012, before it linked its program to Quebec's. *See* ECF No. 7-3; *see also* Sahota Decl., ¶ 53. WCI, Inc. has no policy-making, regulatory, or enforcement authority, and plays no role in deciding whether California or Quebec will accept each other's compliance instruments. Sahota Decl., ¶ 57; *see also* Cal. Code of Regs., tit. 17, §§ 95940, 95943(a).

E. California Linked Its Program, via Rulemaking, to Ontario's Program in 2017, and the Three Jurisdictions Signed an Agreement to Continue Collaborating

On July 27, 2017, after the Governor made the requisite findings, CARB completed a rulemaking proceeding and adopted regulatory amendments to link its cap-and-trade program with Ontario's, with that linkage becoming operational on January 1, 2018. Sahota Decl., ¶¶ 62-64; Dorsi Decl., Exh. 9; *see also* Cal. Code Regs., tit. 17, § 95943(a)(2).[9] In September 2017, the governments of California, Quebec, and Ontario signed an agreement, again reflecting the parties' intentions to continue coordinating their respective programs. Am. Compl., Attachment B (ECF No. 7-2) (2017 agreement). That 2017 agreement replaced the 2013 agreement between California and Quebec. *See id.* at 3.

[8] The majority of California allowances are made available through these quarterly auctions; some allowances are provided to regulated parties at no cost. *See* Cal. Code Regs., tit. 17, § 95910.

[9] California's Office of Administrative Law approved the amendments and filed them with the California Office of the Secretary of State on September 18, 2017, with an effective date of October 1, 2017. Dorsi Decl., Exh. 10.

Like its predecessor, the 2017 agreement is of limited reach. Far from linking the programs, the 2017 agreement expressly notes that the links between the programs—mutual recognition of compliance instruments, joint auctions, and cross-program trading—were effectuated by, and would be governed by, each party's respective regulations. *Id.* at 2 & Arts. 6, 7, 9; *see also id.* at 2 (recognizing "that the harmonization and integration of [the parties'] cap-and-trade programs are to be attained by means of regulations adopted by each Party"). The agreement also explicitly states that it "does not modify any existing statutes and regulations [and] does [not] require or commit the Parties or their respective regulatory or statutory bodies to create new statutes or regulations." *Id.,* Art. 14. Further, like the 2013 agreement, the 2017 agreement expressly recognizes that each participating jurisdiction retains its "sovereign right and authority to adopt, maintain, modify, repeal or revoke any of their respective program regulations or enabling legislation." *Id*. at 2. The 2017 agreement also recognizes that the "Agreement does not, will not and cannot be interpreted to restrict, limit or otherwise prevail over relevant national obligations of each Party." *Id*. Finally, the 2017 agreement indicates that a "Party may withdraw" from it "by giving written notice of intent to withdraw to the other Parties" but expresses the Parties' intentions to "endeavour to give 12 months notice of intent to withdraw." *Id.*, Art. 17. The 2017 agreement contains no discussion of any mechanism for its enforcement.

The parties entered into the agreement because they recognized "the importance of effective and timely public consultation regarding their respective [cap-and-trade] program[s]," in light of the fact that the parties' linkage regulations effectively established expanded markets including all three jurisdictions' compliance instruments. *Id.* at 2, Art. 11. Coordination helps ensure that each party understands what program changes are being considered by the other parties and whether those changes might have indirect effects on the linked programs. Sahota Decl. ¶ 49. Acknowledging that the parties had already "developed constructive working relationships among their respective staff and officials," the parties expressed their intentions to "facilitate continued consultation." ECF No. 7-2, at 2.

To that end, the parties stated their intentions to "continue to examine their respective regulations" and, where differences in the programs exist, determine whether further

harmonization was warranted "for the proper functioning and integration of the programs," consulting with each other accordingly. *Id.*, Art. 4. Notably, many differences in the programs do *not* require harmonization, as demonstrated by numerous differences between Quebec's and California's programs. For example, Quebec's program includes emissions of high global warming potential gases (such as hydrofluorocarbons), while CARB's program does not. Sahota Decl., ¶ 35. The two programs are also set up to respond differently to the potential invalidation of offset credits: CARB's program has enforceable buyer liability provisions, while Quebec's contains an "environmental integrity" buffer account. *Id*. Additionally, Quebec and California have adopted different methodologies for distributing allowances to regulated parties. *Id*. California's methodologies include giving allowances to utilities for free but requiring the utilities to consign those allowances at auction, with the auction revenues providing a climate credit to California ratepayers. *Id*. Quebec's program does not include this feature. *Id.*

The agreement also reflects the parties intentions to "discuss[] between the Parties" changes a party was considering proposing to its "offset protocols" or "procedures for issuing offset credits." ECF No. 7-2, Art. 5. As touched on briefly above, offsets are tradeable compliance instruments that can be used, instead of allowances, for a limited portion of a regulated party's compliance obligation. *See, supra*, at 6 n.4. Because the linkage of the programs effectively links the markets for offsets, as well as for allowances, the agreed upon "discussion" amongst linked jurisdictions regarding these protocols and procedures is important to the functioning of all the programs. Sahota Decl., ¶¶ 67-68; see also *id*. ¶¶ 47-49.

On these issues, and others, the parties articulated their intentions to continue their consultations, aiming to constructively "resolve differences by using and building on established working relationships." ECF No. 7-2, Art. 20. The parties would "engage through the Consultation Committee" described in the agreement on any issues they were unable to resolve informally. *Id.* That Committee was intended to be "composed of one representative from each of the Parties" and to "meet as needed to ensure timely and effective consultation in support of the objectives of the Agreement." *Id.*, Art. 13. However, to date, consultations between

California and Quebec have continued informally, and the Consultation Committee has never met or even been formed. Sahota Decl., ¶ 69.

F. Ontario Cancelled Its Cap-and-Trade Program, Effectively Unlinking It and Withdrawing from the 2017 Agreement, without Any Formal Notice

In the lead up to a June 7, 2018 election, the Ontario Progressive Conservative Party's platform called for terminating Ontario's cap-and-trade program if the Party prevailed in the election. Sahota Decl., ¶ 71. The Ontario Progressive Conservative Party did prevail in that election, winning an absolute majority in the Ontario legislature and making that Party's leader, Doug Ford, the Premier-Designate of Ontario. *Id.*, ¶ 72. On June 15, 2018 Premier-Designate Ford announced that his government's first act would be to "cancel" Ontario's cap-and-trade program, including terminating the linkage between its program and California's and Quebec's. *Id.*, ¶ 73. On June 29, 2018, the Ontario cabinet approved a regulation revoking its cap-and-trade regulations and prohibiting further trading of compliance instruments by Ontario entities. *Id.*, ¶ 74. This was followed by the Cap and Trade Cancellation Act, enacted by the Ontario legislature, effective November 15, 2018. *Id.*, ¶ 75. At no point during any of these revocation or cancellation proceedings did Ontario provide notice to CARB of its withdrawal from the 2017 agreement, despite the provision expressing the parties' intentions to do so. *Id.*, ¶ 76.

As reflected in CARB's regulations, the link with Ontario was effective from January 1, 2018 through June 15, 2018. Cal. Code Regs., tit. 17, § 95943(a)(2). The linkage between California's and Quebec's programs remains in effect. *Id.* § 95943(a)(1).

II. PROCEDURAL HISTORY

Plaintiff filed its initial complaint against Defendants on October 23, 2019 and its amended complaint on November 19, 2019. ECF Nos. 1, 7. The amended complaint asserts four causes of action and seeks declaratory and injunctive relief. ECF No. 7. On November 19, 2019, the parties filed, and the Court subsequently granted for good cause, a joint stipulation giving all Defendants a deadline of January 6, 2020 to file responsive pleadings. ECF Nos. 8, 11.

On December 11, 2019, before responsive pleadings were filed, Plaintiff moved for summary judgment as to two of its four causes of action—under the Treaty and Compact Clauses. ECF No. 12.

On January 6, 2020, all WCI, Inc. Defendants and Defendant Jared Blumenfeld, in his official capacity as Secretary for Environmental Protection, moved to dismiss themselves as Defendants. ECF No. 25. On that same day, the remaining State Defendants answered the amended complaint. ECF No. 24.

The hearing on the motion to dismiss is now set for February 24, 2020. ECF No. 44. The hearing on the parties' cross-motions for summary judgment is set for March 9, 2020. ECF No. 43.

STANDARD FOR SUMMARY JUDGMENT

A party seeking summary judgment bears the initial burden of demonstrating the absence of a genuine issue of material fact as to the basis for the motion. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Material facts are those that might affect the outcome of the case, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986), as "determined by the substantive law governing the claim or defense." *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987). The court must "view[ ] the evidence in the light most favorable to the nonmoving party[.]" *Fontana v. Haskin*, 262 F.3d 871, 876 (9th Cir. 2001). But "[c]onclusory, speculative testimony in affidavits and moving papers is insufficient to raise genuine issues of fact and defeat summary judgment." *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007).

Where, as here, the "parties submit cross-motions for summary judgment, each motion must be considered on its own merits." *Fair Hous. Council of Riverside Cty., Inc. v. Riverside Two*, 249 F.3d 1132, 1136 (9th Cir. 2001) (internal quotation marks omitted). "[W]hen simultaneous cross-motions for summary judgment on the same claim are before the court, the court must consider the appropriate evidentiary material identified and submitted in support of both motions, and in opposition to both motions, before ruling on each of them." *Id.* at 1134; *Tulalip Tribes of Wash. v. Wash.*, 783 F.3d 1151, 1156 (9th Cir. 2015).

ARGUMENT

Agreements between States and between States and foreign governments are far from uncommon. According to the most recent scholarship in this area, state and local governments have entered into thousands of agreements with foreign jurisdictions, including more than four hundred between States and Canadian provinces.[10] These agreements cover diverse subjects including trade, transportation, and environmental protection.[11] The vast majority of these agreements attract neither legal challenges nor the attention of Congress—the body authorized to approve certain agreements under the Compact Clause.[12] Indeed, while States frequently enter into agreements with other governments, and have done so since before the Constitution was ratified, the Supreme Court has rarely addressed the constitutional constraints on state authority established in Article I, section 10. *See U.S. Steel Corp.*, 434 U.S. at 461 n.10, 467-69. And, with the exception of the Civil War Confederacy, it has never invalidated a state agreement under those constraints. *See Williams v. Bruffy*, 96 U.S. 176, 182 (1877).

The Supreme Court has recognized three categories of agreements between States and other governments: 1) the plethora of agreements involving "many matters … that can in no respect concern the United States," which are not subject to any constitutional restrictions under Article I; 2) the rare "compact" or other agreement that "increase[s] [the] political power in the states" and "encroach[es] upon … the just supremacy of the United States," which requires congressional consent under the Compact Clause; and 3) the rarer still " Treaty, Alliance, or Confederation," which so threatens national unity that not even Congress may approve it. *See Virginia*, 148 U.S. at 518, 519 (1893); *see also Williams*, 96 U.S. at 182; *see also* U.S. Const., art. I, § 10, cl. 1, 3.

Plaintiff claims that California has entered into an agreement that fits within the second or third categories—an agreement that is either a Compact or Treaty under Article I. Plaintiff is wrong. Indeed, Plaintiff's arguments depend on expansive interpretations of these Clauses that

[10] Michael Glennon & Robert Sloane, *Foreign Affairs Federalism: The Myth of National Exclusivity* 60 (2016). For the Court's convenience, relevant pages of this book are attached to the Dorsi Declaration as Exhibit 15.

[11] *Id.* at 60-61.

[12] William H. Taft, IV, Legal Adviser of the U.S. Dept. of State, "Memorandum," in *Digest of United States Practice of International Law* 184 (Sally J. Cummins & David P. Stewart, eds., 2001) ("Taft Memo"), attached to Dorsi Decl. as Exhibit 13.

are completely at odds with the constitutional text and structure, historical understanding, long-standing practices, and Supreme Court precedent. Moreover, although the linkage between California's and Quebec's programs has been operational for more than six years, Plaintiff has provided no evidence demonstrating *any* specific effects of this linkage or its related agreements, let alone any evidence of infringement on federal supremacy or threat to national unity.

Plaintiff's causes of action under the Treaty and Compact Clauses both fail, and summary judgement should be entered for Defendants.

I. THE CHALLENGED AGREEMENT IS NOT AN ARTICLE I TREATY

A. The Article I Treaty Clause Prohibits Only Agreements with Substantial Consequences for Our Federal Structure, Such as Risks to National Unity

Plaintiff's Treaty Clause claim is highly unusual. Indeed, although the prohibition against a State entering into "any Treaty, Alliance, or Confederation" has been in Article I of the Constitution since ratification, the Supreme Court has only applied it once and with little discussion—to the Civil War Confederacy. *Williams*, 96 U.S. at 182.[13] And the precise meaning of "Treaty," as used in the Clause, has been lost to history. *See U.S. Steel*, 434 U.S. at 463. Nevertheless, the text and structure of the Constitution, historical understandings, and the Supreme Court's application of the Compact Clause all confirm what the dearth of Treaty Clause case law itself suggests: that the only state agreements that could rise to the level of an Article I Treaty are the rarest of the rare—agreements that could have such substantial consequences for the Nation, such as threatening national unity, that Congress may not authorize them.

The Constitution's text and structure make this clear in two ways. The Treaty Clause establishes a categorical bar against treaties, alliances, and confederations, *see* U.S. Const., art. I, § 10, cl. 1, but the Compact Clause permits compacts if Congress consents, *see id*. art. 1, § 10, cl. 3. Distinguishing treaties from compacts and barring the former categorically demonstrates that Article I Treaties must be very rare agreements of such unusual importance and substantial

[13] This clause was discussed, briefly, with respect to Vermont's decision to hold and extradite an individual charged with a crime in Quebec, in *Holmes v. Jennison*, 39 U.S. 540 (1840). But a plurality of four Justices concluded quickly that there was no Treaty and analyzed the issues under the Compact Clause. *Id.* at 571. In any event, the case produced no majority opinion of the Court. *Id.* at 561.

consequences for the Nation that Congress should not be permitted to authorize them. The language of the Treaty Clause itself confirms this conclusion. Under well-established canons of construction, "the meaning naturally attaching to" the word "Treaty" should be construed "by reference to associated words," namely "Alliance" and "Confederation." *See Virginia*, 148 U.S. at 519 (applying this canon of construction to the Compact Clause). Both of those terms connote consequential, indeed potentially dangerous, types of agreements. The only "Confederation" identified to date is the Civil War Confederacy," *Williams*, 96 U.S. at 182, and constitutional commentaries relied upon by the Court describe "'treaties of alliance'" as arrangements for "'purposes of peace and war,'" *Virginia*, 148 U.S. at 519 (quoting Justice Story's *Commentaries on the Constitution*). Thus, for purposes of Article I, "treaties" must be interpreted as those rare agreements risking serious consequences for the Nation, including threats to national unity.

This interpretation is consistent with the functional view that the Supreme Court has adopted of the other clause in Article I that addresses state agreements—the Compact Clause. There, "[t]he relevant inquiry" concerns the "impact [an agreement might have] on our federal structure." *U.S. Steel*, 434 U.S. at 471. Underlying that view is the Court's recognition that "[t]he Constitution looked to the essence and substance of things, and not to mere form." *Id.* (internal quotation marks omitted). Application of this functional view confirms that "treaties"—which, again, are categorically barred—must have a greater impact on our federal structure than Compacts. If Congress can authorize some impact on our federal structure—and it can—agreements Congress cannot authorize must pose greater, and therefore impermissible, threats to the Nation, including to national unity.

This interpretation is likewise consistent with the concern underlying the Article I Treaty Clause, which as Plaintiff recognizes (Plaintiff's Motion for Summary Judgment (MSJ) at 2:16-21), included the fear that the country would "split into a number of confederacies" that could be "played off against each other" by major foreign powers. *The Federalist No. 4*, at 44 (John Jay) (Clinton Rossiter ed., Signet 2003). Accordingly, the "sound policy" underlying the Treaty Clause's flat prohibition against States entering into any treaties, alliances, or confederations is "the preservation of any national government." Joseph Story, *Commentaries on the Constitution*

of the United States § 1349, at 217-18 (1833) (arguing that if states were at liberty to enter into treaties, alliance, or confederations, "the internal peace and harmony of the Union might be destroyed, or put in jeopardy" and "perpetual source of foreign corrupt influence" would be created). For all of these reasons, the Treaty Clause should be limited to state agreements addressing matters of such consequence, such as threats to national unity, that they must be barred without regard to congressional consent.[14]

Asking this Court to adopt a very different, and much broader, interpretation of the Treaty Clause, Plaintiff isolates a single phrase—"of a political character"—from Justice Story's *Commentaries*, asserts that the Supreme Court has adopted this as the Treaty Clause test, and argues for a sweeping, though hardly crisply defined, reading of "political character." *E.g.*, MSJ at 13:12-13, 14:22-24, 15:5-9. But the Supreme Court has not adopted a Treaty Clause test, having never held that a state agreement other than the Civil War Confederacy violated this Clause. *See* MSJ at 14:17-25, 15:5-17 (relying on *Virginia* and *U.S. Steel*, both of which decided *Compact Clause* claims).

Moreover, contrary to Plaintiff's assertions, Justice Story's *Commentaries* adopt a view of the Treaty Clause wholly in line with the narrow interpretation supported by the text and structure of Article I, the concerns underlying the Clause, and the Supreme Court's Compact Clause decisions. As the Supreme Court has observed, Story wrote that treaties, alliances, and confederations "generally connote military and political accords." *U.S. Steel*, 434 U.S. at 464. Accordingly, Story's "treaties of a political character" included "treaties of alliance for purposes of peace and war," "treaties of confederation, in which the parties are leagued for mutual government," and "treaties of cession of sovereignty, or conferring internal political jurisdiction, or external political dependence, or general commercial privileges." *Commentaries*, § 1397, at

[14] St. George Tucker, one of the Framers who participated in the Annapolis Convention of 1786 along with James Madison, reached a similar conclusion. He interpreted "treaties, alliances, and confederations" to "relate ordinarily to subjects of great national magnitude or importance." *See U.S. Steel*, 434 U.S. at 463 n.13 (internal quotation marks omitted). The Supreme Court also ascribed similar meaning to the provision of the Articles of Confederation that prohibited "any treaty, confederation, or alliance between the states without the consent of congress." *Wharton v. Wise*, 153 U.S. 155, 167 (1894) (holding this provision was "intended to prevent any union of two or more states, *having a tendency to break up or weaken the league between the whole*") (emphasis added).

271; *see also Virginia*, 148 U.S. at 519. Each of these examples represents a treaty of high impact for our federal structure and implicates national unity. State "treaties of alliance for purposes of peace and war" are obviously important and pose a danger to national unity because they may commit a state to military action or inaction unsupported or inimical to other states or the federal government. As the Civil War Confederacy tragically showed, "treaties of confederation" can literally tear the nation apart. Treaties ceding sovereignty to a foreign power (as Austria did to Germany at the beginning of World War II), conferring internal political jurisdiction upon a foreign power (such as Cuba did with Guantanamo Bay), or accepting external political dependence (as the Republic of Texas did when it was annexed by the United States) raise similarly momentous issues.

Story's reference to "treaties … conferring … general commercial privileges" likewise refers to agreements with substantial consequences, such as those that could impair national unity.[15] The "commercial privileges" subject to treaties are, indeed, consequential ones—such as, tonnage duties on ships arriving in ports, tariffs on imported goods, and the privilege for non-citizens to live and pursue commercial activities in this country. *See, e.g.,* Max Farrand, "The Commercial Privileges of the Treaty of 1803," in 7 *The American Historical Review* 494 (1902);[16] *Chae Chan Ping v. United States*, 130 U.S. 581, 590 (1889) (describing the interest of the United States in acquiring "the same commercial privileges" China had provided by treaty "to British subjects," including permission "to reside [in China] for the purpose of carrying on mercantile pursuits"); *The Mary & Susan*, 14 U.S. 46, 55 & n. f (1816) (similarly describing a U.S. citizen as acquiring "commercial privileges" in the foreign country of his domicile).[17]

[15] Plaintiff may mean to suggest otherwise with its oblique contention that California lacks a "proprietary or quasi-proprietary interest" here. MSJ at 14:26-27. But Plaintiff does not explain either what it means by such interests or why the presence or absence of such interests is relevant.

[16] A courtesy copy of this article is provided as Exhibit 16 to the Dorsi Declaration.

[17] In purporting to apply Justice Story's interpretation, Plaintiff simply plucks words out of Story's discussion without any regard to the overall point that he was making. For example, Plaintiff asserts that the 2017 Agreement creates a "political alliance" without acknowledging that Justice Story used this term to refer to "treaties of alliance *for purposes of peace and war*." Story, *Commentaries,* § 1397, at 271 (emphasis added). Indeed, most of Plaintiff's arguments consist of using the word "political" in different ways, none of which sheds light on what Plaintiff means by the term, much less attempts to explain how that meaning comports with Story's. *E.g.,* MSJ at

Thus, the text of the Article I Treaty Clause, the structure of Article I, related Supreme Court precedent, the concerns underlying the Clause, and historical commentary all support the conclusion that the Treaty Clause is limited to a narrow category of agreements with substantial consequences for our federal structure, including threats to national unity.

B. The Challenged Agreement Is of Little to No Consequence to our Federal Structure, Does Not Threaten National Unity, and Is Not an Article I Treaty

Plaintiff claims that the 2017 agreement between Quebec and California is an Article I Treaty. MSJ at 14:6-16:12; Am. Compl., ¶ 160. That agreement does not qualify as a Treaty because it does not address a matter of substantial consequence to our federal structure, much less one implicating national unity. Indeed, the agreement does not even link the two cap-and-trade programs. That link was created through regulatory amendments made by California and Quebec, pursuant to each jurisdiction's separate legal requirements for rulemakings. The agreement that Plaintiff claims is a Treaty merely expresses California's and Quebec's good-faith intentions to continue communicating and collaborating, as they have been for more than six years, so that the link between the two cap-and-trade programs may continue to function properly. In any event, nothing about the agreement or the linkage regulations threatens the kinds of consequences for the Nation that could support a Treaty Clause claim.

1. Rather than Linking the Cap-and-Trade Programs, the Agreement Simply Expresses the Parties' Intentions to Continue Communicating and Coordinating Regarding their Respective Programs

Plaintiff asserts that the 2017 agreement "provides that auctioning of compliance instruments by Parties' respective programs shall occur jointly," MSJ at 8:13-14, authorizes "covered entities in California … to trade instruments with covered entities in Quebec," *id.* 9:16-14:19 (describing the challenged agreement as a "political alliance" without explication); *id.* at 14:26 (using "device 'of a political character' in this sense" without explaining what "sense" is meant); *id.* at 15:10 (using "freighted with 'a political character'" in a similarly unexplained way). As such, Plaintiff's "test" is ill-defined and at least arguably presents no "judicially discoverable and manageable standards." *See Saldana v. Occidental Petroleum Corp.*, 774 F.3d 544, 551 (9th Cir. 2014); *see also Made in the USA Found. v. United States*, 242 F.3d 1300, 1315 (11th Cir. 2001) (rejecting Article II Treaty claim in part because "the appellants themselves fail to offer, either in their briefs or at argument, a workable definition of what constitutes a 'treaty'").

17, and constitutes California's "agree[ment] to accept instruments issued by Quebec" as a means of compliance with California's program, *id.* 9:18-19. In fact, the agreement does none of these things. All of those activities are governed by regulations, not the agreement, as the agreement itself makes clear. For example, Article 9 states that "the auctioning of compliance instruments by the Parties' respective programs shall occur jointly … *as provided for under their respective cap-and-trade programs*." ECF No. 7-2, Art. 9 (emphasis added). Similarly, Article 6 states that "mutual recognition of the Parties' compliance instruments shall occur *as provided for under their respective cap-and-trade program regulations*." *Id.*, Art. 6 (emphasis added); *see also id.*, Art. 7 (containing similar language regarding compliance instrument trading).

The California Code of Regulations confirms that it is CARB's regulatory provisions that effectuate the linkage, authorizing CARB to accept Quebec-issued instruments and to jointly auction allowances. Cal. Code Regs., tit. 17, §§ 95943(a)(1), 95911(a)(5). CARB adopted these regulatory amendments, to link its program to Quebec's, on April 19, 2013, more than five months before the first agreement with Quebec was signed in September 2013. Dorsi Decl., Ex. 6, Sahota Decl, ¶¶ 40, 44.

This is not to the say that the 2017 agreement is of no import. It expresses the parties' intentions to continue communicating and coordinating with each other regarding their respective programs and to provide the other party with notice before making significant changes to their respective regulations. Sahota Decl., ¶¶ 65, 67-68. This coordination and notice are extremely valuable for linked cap-and-trade programs because decisions that one party makes about its program can indirectly affect the other's program. *Id.*, ¶¶ 30, 68. The intent of the agreement was to identify those sorts of issues early, so that the parties to the agreement could attempt to resolve any concerns and so that each party could take any actions it independently deemed necessary. *Id.*; see *id.*, ¶¶ 47-49. Notably, this coordination is necessary, and important, because each jurisdiction retains its independent, sovereign authority to amend, modify, or even repeal its regulation, as the agreement expressly recognizes. ECF 7-2 at 2.

Contrary to Plaintiff's characterization, the agreement does not knit California and Quebec into a "virtually seamless regulatory body" or require California "to conform its regulations as

much as possible—and certainly in every material respect—to those of Quebec." MSJ at 16:16-22; *see also id*. at 7:18-19 (asserting that the agreement "integrates California's program with that of Quebec in a virtually seamless web"). Indeed, the coordination and consultation described in the agreement—which began before the first agreement was signed in 2013—has not produced identical programs. For example, Quebec's emissions cap includes high global warming potential gases, and CARB's does not because CARB decided to regulate those emissions separately from its cap-and-trade program. Sahota Decl., ¶ 35. In addition, the methods CARB and Quebec chose to allocate allowances differ in several ways—such as the climate credit for California ratepayers that is generated by CARB's requirement that utilities consign at auction the allowances they are initially given for free. *Id*. This feature, which is designed to protect against energy price spike impacts, is not included in the Quebec program. *Id*. This is only a partial list of differences in the two programs, but it underscores that each jurisdiction maintains authority over its own program. Further, while communication regarding such differences is important, that communication does not result in anything like identicality or "virtually seamless" integration.

And, contrary to Plaintiff's repeated invocation of language from *Massachusetts v. EPA*, 549 U.S. 497, 519 (2007), the 2017 agreement is plainly not an emissions treaty. *See* MSJ at 1:3-5, 14:10-14. As discussed, the agreement does not even link the two cap-and-trade programs, let alone set emissions goals or mandates for the State or Province. Nor do the linkage regulations (which Plaintiff has not claimed are a Treaty) set emissions goals; they simply provide regulated parties with greater compliance flexibility. It is, in fact, California's *Legislature* that has established the greenhouse gas emission mandates for the State, and it has done so without reference to any emissions commitment from any other jurisdiction. Cal. Health & Safety Code §§ 38550, 38566. Meanwhile, Quebec has set *different* emissions targets for itself. Sahota Decl., ¶ 35. While California's Legislature mandated the State reduce emissions to 1990 levels by 2020, Quebec set a 2020 emissions limit of *20% below* 1990 levels. Cal. Health & Safety Code § 38550; Sahota Decl., ¶ 35. Neither the 2017 agreement nor the linkage regulations sets emissions targets or otherwise bears any resemblance to an emissions treaty.

As discussed below, the intention to continue coordinating and communicating, as expressed in the 2017 agreement, does not implicate national unity or otherwise establish that the agreement is an Article I Treaty.

2. The Agreement's Expressions of Intent to Continue Coordination Regarding Independently Adopted Pollution-Control Programs Raise No Issues of Substantial Consequence for Our Federal Structure

The actual function of the agreement—to express the parties' intentions to continue coordinating—does not violate the Treaty Clause. In fact, in applying the Compact Clause, the Supreme Court has already held that the intent to coordinate with other jurisdictions to "promot[e] uniformity and compatibility" across their respective regulatory regimes does not infringe on federal supremacy, especially where regulatory proposals resulting from the coordination "have no force in any member State until adopted by that State in accordance with its own law." *U.S. Steel*, 434 U.S. at 456-57, 472. As established above, the agreement does no more than this: it promotes harmonization of the two programs, and both CARB and Quebec retain their full authorities to decide how, whether, and when to modify or repeal their regulations.[18]

Thus, Article 3 of the agreement expresses the parties' intentions to "consult … regularly and constructively … build[ing] on existing working relationships," ECF 7-2 at 5, and Article 4 expresses the parties' plans to "continue to examine their respective regulations" and, where differences are identified, to "determine if such elements need to be harmonized for the proper functioning and integration of the programs," *id.* Article 4 also indicates the parties' intentions to discuss proposed changes and to "consult regarding changes that may affect the harmonization and integration process." *Id*. Other articles similarly provide for cooperation concerning offsets (*id.*, Art. 5) and enforcement (*id.*, Art. 11) and for notification regarding instruments to be voided (*id.*, Art. 6) and investigations to be conducted (*id.*, Art. 7).

[18] Because each jurisdiction retains its full sovereign authority, even if the agreement did link the programs, Plaintiff's Treaty Clause claim would still fail. As discussed below, nothing about CARB's decision to provide regulated parties with increased compliance flexibility and cost-reduction opportunities infringes on federal supremacy, let alone threatens national unity. *See, infra*, Sec. II.B, II.C.

Article 14, however, plainly states that the agreement "does not modify any existing statutes and regulations" or "require or commit the Parties or their respective regulatory or statutory bodies to create new statutes or regulations." *Id.* at 10. And the preamble recognizes that the agreement "does not, will not and cannot be interpreted to restrict, limit, or otherwise prevail over relevant national obligations of each Party" or over "each Party's sovereign right and authority to adopt, maintain, modify, repeal or revoke any of their respective programs regulations or enabling legislation." *Id.* at 2.

Thus, while the parties to the 2017 agreement clearly expressed an intent to consult with each other, that intention does not prevent the parties from shaping their programs as they wish. And, as discussed above, CARB and Quebec have, in fact, done so—implementing and enforcing their respective and different regulations and modifying those regulations as they deem warranted. *See* Sahota Decl., ¶¶ 46, 49, 78-79. Indeed, CARB has amended its regulation more than five times, sometimes quite significantly, since 2013 when it adopted its linkage provisions and signed the first agreement with Quebec. *Id.*, ¶¶ 78-80.

The 2017 agreement does no more, and in some ways does far less, than the Multistate Tax Compact that *United States Steel* held was not an Article I Compact. The 2017 agreement cannot, therefore, be an Article I Treaty because it does not even require congressional approval, let alone implicate substantial consequences, such as threats to national unity, for which congressional approval would not be available.

C. Executive Branch Practice under Article II's Treaty Clause Supports the Conclusion that the 2017 Agreement Does Not Fall within Article I's Treaty Clause

The conclusion that the 2017 agreement is not a treaty under the Treaty Clause is supported by Executive Branch practice. Article II grants the President the power, "by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . . ." U.S. Const., art. II, § 2, cl. 2. Although Article II's Treaty Clause requires Senate approval of any treaty, the Executive Branch routinely enters into agreements with foreign governments far more consequential than the one at issue here without submitting them to

Congress. Plaintiff admits as much. MSJ at 15:18-20. Notably, the President did not even treat the Paris Agreement of 2015—which, unlike any action challenged here, directly addresses emission reductions—as a treaty under Article II and did not submit it to the Senate. MSJ at 11:2-4. *A fortiori*, the 2017 agreement should not be considered a treaty under Article I's Treaty Clause.

Plaintiff asserts that "the precedents and practices of the federal government under the Treaty Clause of Article II do not carry over to judging what actions are barred by the Treaty Clause of Article I" because of the foreign affairs authority that the Constitution "allocates to the President." MSJ at 15:22-16:2. However, Plaintiff is unable to point to anything in the actual text of the Constitution suggesting that the Treaty Clause in Article II is narrower than the Treaty Clause in Article I. Plaintiff's arguments do nothing to overcome the fact that the Executive Branch's own practice supports the conclusion that the 2017 agreement is not a treaty.

D. Plaintiff's Assertions that the 2017 Agreement Is Binding Are Immaterial and Incorrect

Plaintiff also spends two full pages of its brief attempting to establish that the 2017 agreement is binding. MSJ at 16:13-18:14. It is, of course, generally true that only agreements intended to be of binding character are considered treaties under international law. *See, e.g.,* Restatement (Fourth) of Foreign Relations Law § 312, reporter's note 4. It does not follow, however—and Plaintiff points to no case for the proposition—that all agreements that are binding qualify as treaties under Article II, much less Article I. And, indeed, Plaintiff's implicit argument that an agreement that is binding as to *any* provision would be an Article I Treaty contravenes the functional view the Supreme Court has adopted for Article I Compacts, under which the impact the agreement has on our federal structure, not the formalities of the agreement, are the "relevant inquiry." *U.S. Steel*, 434 U.S. at 470-71.

Further, Plaintiff fails to show that the 2017 agreement is, in fact, binding. Plaintiff points to the *dissenting* opinion in *Garcia v. Texas*, 564 U.S. 940, 944 (2011), a case involving a different agreement entered into by the federal government, but that cannot establish that the 2017

agreement is binding. *See* MSJ at 17:7-10. Plaintiff also tries to infer from the agreement's withdrawal and termination provisions that the agreement is binding, MSJ at 17:1-12, but, in fact, the withdrawal provision shows just the opposite. It states that "[a] party may withdraw from this Agreement by giving written notice of intent to withdraw." ECF No. 7-2, Art. 17. Thus, the agreement grants the parties an unfettered right to withdraw and allows the parties to avoid doing anything under the agreement at any time they choose. Ontario's abrupt effective withdrawal, for which Ontario provided no notice beyond general public statements, only underscores the point. *See, supra*, Background, Sec. I.F.

In any event, as shown above, the 2017 agreement does not effectuate the linkage between the programs. Rather, it expresses the parties' intentions to continue collaborating regarding their respective programs, leaving each party free to amend or repeal its own regulations. Even if these expressed intentions were binding, and Plaintiff has not established that they are, that would not establish that the agreement is a Treaty because those collaborations have no impact on the federal structure, let alone pose a threat to national unity.

Plaintiff's Article I Treaty Clause claim fails, and Defendants are entitled to summary judgment on this cause of action.

II. NEITHER THE CHALLENGED AGREEMENT NOR THE REGULATORY PROVISIONS THAT EFFECTUATE LINKAGE VIOLATE THE COMPACT CLAUSE

Plaintiff's Compact Clause claim likewise fails. While Plaintiff's motion for partial summary judgment focuses solely on the 2017 Agreement, the Compact Clause claim asserted in its Amended Complaint appears to challenge not only the 2017 agreement but also the regulatory provisions, as applied, that actually effectuate the linkage between the programs. *See* Am. Compl., ¶ 164.[19] However, neither the agreement nor the regulations can satisfy the Supreme

[19] Defendants understand Plaintiff's complaint as challenging the regulatory provisions that effectuate linkage. While Plaintiff mentions Section 38564 of the California Health and Safety Code, *e.g.*, Am. Compl., ¶ 58, Plaintiff never identifies an application of that provision it is challenging. In any event, as is plain from its title and its text, Section 38564 directs CARB to "*consult* with other states, and the federal government, and other nations" in support of cost-effective greenhouse gas emission reductions. Cal. Health & Safety Code § 38564. Information sharing of this sort could not constitute a Compact, even if Plaintiff had identified or could identify an *application* of this provision. *E.g.*, *Gray v. North Dakota Game and Fish Dept.,* 706

Court's functional test for Compact Clause claims.[20] Indeed, Plaintiff's Compact Clause claim is squarely foreclosed by *United States Steel Corporation*. Further, although the Court need not reach the question because there is no expansion of state power here, neither the agreement nor the linkage regulations bears the indicia of a Compact identified in *Northeast Bancorp, Inc. v. Bd. of Governors of Fed. Reserve Sys*., 472 U.S. 159 (1985). Plaintiff's Compact Clause claim fails.

A. The Supreme Court Has Held that the Compact Clause Applies Only to Agreements that Expand State Authority at the Expense of Federal Authority

Article I's Compact Clause provides that "No State shall, with the Consent of Congress … enter into any Agreement or Compact with another State, or with a foreign Power." U.S. Const., Art. I, § 10, cl. 3. The Supreme Court has recognized that, in the Compact Clause, the words "compact" and "agreement" are "terms of art," the meanings of which have been "lost" to history. *U.S. Steel*, 434 U.S. at 462. The Court has rejected a literal reading of the Compact Clause—one that would sweep in any agreement between States or between States and foreign governments—because such a broad reading "would require the States to obtain congressional approval before entering into any agreement among themselves, irrespective of form, subject, duration, or interest to the United States." *Id.* at 459-60. Recognizing that such a reading would unnecessarily undermine countless constitutional agreements entered into by States, the Court adopted a "functional view of the Compact Clause" under which "the relevant inquiry must be one of impact on our federal structure." *Id.* at 468, 471.

Under this functional test, an agreement can only constitute an Article I Compact if it is "directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States." *Id.* (internal quotation marks omitted). Notably, an "impact on federal interests" is insufficient to

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N.W.2d 614, 622 (N.D. 2005); *In re Manuel P*., 215 Cal.App.3d 48, 71 (1989).

[20] Although Plaintiff offers *no* argument or evidence supporting its Compact Clause challenge to the linkage regulations, Plaintiff appears to ask this Court to declare those regulations invalid. MSJ at 27:25-26. That statement is plainly inadequate to obtain summary judgment. *Walker v. Sumner*, 917 F.2d 382, 387 (9th Cir. 1990) ("conclusory assertions are wholly insufficient [for] summary judgment"). In any event, it is Defendants who are entitled to summary judgment on this claim, as to both the agreement and the regulations.

establish that an agreement encroaches upon or interferes with federal supremacy. *Id.* at 479 n.33. Indeed, "[a]bsent a threat of encroachment or interference through enhanced state power, the existence of a federal interest is irrelevant." *Id.* Likewise, the enhancement of state power at the expense of private parties does not make an agreement an Article I Compact. *Id.* at 473. Rather, an agreement can only rise to the level of an Article I Compact if it "enhance[s] state power *at the expense of federal supremacy*." *Id.* at 472 (emphasis added).

Underlying this functional view of the Compact Clause is the Supreme Court's recognition that States have long entered into agreements with other jurisdictions that raise no federalism concerns at all. *See U.S. Steel*, 434 at 460 n.10. Accordingly, the Court has been "reluctant … to circumscribe modes of interstate cooperation that do not enhance state power to the detriment of federal supremacy," *id.* at 460, because that "broader prohibition" is "unnecessary to protect the Federal Government" and thus could not have been intended by the Framers, *id.* at 466.

As Plaintiff recognizes, this functional test applies to foreign as well as interstate Compacts. *See* MSJ at 19:6-9. The text of Article I makes no distinction between Compacts "with another State, or with a foreign Power." U.S. Const., art. I, § 10, cl. 3. And although the Supreme Court has not had occasion to apply its functional test directly to an agreement involving a foreign government, it has recognized there is no need for a different test for such agreements by reconciling its functional test with an earlier plurality opinion involving an alleged compact between Vermont and Quebec. *U.S. Steel*, 434 U.S. at 465 n.15. Accordingly, courts that have considered agreements with foreign governments have applied the Supreme Court's functional test. *E.g.*, *McHenry v. Brady*, 163 N.W. 540, 545-47 (N.D. 1917) (applying functional test to agreement between North Dakota and a Canadian province); *In re Manuel P.*, 215 Cal. App. 3d at 68-69 (applying functional test to agreement between San Diego and Mexico). And the State Department does so as well, recognizing "that U.S. states often conclude various arrangements with foreign powers without congressional consent" and indicating that, when such arrangements "are called to the State Department's attention, they are analyzed under" the functional test, referred to as "the *Virginia [v. Tennessee]* standard."[21]

[21] Taft Memo at 185, attached to Dorsi Decl. at Exhibit 13.

Application of this functional test demonstrates that neither the 2017 agreement nor the linkage regulations are an Article I Compact. Rather, the agreement and linkage regulations, like the Multistate Tax Compact in *United States Steel*, constitute just some of the "many matters … that can in no respect concern the United States." *Virginia*, 148 U.S. at 518.

B. Plaintiff Cannot Meet Its Burden of Establishing that the 2017 Agreement or the Linkage Regulations Expand California's Political Power at the Federal Government's Expense

Neither the 2017 agreement nor the linkage regulations expand California's power at all, let alone at the expense of federal supremacy. Indeed, in *United States Steel* the Supreme Court rejected a Compact Clause challenge to an even more extensive and consequential agreement based on grounds that squarely apply here.

The Multistate Tax Compact considered in *United States Steel* was an agreement among twenty or so States from across the country. 434 U.S. at 454, n.1. It arose out of, and was designed to address, the member States' "recognition that, as applied to multistate businesses, traditional state tax administration was inefficient and costly to both State and taxpayer." *Id.* at 456. The agreement, and the Commission it created, were thus intended, in part, to "promot[e] uniformity and compatibility" across the member States' respective tax laws and to "facilitat[e] taxpayer convenience and compliance." *Id.* The Commission created by the agreement was, accordingly, authorized "to develop and recommend proposals for an increase in uniformity and compatibility of state and local tax laws," to adopt advisory "uniform regulations" for the consideration of the member States, and, for those States that opted in, to perform tax audits on the State's behalf. *Id.* at 456-57. The Court easily concluded that this agreement was not a Compact under Article I because, while the Multistate Tax Compact "might incrementally increase [the] power of the member States *quoad* the corporations subject to their respective taxing jurisdictions," it did not "enhance the political power of the member States in a way that encroach[ed] upon the supremacy of the United States." *Id.* at 472-73.

United States Steel forecloses Plaintiff's primary argument—that only agreements involving "intensely local cooperation" between "adjoining states" fall outside the Compact

Clause (MSJ at 19:1-20:12)—because the agreement upheld in that case included numerous member States, including Hawaii and Alaska, that do not share borders. *Id.* at 454 n.1; *see also Northeast Bancorp*, 472 U.S. at 175 (rejecting alleged Compact that included States, Connecticut and Maine, that do not share a border). In fact, the cooperating member States were spread out across the country, rendering their cooperation far from "intensely local." *See* MSJ at 19:11; *see also Star Scientific Inc. v. Beales*, 278 F.3d 339, 344, 360 (4th Cir. 2002) (rejecting Compact Clause challenge to agreement involving 46 States, the District of Columbia, and 5 territories).[22] Moreover, the subject of this cooperation—state taxation of multi-state and multi-national corporations—demonstrates that, contrary to Plaintiff's suggestion, an agreement does not become a Compact simply by virtue of the amount of money it implicates. *See* MSJ at 15:11; 17:16-21, 25:18-23; *see also Northeast Bancorp*, 472 U.S. at 175-76 (regulation of bank acquisitions); *Star Scientific Inc.*, 278 F.3d at 360 (settlement of tobacco litigation); *Tichenor v. Missouri State Lottery Comm'n*, 742 S.W.2d 170, 176 (Mo. 1988) (multi-state lottery).

Notably, the Supreme Court mentioned neither of these factors—the presence of non-contiguous members or the amount of money at stake—in rejecting the Compact Clause claim in *United States Steel*. Instead the Court focused on three other factors in concluding that the Multistate Tax Compact did not expand state power at the expense of the federal government and was not, therefore, an Article I Compact: (1) whether the agreement in question authorized member States "to exercise any powers they could not exercise in its absence"; (2) whether there was any "delegation of sovereign power" to an organization; and (3) whether each State was "free to withdraw at any time." *U.S. Steel*, 434 U.S. at 473. All of these factors support the same conclusion here.[23]

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[22] *See also S&M Brands, Inc. v. Caldwell*, 614 F.3d 172, 175-76 (5th Cir. 2010); *Vibo Corp., Inc. v. Conway*, 594 F. Supp. 2d 758, 786 (W.D. Ky. 2009), aff'd on other grounds by *VIBO Corp., Inc. v. Conway*, 669 F.3d 675, 691 (6th Cir. 2012); *PTI, Inc. v. Philip Morris Inc.*, 100 F. Supp. 2d 1179, 1198 (C.D. Cal. 2000).

[23] Plaintiff erroneously contends that it could prevail if it could satisfy *one* of these factors. MSJ at 24:22, 25:25-27. What Plaintiff has to show is that the 2017 agreement or the linkage regulations "enhance the political power" of California "in a way that encroaches upon the supremacy of the United States." *U.S. Steel*, 434 U.S. at 472. When, as here, none of the factors discussed in *United States Steel* are present, a plaintiff cannot make that showing. *Id.* That does not, however, establish that the presence of *one* of those factors would suffice to make

First, like the member States in *United States Steel*, California is not exercising "any powers [it] could not exercise" in the absence of either the 2017 agreement or the linkage regulations. *See id*. at 473. And neither that agreement nor those regulations "purport to authorize" California to do so. *See id.*[24] Plaintiff does not, and cannot, dispute that California may design, adopt and enforce a cap-and-trade regulation to constrain statewide greenhouse gas emissions. "Air pollution prevention falls under the broad police powers of the states," *Exxon Mobil Corp. v. EPA*, 217 F.3d 1246, 1255 (9th Cir. 2000), and it is "well settled that the states have a legitimate interest in combating the adverse effects of climate change on their residents," *American Fuel & Petrochemical Manufacturers v. O'Keeffe*, 903 F.3d 903, 913 (9th Cir. 2018). The action Plaintiff does challenge—the decision to expand compliance options for businesses regulated by the State's program—fits easily within the "'great latitude'" States "'traditionally have had … under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons.'" *Exxon Mobil*, 217 F.3d at 1255 (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996)). Indeed, the Court confirmed as much in *United States Steel*, rejecting the notion that coordinated, cross-jurisdictional actions by member States to "[f]acilitat[e] … convenience and compliance" for their taxpayers involved an expansion of state power that could encroach upon federal supremacy. *See U.S. Steel*, 434 U.S. at 456, 472-73. Plaintiff simply cannot establish that California is exercising authority it could not exercise absent either the 2017 agreement or the linkage regulations.[25]

Second, California has not delegated any "sovereign power" to another organization or body. *See U.S. Steel*, 434 U.S. at 473.[26] Indeed, the Multistate Tax Commission in *United States*

that showing.

[24] Plaintiff claims the 2017 agreement authorizes California to "compel Quebec" to discuss changes to its program with CARB. MSJ at 25:4-6. Plaintiff does not explain how this purported compulsion works or could be enforced, how this interpretation is consistent with Ontario's repeal of its linked program without any such discussion, or how this interpretation could be reconciled with the agreement's express recognition that each party retains their full "sovereign right and authority to adopt, maintain, modify, repeal or revoke any of their respective program regulations or enabling legislation." *See* ECF 7-2 at 1.

[25] In fact, as the agreement notes, California and Quebec were consulting and had already "developed constructive working relationships" prior to signing the agreement. ECF 7-2 at 2.

[26] This fact alone distinguishes this case from the Great Lakes Basin Compact, undermining Plaintiff's reliance on State Department statements concerning that Compact. *See* MSJ at 23:10-

Steel had been authorized to draft "rules and regulations," and neither that, nor the ability to audit taxpayers on the State's behalf, constituted a delegation of sovereign power. *Id.* The two "organizations" Plaintiff identifies—WCI, Inc. and the Consultation Committee referenced in the 2017 agreement—have even less responsibility and plainly have no sovereign power. *See* MSJ at 24:10-11. Plaintiff concedes that WCI, Inc. provides only "administrative and technical support" services to CARB and Quebec, Am. Compl. ¶¶ 136, 142; MSJ at 24:10, and Plaintiff has not even attempted to establish that the development and maintenance of a compliance instrument tracking system or the execution of joint auctions involve or require sovereign power. The Consultation Committee likewise exercises no sovereign power because its sole purpose is "to ensure timely and effective consultation in support of the objectives of [the 2017 agreement]." ECF 7-2, Art. 13. The facilitation of consultations alone does not involve any sovereign power, *U.S. Steel*, 434 U.S. at 473, and, in any event, the Consultation Committee has never been established and has never met. Sahota Decl., ¶ 69.

Underscoring that the State has not delegated any sovereign power, CARB "retains complete freedom to adopt," amend, or repeal its own regulations. *See U.S. Steel*, 434 U.S. at 473. Indeed, the 2017 agreement expressly recognizes that both California and Quebec each retain their "sovereign right and authority to adopt, maintain, modify, repeal or revoke any of their respective program regulations or enabling legislation." ECF 7-2 at 2 (8th WHEREAS clause); *see also id.*, Art. 14 (stating that agreement "does not modify any existing statutes and regulations" and does not "require or commit the Parties or their respective regulatory or statutory bodies to create new statutes or regulations"). The agreement also expressly acknowledges that it is each jurisdiction's own, independently adopted regulations, and not the agreement, that

23. The State Department stressed the Compact's establishment of an international commission with authority to, among other things, assist Canada in its negotiations with the United States which could interfere with existing U.S. treaties and international commissions. Hearing on S. 2688 Before Subcomm. on the Great Lakes Basin of the S. Comm. on Foreign Relations, 84th Cong. at 16 (1956) (statement of Willard B. Cowles, Deputy Legal Advisor, Department of State) (Decl. of Rachel Iacangelo, Exh. 11). No organization with powers remotely like those exists here. Further, the Supreme Court has rejected the premise of Plaintiff's discussion of this and other agreements submitted to Congress—that comparison to other compacts Congress did or did not approve—is relevant to determining the constitutionality of an agreement. *U. S. Steel Corp.*, 434 U.S. at 471-72, n.24.

authorize the acceptance of the other jurisdiction's instruments, the trading of those instruments, and the joint auctioning of allowances. ECF 7-2, Arts. 6, 7, 9.

Nor do CARB's linkage regulations change its authority to adopt, amend, or even repeal its cap-and-trade regulations because that authority was delegated to CARB by the Legislature. *E.g.*, Cal. Health & Safety Code § 38560; *see also Cal. State Auto. Assn. Inter-Ins. Bureau v. Garamendi*, 6 Cal. App. 4th 1409, 1422 (1992) (recognizing that "broad discretion to adopt rules and regulations as necessary … also necessarily grants power to change existing rules and regulations in light of experience") (internal quotation marks omitted). And the fact that CARB retains this authority, despite the agreement and the linkage regulations, is demonstrated by the fact that CARB has repeatedly, and sometimes significantly, amended the cap-and-trade regulation since linkage occurred. Sahota Decl., ¶¶ 78-79.

Third, California remains "free to withdraw at any time." *See U.S. Steel*, 434 U.S. at 473. This is true of the linkage regulations because, as discussed above, CARB remains free to amend or even repeal its regulations. It is just as true of the 2017 agreement, and, in fact, the agreement is explicit on this point: "A party may withdraw from this Agreement by giving written notice of intent to withdraw to the other Parties." ECF 7-2, Art. 17. Certainly, the parties expressed their intentions to "endeavour" to give each other 12 months notice before withdrawing, but the intention to *try* to provide notice is less of an impediment to immediate withdrawal than the need to "enact[] a repealing statute" as the Compact in *United States Steel* required. *See* 434 U.S. at 457. The intention to provide notice is also no impediment to *unilateral* withdrawal because it does not condition any party's withdrawal on the approval of any other party. Underscoring the point, Ontario effectively withdrew from both linkage and the 2017 agreement without providing any particular notice and without any approval or other action from CARB. Sahota Decl., ¶¶ 75-76.

Plaintiff cannot establish that any of the factors identified in *United States Steel* is satisfied here. In addition, *United States Steel* forecloses Plaintiff's claim that CARB's decision to continue consulting with Quebec in an effort to "harmonize" programs raises Article I constitutional concerns. *See* MSJ at 7:18-8:6; 16:17-23; 25:10-15. Indeed, the promotion of

greater uniformity across jurisdictions was at the very heart of the Multistate Tax Compact, and the Court concluded that agreement did not encroach on federal supremacy. *U.S. Steel*, 434 U.S. at 456, 472. Likewise, CARB's decision to auction allowances jointly with Quebec is not meaningfully different from the decision many States made to join the Multistate Tax Compact in order to reduce their costs and improve the administration of their laws, *id.* at 456, or the decisions several States have made to hold multi-state lotteries "to benefit the treasuries of participating states," *Tichenor*, 742 S.W. 2d at 176. Neither those interests nor the cross-jurisdictional efforts to advance them infringed on federal supremacy in any way, and California's joint auctions do not do so either. *See U.S. Steel*, 434 U.S. at 476 ("[The] increased effectiveness in the administration of state tax laws, promoted by [reciprocal] legislation, [does not] threaten federal supremacy.").

As *United States Steel* demonstrates, neither the 2017 agreement nor the linkage regulations is an Article I Compact.

C. The Supreme Court's Foreign Affairs Preemption Cases, Including *Garamendi*, Demonstrate that There Is No Interference with the Federal Government's Foreign Affairs Powers

Unable to satisfy the functional test for a Compact Clause claim, as laid out in *United States Steel*, Plaintiff argues the 2017 agreement "could complexify the federal government's ability to negotiate competitive agreements in the foreign arena with the entirety of the economy at its back." MSJ at 21:12-14. Although Plaintiff quotes repeatedly from *Garamendi*, 539 U.S. 396 and *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000), those cases addressed the Foreign Affairs Doctrine and statutory preemption, respectively, and Plaintiff does not explain how either shows the expansion of state power needed to satisfy the Compact Clause's functional test. Indeed, Plaintiff cites to no Compact Clause precedent drawing on the Foreign Affairs Doctrine or statutory preemption. Moreover, none of Plaintiff's cases suggest that either the 2017 agreement or the linkage regulations encroach upon or interfere with federal power.

The California law at issue in *Garamendi* imposed disclosure requirements on insurance companies that could open them up to claims by Holocaust survivors and required the suspension

of licenses to do business in the State for companies that did not comply. *Garamendi*, 539 U.S. at 409-410. The insurance claims at which the California law was targeted were also the subject of an agreement between the President of the United States and the German Chancellor under which Germany had created "a voluntary compensation fund … conditioned on some expectation of security from lawsuits in United States courts." *Id.* at 405. "As for insurance claims specifically, both countries agreed that the German Foundation," funded by the German government, "would work with the International Commission on Holocaust Era Insurance Claims (ICHEIC)" which had "set up procedures" to settle such claims. *Id.* at 406, 407. This agreement with Germany had "served as model for similar agreements with Austria and France, and the United States Government [was continuing] to pursue comparable agreements with other countries." *Id.* at 408. The Court held that California's law was preempted. *Id.* at 424-425. Specifically, because "the automatic sanction for noncompliance with the State's … policies on disclosure" was "exclusion from a large sector of the American insurance market [i.e., California]," those state policies impermissibly deprived the President of "economic and diplomatic leverage" and undermined "the President's authority to provide for settling claims in winding up international hostilities." *Garamendi*, 539 U.S. at 423-24.

Crosby involved a Massachusetts law that prohibited state agencies from "purchas[ing] goods or services from companies doing business with Burma." *Crosby*, 530 U.S. at 366. The Supreme Court held that this law conflicted with a federal statute by which Congress had "placed the President in a position with as much discretion to exercise economic leverage against Burma, with an eye toward national security, as our law will admit." *Id.* at 375-76. Massachusetts' attempt to wall-off at least a portion of the State's economy "undermine[d] the President's intended statutory authority by making it impossible for him to" utilize the entire national economy as leverage to "move the Burmese regime in the democratic direction." *Id.* at 377.

These cases are entirely inapposite. First, *Garamendi* has no application here because the Supreme Court has limited it, and other cases upon which Plaintiff relies, including *Dames & Moore v. Regan*, 453 U.S. 654 (1981) and *Movsesian v. Victoria Versicherung AG*, 670 F.3d 1067 (9th Cir. 2012), as involving the President's authority "to settle foreign claims pursuant to

an executive agreement." *Medellin v. Texas*, 552 U.S. 491, 530, 532 (2008).[27] In contrast, this case does not "involve [that] narrow set of circumstances: the making of executive agreements to settle civil claims between American citizens and foreign governments or foreign nationals." *See id.* at 531. This case therefore does not implicate the "'particularly longstanding practice' of congressional acquiescence" to the President's authority to settle such claims. *Id.* at 532 (quoting *Garamendi*, 539 U.S. at 415).

Moreover, neither the 2017 agreement nor the linkage regulations reduce the federal government's diplomatic leverage in any way, let alone in ways comparable to *Crosby* and *Garamendi*. Plaintiff asserts that diplomacy often is "a matter of leverage and the possession of multiple options," MSJ at 21:14-15, and that California may compromise the President's ability to forge agreements and other diplomatic solutions, MSJ at 22:1-4. Plaintiff, however, does not even attempt to explain what options the 2017 agreement or the linkage regulations foreclose, especially as the agreement merely provides for consultation and cooperation, and the linkage regulations expand compliance flexibility and cost-reduction opportunities. Plaintiff's claim is also supported by no evidence, despite the fact that linkage has been operational since January 1, 2014. *See Central Valley Chrysler-Jeep, Inc. v. Goldstene*, 529 F. Supp. 2d 1151, 1187 (E.D. Ca. 2007) (requiring a "*showing* that California's efforts … interfere with the efforts of this government or a foreign government [to comply with] a negotiated agreement, treaty, partnership or the like") (emphasis added). Plaintiff also asserts that the linkage between the two programs has somehow "fenced off" an "enclave" of the national economy, MSJ at 3:1-7; 22:1-9, but fails

[27] In addition to rejecting application of *Garamendi* and other "claims-settlement cases" outside that context, the Court also rejected the argument that a presidential memorandum could "reach[] deep into the heart of the State's police powers" and require state courts to give effect to a decision of the International Court of Justice. *Medellin*, 552 U.S. at 532. This demonstrates that Plaintiff stretches too far when it reads *Hines v. Davidowitz*, 312 U.S. 52 (1941), as suggesting that the President could, by doing nothing, occupy the field and somehow preempt California's police power authority to determine the means of compliance with its own regulatory programs. MSJ at 27:10-13. Plaintiff's view is also inconsistent with *Garamendi*, in which the Court indicated "that *at some point* an exercise of state power that touches on foreign relations must yield to the National Government's *policy*." *Garamendi*, 539 U.S. at 413 (emphasis added). Plaintiff's dramatically expansive understanding of the federal government's authority would also appear to invalidate hundreds of existing agreements between states and foreign governments. *See* Michael Glennon & Robert Sloane, *Foreign Affairs Federalism: The Myth of National Exclusivity* 60 (2016), provided as Dorsi Decl., Exh. 15.

to explain how linkage—which effectively *expands* compliance instrument markets—fences off anything or limits the use of any portion of California's economy as diplomatic leverage. Indeed, it is entirely unclear how either the 2017 agreement or the linkage regulations could do so, given that, unlike the state laws in both *Crosby* and *Garamendi*, neither imposes any sanctions at all.[28]

Finally, California is not "employ[ing] 'a different, state system of economic pressure'" on international businesses than the federal government is using. *See Garamendi*, 539 U.S. at 423 (quoting *Crosby*, 530 U.S. at 376). Notably, if California's cap-and-trade program applies "economic pressure" on any businesses, it does so only with respect to *California* businesses and their *California* emissions, and linkage, if anything, *eases* that pressure. Plaintiff has not identified a "particular mechanism the President has chosen" in order to pressure these businesses to reduce their emissions or their costs to comply with California's program. *See id.* at 424. Indeed, Plaintiff has not identified *any* mechanism that linkage "threatens to frustrate." *See id.*

Plaintiff points to President Trump's initiation of the process to withdraw from the Paris Agreement and statements made by Secretary of State Pompeo regarding the President's action. MSJ at 26:18-27:9. But beginning the process to end participation in an international agreement is not a "particular mechanism" like the one in *Garamendi*—namely, an international commission set up exclusively "to negotiate with European insurers to provide information about and settlement of unpaid insurance policies" with established "procedures to that end." *Garamendi*, 539 U.S. at 397. And Plaintiff does not, and cannot, establish that California's linkage with Quebec frustrates (or has anything to do with) the process to end the United States' participation in the Paris Agreement. Plaintiff likewise fails to explain how the expansion of cost-effective emission reduction opportunities is at all inconsistent with Secretary Pompeo's statement that the United States will "continue to … grow our economy while reducing emissions and extending a helping hand to our friends and partners around the globe." MSJ at 27:3-5.[29]

[28] The same is true of the other agreements and statements to which Plaintiff points in an attempt to establish that California has a "foreign policy." *See* MSJ at 2:4-11; 5:10-23, 20:9-23. Notably, Plaintiff does not even attempt to establish that any of these other agreements or statements are Treaties or Compacts under Article I of the Constitution.

[29] Plaintiff also points to the President's executive order concerning discount rates and other factors *federal* agencies should consider when "monetiz[ing] the value of changes in

Plaintiff also contends that the link between programs interferes with the President's ability to speak with "one voice." MSJ at 21:21-24. But Plaintiff acknowledges that the United Nations Framework Convention on Climate Change (UNFCCC) "is law of the land, having been ratified by the Senate." Am. Compl., ¶ 35. Thus, air pollution and climate change are not areas in which "the President alone … determine[s] the whole content of the Nation's foreign policy." *Zivotofsky v. Kerry*, 576 U.S. 1, 135 S. Ct. 2076, 2090 (2015). And, as Plaintiff alleges, the UNFCCC's objective is to stabilize "greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system." Am. Compl., ¶ 36. Plaintiff cannot establish that linkage—which enables greenhouse gas emission reductions to occur more cost-effectively—interferes with this objective. *See Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295, 394-95 (D. Vt. 2007) ("The United States remains committed to the UNFCCC, the UNFCCC requires parties to report on their countries' strategies for addressing GHG [greenhouse gas] emissions."). Indeed, to the extent Plaintiff asserts that cost-effectively reducing greenhouse gas emissions is in conflict with the President's policy, that policy itself would be in tension, if not conflict, with the "law of the land" and thus could not support an argument that the Nation is speaking, or must speak, with "one voice." In truth, Plaintiff has identified no evidence of an actual foreign policy on greenhouse gas emissions, other than the UNFCCC, and the 2017 agreement or the linkage regulations are entirely consistent with that policy.[30]

Finally, Plaintiff's "concerns" regarding potential impacts to international negotiations are belied by the facts. Since 2013, the year California promulgated its linkage regulations and

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greenhouse gas emissions" as part of *federal* rulemakings, MSJ at 11:7-16, but fails to explain how this establishes a *foreign policy*, let alone one that could conflict with any *state* program.

[30] Plaintiff's assertion that the absence of any policy concerning international greenhouse gas emissions could establish foreign affairs preemption, MSJ at 27:10-20, is simply wrong. Plaintiff relies on a truncated quotation from a case considering whether a federal statute, the Federal Power Act, "pre-empts state regulation." *Arkansas Elec. Co-op. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 384 (1983). That an *affirmative* act of *Congress* could amount to "an authoritative federal determination that [an] area is best left *un* regulated," *id.*, does not establish that the absence of a defined policy from the *Executive Branch* can do the same. In any event, Plaintiff expressly disclaims this argument by proclaiming that the United States does, in fact, have a climate policy.

Quebec and California first signed an agreement to continue coordinating with respect to their cap-and-trade programs, the United States has entered into hundreds of agreements with foreign governments, including Canada.[31] And, just days ago, on January 29, 2020, the President signed into law the United States-Mexico-Canada Agreement. RJN, Part I, ¶ 3. According to the United States' own press statement, this is the "largest, most significant, modern, and balanced trade agreement in history." Dorsi Decl., Exh. 14. Plaintiff's claims of interference cannot be reconciled with the actions and statements of the United States and are notably unsupported by *any* evidence of *any* interference, despite six years of operational linkage.

Plaintiff cannot show that the 2017 agreement or the linkage regulations expand the State's power at the expense of the federal government, and Defendants are entitled to summary judgment on Plaintiff's Compact Clause claim.

D. Defendants Are Also Entitled to Summary Judgment Because Neither the Agreement nor the Linkage Regulations Bear the Indicia of a Compact

Plaintiff also asserts that the linkage agreement has the indicia of a compact. MSJ 24:6-21. This argument, however, cannot save Plaintiff's Compact Clause claim because, even where an agreement bears the "classic indicia of a compact," it must still satisfy the Clause's functional test. *Northeast Bancorp*, 472 U.S. at 175. Moreover, the indicia provide another ground for rejecting Plaintiff's Compact Clause claim because Plaintiff cannot satisfy them.

The classic indicia of a Compact are: (1) whether the agreement establishes a "joint organization or body" with regulatory authority; (2) whether the state action was "conditioned on action by" the other parties to the agreement such that the State is not "free to modify or repeal its law unilaterally;" and, (3) whether the agreement requires the State to impose regulatory limitations that are reciprocated by the other parties. *Id*. The absence of "several of the classic indicia" is enough to cast "doubt" on the existence of a Compact. *Northeast Bancorp*, 472 U.S. at

[31] Office of the Legal Adviser, United States Department of State, *Treaties in Force: A List of Treaties and Other International Agreements of the United States in Force on January 1, 2019* (2019) (documenting that the United States and foreign countries executed approximately: 125 agreements in 2014, 156 agreements in 2015, 125 agreements in 2016, 111 agreements in 2017, and 73 agreements in 2018), available at www.state.gov/wp-content/uploads/2019/06/2019-TIF-Bilaterals-6.13.2019-web-version.pdf (last visited February 10, 2020).

175. Thus, the absence of all or most of the indicia would be fatal to a plaintiff's claim. *See id.* All three are absent here.

1. Neither the Agreement Nor the Linkage Regulations Create a Regulatory Organization

The first indicia of a Compact is the establishment of a "joint organization for regulatory purposes." *Seattle Master Builders Ass'n v. Pac. Nw. Elec. Power & Conserv. Planning Council*, 786 F.2d 1359, 1363 (9th Cir. 1986); *see also Northeast Bancorp*, 472 U.S. at 175. Plaintiff has identified only two "organization[s]" that it claims support finding this indicia here: WCI, Inc. and the Consultation Committee referenced in the 2017 agreement. MSJ at 24:10-11. Neither satisfies the "joint organization" indicia, just as neither supports the notion that California has expanded its powers. *See, supra,* at 31. WCI, Inc. plays no role in the enforcement of the cap-and-trade program, and, indeed, exercises no regulatory powers at all. Sahota Decl., ¶ 57. And, even if it had ever met (which it has not), the Consultation Committee would provide even less support because, by definition, it only facilitates consultation and plays no regulatory role. ECF No. 7-2, Art. 13; Sahota Decl., ¶ 69. Thus, neither the 2017 agreement nor the linkage regulations bears the first indicia of a Compact.

2. Neither the Agreement Nor the Linkage Regulations Limit CARB's Authority to Change or Even Repeal Its Regulations

The second indicia involves "conditional consent by member states in which each state is not free to modify or repeal its participation [or its laws] unilaterally." *Seattle Master Builders*, 786 F.2d at 1363; *see also Northeast Bancorp*, 472 U.S. at 175 (describing this indicia as a restriction on the State's ability to "modify or repeal its law unilaterally"); *In re Manuel P.*, 215 Cal. App. 3d 48, 66 (1989) (describing this indicia as "a prohibition on either government terminating its participation unilaterally"). This indicia is also absent.

The 2017 agreement does not limit California's ability to unilaterally withdraw. As shown above, the agreement expressly provides that parties may withdraw, and no party's withdrawal is conditional upon any other party's approval. *See, supra*, at 32. The agreement also expressly recognizes that the Parties retain the "sovereign right and authority to adopt, maintain, modify,

repeal or revoke any of their respective program regulations or enabling legislation." ECF 7-2 at 2 (first page of the agreement). Plaintiff's entire argument to the contrary amounts to the conclusory statement that the agreement "knit[s]" the two programs "into a virtually seamless regulatory apparatus," MSJ at 24:13-14, which, as shown above, is belied by the plain text of the agreement and by the numerous differences in the two programs. *See, supra*, at 11, 20-21, 31-32.

Any claim that this indicia is satisfied by the linkage regulations would fare no better. As discussed above, nothing in those regulations limits CARB's authority to amend or repeal them. *See, supra*, at 31-32. CARB has demonstrated as much, having amended the cap-and-trade regulation more than five times since it was first adopted in 2011. Sahota Decl., ¶¶ 78-79. Neither the agreement nor the linkage regulations provided any impediment to CARB doing so. Sahota Decl., ¶¶ 80, 82.

The second indicia is absent from both the agreement and the linkage regulations.

3. Neither the Agreement nor the Regulations Mandate the Kind of Reciprocity that Constitutes an Indicia of a Compact

The third indicia of a Compact is reciprocal regulatory limitations. *Northeast Bancorp*, 472 U.S. at 175. For example, in *Northeast Bancorp*, two States—Massachusetts and Connecticut—had passed statutes permitting an out-of-state bank holding company to acquire in-state banks *only if* the holding company was based in a Northeast State that permitted reciprocal acquisitions (i.e., would allow a Massachusetts or Connecticut holding company to acquire its banks). But other state parties to the purported Compact had not imposed the same regional, reciprocal limitations on bank acquisitions, and thus the third indicia was missing. *Id.*; *see also In re Manuel P.*, 215 Cal. App. 3d at 66 (describing this indicia as "reciprocal enforcement"). In contrast, the Court has made it clear that reciprocal *benefits*—such as exemptions from highway taxes—are *not* the "kind of reciprocal arrangement between states [that have] been thought to violate the Compact Clause of art. I, § 10 of the Constitution." *Bode v. Barrett*, 344 U.S. 583, 586 (1953). Thus, the third indicia involves the imposition of the same, reciprocal regulatory *limitations*, as opposed to the granting of reciprocal *benefits*, by the participating States.

There are no such reciprocal limitations here. Indeed, the 2017 agreement imposes no regulatory limitations at all because, as shown above, any regulatory limitations that California and Quebec impose on businesses are determined by their respective regulations, not the agreement. *See, supra*, at 19-20. And the linkage regulations themselves do not impose reciprocal limitations on their respective regulated parties. For example, Quebec's program imposes a regulatory limitation on "high global warming potential gases," whereas CARB regulates those gases in a different way and *not* under its cap-and-trade program. Sahota Decl. ¶ 35. In addition, by expanding compliance instrument markets and access to cost-reduction opportunities, California and Quebec's decisions to accept each other's allowances provide, at most, reciprocal *benefits* to regulated parties, which is insufficient to satisfy this third indicia. *See Bode,* 344 U.S. at 586.

In sum, Plaintiff's motion for summary judgment should be denied because Plaintiff failed to meet its burden of proving the 2017 Agreement, the focus of its motion, expands California's political power at the expense of federal supremacy or bears any of the indicia of a Compact. Moreover, Defendants are entitled to summary judgment because the case law and the record demonstrate that neither the 2017 agreement nor the regulations is an Article I Compact. Plaintiff's claims fail as a matter of law.

CONCLUSION

For the reasons discussed above, the 2017 agreement is not an Article I Treaty, and neither that agreement nor the linkage regulations are an Article I Compact. Plaintiff's motion for summary judgment, which only challenges the 2017 agreement, should be denied. Defendants' motion for summary judgment should be granted on both causes of action.

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Dated: February 10, 2020

Respectfully Submitted,

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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

THE UNITED STATES OF AMERICA, Plaintiff, v. THE STATE OF CALIFORNIA; GAVIN C. NEWSOM, in his official capacity as Governor of the State of California; THE CALIFORNIA AIR RESOURCES BOARD; MARY D. NICHOLS, in her official capacity as Chair of the California Air Resources Board and as Vice Chair and a board member of the Western Climate Initiative, Inc.; WESTERN CLIMATE INITIATIVE, INC.; JARED BLUMENFELD, in his official capacity as Secretary for Environmental Protection and as a board member of the Western Climate Initiative, Inc.; KIP LIPPER, in his official capacity as a board member of the Western Climate Initiative, Inc., and RICHARD BLOOM, in his official capacity as a board member of the Western Climate Initiative, Inc., Defendants.	2:19-cv-02142-WBS-EFB **DECLARATION OF RAJINDER SAHOTA IN SUPPORT OF STATE DEFENDANTS' OPPOSITION TO PLAINTIFF'S SUMMARY JUDGMENT MOTION AND STATE DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT** Date: March 9, 2020 Time: 1:30 PM Courtroom: 5 Judge: Honorable William B. Shubb Trial Date: Not Set Action Filed: October 23, 2019

[1] The State Defendants are State of California; Gavin C. Newsom, in his official capacity as Governor of the State of California; the California Air Resources Board; Mary D. Nichols, in her official capacity as Chair of the California Air Resources Board; and Jared Blumenfeld, in his official capacity as Secretary for Environmental Protection.

I, Rajinder Sahota, hereby declare:

1. All of the statements contained herein are based on my own personal knowledge and if called to testify I could and would competently testify thereto.

2. I am employed as the Chief of the Industrial Strategies Division of the California Air Resources Board (CARB), and previous to that, I was the Assistant Division Chief of CARB's Industrial Strategies Division for three years. My current work includes updates to California's Climate Change Scoping Plan, oversight of climate programs (including the Cap-and-Trade Program and Low Carbon Fuel Standard), energy and climate policy, oil and gas regulations, fuel specifications, and programs to reduce short-lived climate pollutants.

3. Prior to taking the division management roles, I held the following positions at CARB: Chief for the Cap-and-Trade Program (Aug 2013 – Mar 2016), Manager for Market Monitoring in the Cap-and-Trade Program (Dec 2011 – Aug 2013), Manager for Program Operations in the Office of Climate Change (Feb 2011 – Dec 2011), Manager of the Climate Change Verification and Protocols Section (Jan 2009 – Feb 2011), and an air pollution specialist (November 2001, when I started at CARB – January 2009). I hold a Bachelors and Masters of Science in Atmospheric Sciences from the University of California, Davis.

4. In my various roles, I have worked on, or managed, every iteration of the Cap-and-Trade Regulation (Regulation). Starting in 2009, I was part of the team drafting the initial regulatory text. In early 2011, I became one of two lead managers tasked with completing the initial Regulation, including managing a 15-person team. Concurrently, I was representing California on technical calls and meetings with other jurisdictions in the Western Climate Initiative to develop recommendations for the reporting and verification of greenhouse gases, criteria for offsets and offset protocols, and general carbon market policy. Beginning in 2012, I was one of the key staff involved in conversations with counterparts in Quebec on whether and how to link programs, developing regulations for linking the programs, and coordination and consultation that was eventually memorialized in two agreements—one in 2013 and another in 2017.

Background

5. The California Legislature passed Assembly Bill 32 (AB 32) in 2006, establishing a statewide greenhouse gas emissions limit of 1990 levels to be achieved by 2020. AB 32 required CARB to develop a Scoping Plan to describe the State's strategy for achieving the AB 32 mandate and to develop and adopt regulations that would achieve the statewide emissions limit. AB 32 authorized, but did not require, CARB to adopt a cap-and-trade program as part of its suite of measures directed at reducing greenhouse gas emissions.

6. CARB adopted its first Climate Change Scoping Plan in 2008. The development of the Scoping Plan involved robust review of a breadth of information and substantial public participation. As described in the Scoping Plan, CARB "held dozens of workshops, workgroups, and meetings on specific technical issues and policy measures," "reviewed … over 1,000 unique comments" from the public, consulted with state and local government officials outside CARB, and "heeded the advice of public health and environmental experts." 2008 Scoping Plan at E-2, E-3. CARB also "examine[d] programs at the regional, national, and international levels," meeting with and learning from experts "from the European Union, the United Kingdom, Japan, Australia, the United Nations, the Regional Greenhouse Gas Initiative [of northeastern States], the RECLAIM program [of the South Coast Air Quality Management District], and the U.S. Environmental Protection Agency." *Id.* at 9.

7. In the Scoping Plan, CARB ultimately concluded that achieving the statewide emissions limits mandated by the Legislature could "best be accomplished through a cap-and-trade program along with a mix of complementary strategies that combine market-based regulatory approaches, other regulations, voluntary measures, fees, policies, and programs." *Id.* at 15. The cap-and-trade program, covering approximately eighty percent of statewide emissions, would provide "[a]n overall limit on greenhouse gas emissions from most of the California economy." *Id.* at 15. But CARB also determined that additional, "direct regulations," such as building efficiency and vehicle emission standards and requirements for renewable electricity generation, should apply to at least some of the sources covered by the cap. *Id.* In addition,

CARB concluded other "specific measures" would be needed to ensure reductions from sources not covered by cap-and-trade. *Id.*

8. Thus, from the very beginning of CARB's planning efforts to meet the emissions reduction requirements established by the Legislature, it was clear that cap-and-trade would be one of multiple measures to reduce emissions.

9. Since then, CARB has adopted several regulatory measures described in the Scoping Plan, including a Low Carbon Fuel Standard, more stringent emissions standards for an array of types of vehicles and engines, and the Cap-and-Trade Regulation.

10. In addition, the Legislature and other state agencies have also taken numerous actions to reduce the State's greenhouse gas emissions, including the adoption of more stringent Renewable Portfolio Standards and a requirement that the State double statewide energy efficiency savings in electricity and natural gas end uses by 2030.

11. All of these measures have contributed to California's success in meeting the 2020 goal set by AB 32 ahead of schedule. Indeed, California's emissions have been below the 2020 emissions limit since 2016. *See* https://ww3.arb.ca.gov/cc/inventory/pubs/reports/2000_2017/ghg_inventory_trends_00-17.pdf.

Development of California's Cap-and-Trade Regulation

12. In 2006, at the time the Legislature passed AB 32 and authorized CARB to adopt a cap-and-trade program, such programs had already been deployed to reduce air pollution. For example, the U.S. Environmental Protection Agency had been implementing a cap-and-trade program to control and reduce sulfur dioxide emissions since 1995—a program adopted in response to congressional directive in the 1990 amendments to the Clean Air Act that were signed into law by President George H.W. Bush. And, by 2006, the European Union had set up its cap-and-trade program for the greenhouse gas emissions that cause climate change.

13. Shortly thereafter, in 2007, the Western Climate Initiative, a somewhat informal "collaboration of independent jurisdictions working together to identify, evaluate, and implement emissions trading policies to tackle climate change at a regional level" was formed. *See*

http://westernclimateinitiative.org/. CARB was a participant in this collaboration on behalf of California.

14. At that time, several participants in the Western Climate Initiative were interested in developing cap-and-trade programs for greenhouse gas emissions and in possibly linking those programs so that the markets for compliance instruments—such as allowances—and the opportunities for cost-savings would be larger than any one jurisdiction's program would produce on its own.

15. The Western Climate Initiative participants eventually produced design recommendations for a greenhouse gas emissions cap-and-trade program. CARB drew heavily on these recommendations while concurrently developing its own Cap-and-Trade Regulation.

16. Throughout this process of developing its own Cap-and-Trade Regulation, CARB staff continued working in focused topic groups comprised of representatives from jurisdictions within the Western Climate Initiative to develop recommendations for different elements of a cap-and-trade program. Quebec, as another jurisdiction in the Western Climate Initiative, also participated in these topic groups.

17. In participating in the development of the Western Climate Initiative recommendations and in developing the California Cap-and-Trade Regulation, CARB staff reviewed the design of the federal nitrogen oxide (NOx) and sulfur oxide (SOx) trading programs, the Regional Greenhouse Gas Initiative, the European Union Emissions Trading Program, Sweden's NOx Program, and RECLAIM, the Regional Clean Air Incentives Market.

18. In developing the Regulation, CARB also considered recommendations provided by an Economic and Allocation Advisory Committee. This committee was comprised of representatives from research organizations, academia, and state government agencies. Staff also engaged in technical discussions with experts and representatives from the Regional Greenhouse Gas Initiative, European Union Emissions Trading System, and United Kingdom Emissions Trading Scheme, which are other greenhouse gas cap-and-trade systems.

19. CARB initiated a rulemaking to adopt a cap-and-trade regulation in October 2010, after more than eighteen months of informal consideration and information gathering, including

reviewing relevant literature, consulting with experts from diverse fields, and holding more than thirty-five public meetings.

20. After another year of public participation, review of relevant material, and expert consultations, that rulemaking culminated with the Board adopting the Cap-and-Trade Regulation in October 2011. The regulation became effective on January 1, 2012, with the first compliance period (during which regulatory obligations would apply to covered sources) commencing January 1, 2013.

CARB's Cap-and-Trade Regulation and Its Linkage Framework

21. CARB's Cap-and-Trade Regulation establishes yearly caps, called "budgets," for the total greenhouse gas emissions of all regulated sources (called "covered entities"). These emission budgets decline each year in order to require emission reductions from covered entities.

22. CARB issues allowances—"authorization[s] to emit up to one metric ton of carbon dioxide equivalent" greenhouse gases—in quantities equal to the emissions budget for a given year. Cal. Code Regs., tit. 17, §§ 95802(a), 95820(a)(1). Covered entities may trade allowances and other compliance instruments and are required to acquire and surrender eligible compliance instruments equivalent to the metric tons of greenhouse gases they emit. That latter requirement enforces the cap (or "budget") while the former provides covered entities with the flexibility to design their own compliance path—their own combination of emissions reductions and allowance acquisitions that is least expensive or otherwise preferred.

23. CARB had to make many design decisions as it developed its Regulation.

24. Some of those design decisions involved whether to include, and how to design, cost-containment measures—features of the program that would help regulated businesses minimize or mitigate their compliance costs. CARB's regulation includes several cost-containment measures. For example, it allows the "banking" of allowances, meaning covered entities can acquire allowances in earlier years (when prices may be lower) and use them for compliance in later years (when prices may be higher due to more stringent emission budgets). CARB also decided to allow the limited use of "offsets"—compliance instruments that, like allowances, authorize a metric ton of emissions. Unlike allowances, however, offsets correspond to emissions reductions

from a source not covered by the program. In essence, then, an offset is a mechanism by which a covered entity pays a non-covered entity to reduce or remove emissions. The ability to use offsets for a small portion of their compliance obligations (between four to eight percent) provides another potential cost-reduction opportunity for covered entities—such as if offsets are less expensive to purchase than allowances or if the availability of offsets reduces the prices of allowances.

25. Another example of a cost-containment measure is the ability to expand the market(s) for compliance instruments by linking to other, similar cap-and-trade programs. As used in this context, linkage simply means (1) that CARB would accept the allowances (or other compliance instruments) issued by the linked jurisdiction as essentially equivalent to CARB-issued instruments and (2) that CARB would conduct coordinated allowance auctions with the other jurisdiction. Linkage would not alter anything else about the linked programs, including the programs' caps (or emissions budgets). Put simply, linkage would provide covered entities with access to more cost-reduction opportunities (specifically, those available in the other jurisdiction), but covered entities would be required to continue reducing emissions under the declining emission cap of the program under which they are regulated.

26. When CARB adopted the cap-and-trade Regulation in 2011, it included a framework for linkage which would allow CARB to link to another jurisdiction's program through a later rulemaking proceeding. However, the regulation adopted in 2011 did not actually link to any other program.

27. Because linkage would expand the available cost-reduction opportunities, many businesses and industries that would be regulated under the program supported CARB's inclusion of this framework for linkage and urged CARB to link to other programs quickly.

SB 1018 Legislation

28. After the 2011 rulemaking, but before CARB had adopted further regulatory amendments to actually link with any other program, California passed legislation relating to any potential linkage that California may make. That legislation, Senate Bill 1018 (SB 1018), was enacted on June 27, 2012.

29. This legislation requires that CARB notify "the Governor that [it] intends to take such action" and that the Governor make four findings, including a finding that "[t]he jurisdiction with which the state agency proposes to link has adopted program requirements for greenhouse gas reductions … that are equivalent to or stricter than those required" by California's Legislature. Cal. Gov. Code § 12894(f).

30. From a cap-and-trade design perspective, it is important to link with programs that are equally constraining, or more constraining, on emissions because programs with less stringency that are less constraining will tend to have lower allowance prices (due to excess supply and/or lower demand). Lower allowance prices blunt incentives to reduce emissions. Also, if regulated sources in jurisdictions with stringent caps could simply buy allowances cheaply from jurisdictions with much less stringent caps, it would undermine the more stringent cap and the degree of emissions constraint it was intended to provide. Thus, when linking cap-and-trade programs, it is important to compare stringencies in order to protect the environmental integrity of the programs.

31. The other three findings that the Governor must make relate to (1) the enforceability of California law; (2) the stringency of the linking jurisdiction's enforcement laws; and (3) the non-imposition of liability on California from any failure associated with linkage. *See* Cal. Gov. Code § 12894(f).

Consideration of Linkage with Quebec and the Related Linkage Findings

32. On February 22, 2013, CARB requested that the Governor make the findings under SB 1018 with respect to linking to Quebec's program. CARB made this request because it saw several advantages to be gained from linking with Quebec. Significantly, CARB found that broadening the scope of the market would provide greater flexibility to California businesses by encompassing a wider range of emissions reduction opportunities and greater market liquidity and could have a positive impact on the California economy.

33. On April 8, 2013, the Governor made the four linkage findings under SB 1018 with respect to linking with Quebec, including finding that the Quebec program was equally or more

stringent than the California program based on the jurisdiction targets, scope of the carbon price signal, and other factors.

34. Although the Governor found that Quebec's requirements for greenhouse gas reductions were equivalent or more stringent than those mandated by the California Legislature, there are notable differences between Quebec's program and California's.

35. Quebec's overall, province-wide greenhouse gas emissions target for 2020 is 20 percent below 1990 levels, whereas California's target is to at least achieve 1990 levels of emissions by 2020. While Quebec's cap-and-trade program includes sources of high global warming potential gases, those gases are not included in CARB's program because CARB chose to regulate those emissions using other regulatory approaches. Quebec chose not to accredit its own third-party verifiers of greenhouse gas emission reports submitted by entities subject to its program and instead relies on existing accreditation systems, while CARB established an accreditation program for individuals to audit any greenhouse gas reports submitted to CARB. California and Quebec also utilize different tools to maintain environmental integrity in the event an offset credit is invalidated at a later time: California enforces buyer liability provisions whereas Quebec maintains an "environmental integrity" buffer account. Additionally, Quebec and California chose different methodologies to allocate allowances to covered industries to minimize for emissions leakage. Further, the California program freely provides allowances to utility companies, which are then consigned at auction, and the allowance value generated by the auction is provided back to California energy rate-payers as a climate credit. This feature, which protects against energy rate-payer price spike impacts, is not included in the Quebec program.

Staff Consultations between California and Quebec

36. Throughout the consideration of linkage with Quebec, CARB and Quebec staff consulted frequently. We held weekly meetings over several months in 2012-2013 to understand and identify differences between our respective programs and to identify any issues that needed to be addressed to allow for our respective programs to be linked. These calls consisted of staff describing how each design of the respective regulations addressed key design elements, such as market rules. I and my staff participated on these calls.

37. These staff consultations with Quebec helped assess whether differences in the two programs would cause a problem for either program if the two programs began accepting each other's compliance instruments. As discussed above, there are multiple ways in which the two programs differ, and those differences were discussed during these consultations and determined not to present significant issues for linkage.

Regulatory Amendments to Link to Quebec

38. In order to link the California and Quebec cap-and-trade programs, CARB needed to amend its Cap-and-Trade Regulation to (1) allow for recognition of compliance instruments issued by Quebec and (2) contemplate joint auctions with Quebec.

39. In early 2012, CARB initiated a rulemaking on the proposed linkage amendments by holding public workshops, publicly releasing draft regulatory amendments, and accepting public comments on those draft amendments.

40. On April 19, 2013, CARB voted to approve the linkage related amendments, and the amended regulation became effective on October 1, 2013 with the linkage itself becoming operational three months later (pursuant to the text of the regulation).

41. Under these regulatory amendments, CARB accepts Quebec-issued instruments for compliance with California's cap-and-trade program. Also under these regulatory amendments, CARB and Quebec each offer their own allowances for sale through jointly-held auctions.

42. Nothing about these regulatory amendments, or linkage generally, altered California's or Quebec's program in other ways. For example, these amendments did not change either program's cap or emissions budget and did not change which businesses have compliance obligations under either program. Likewise, these linkage regulations did not change the fact that Quebec's program covers greenhouse gases that CARB's does not and did not change the fact that Quebec and California distribute allowances somewhat differently, as described above.

43. Nothing about these regulatory amendments altered either jurisdiction's authority or ability to modify, amend, or even repeal its own program. This fully retained authority includes the authority to terminate the linkage by repealing the linkage regulations.

The 2013 Agreement

44. After CARB adopted the regulatory amendments to link to Quebec's program, California and Quebec officials, including CARB's Chair Mary Nichols, signed an agreement expressing their intentions to continue consulting with each other related to the already-adopted linkage. This agreement was signed on September 27, 2013.

45. I was a part of senior management-level discussions about the agreement.

46. The 2013 agreement did not link the two programs. The links were established independently by each jurisdiction's promulgation of its own linkage regulations.

47. The 2013 agreement included details on the process for ongoing discussions between California and Quebec in order to facilitate and continue our coordination. The intent was that we would memorialize our intentions to continue to coordinate, as each jurisdiction managed its respective program. In the process to develop the 2013 agreement, we also recognized that, while the agreement was not enforceable, the commitment to continue to communicate and collaborate on key design features was very important to the efficient and effective operation of the cap-and-trade programs.

48. A key point in the agreement was that each party provide notice before any significant changes came into force in the respective programs. From CARB's perspective, this notice would provide CARB staff an opportunity to provide an update to the CARB Board regarding any potentially relevant changes to Quebec's program, thereby allowing for public testimony and CARB staff action on any Board direction in response to the update.

49. The expression of intent to provide such notice was a key point. As the agreement expressly recognized, each jurisdiction retained all of its authority to amend, modify, or even repeal, its own program, despite the linkage between the programs as to compliance instruments and joint auctions. The intent to provide notice did not alter either jurisdiction's authority; it simply recognized that, because of the linkage, decisions that one jurisdiction made could indirectly affect the other's program. The intent of the agreement was to identify these sort of issues early so that the parties to the agreement could attempt to resolve concerns and so that each party could take any actions it independently deemed necessary.

Western Climate Initiative, Inc. and Its Technical and Administrative Support Services

50. The 2013 agreement also expressed the parties' intentions to continue using Western Climate Initiative, Inc. (WCI, Inc.) for technical and administrative support services related to the parties' respective cap-and-trade programs.

51. The services WCI, Inc. provides are: (1) the development and administration of a technical platform that supports the joint auctions of allowances; and (2) the development and maintenance of a computer system (called the Compliance Instrument Tracking System Service (CITSS)) that tracks compliance instruments and account balances. CITSS is roughly analogous to banking software in that it tracks instrument transactions and instrument holdings much as banking software tracks account balances and deposits and withdrawals. A tracking system like this is critically important to the effective operation and enforcement of the cap-and-trade system, including monitoring to prevent market manipulation and fraud.

52. Notably, the auctions are conducted jointly in the sense that California and Quebec make their respective allowances available at the same time, and in the same auction venue, and conform their bidding and winning parameters. However, there is no joint account where allowances are held prior to distribution to winning bidders. After each auction, California and Quebec separately transfer their respective allowances into the winning bidders' accounts. In this way, the two jurisdictions retain control over the allowances they each put up for auction until such time as those allowances are transferred into a private party's account.

53. In February of 2012, more than a year before the 2013 agreement was signed, CARB had entered into an agreement with WCI, Inc. to provide these services for remuneration. *See* ECF 7-3.

54. Prior to that February 2012 agreement with WCI, Inc., CARB had contracted for the development of an instrument tracking system with SRA International, Inc., now known as General Dynamics Information Technology (GDIT). CARB had also contracted with Markit Group Limited (Markit) to establish an auction platform. Once WCI, Inc. was established,

California thereafter contracted with WCI, Inc. to continue development and maintenance of those systems and, in turn, WCI, Inc. sub-contracted with GDIT and Markit for their services.

55. As both the California and Quebec cap-and-trade programs were similar, both jurisdictions began to utilize WCI, Inc. to provide the information technology systems to administer certain aspects of the respective programs.

56. CARB also determined that using the same service provider as other jurisdictions, like Quebec, would reduce CARB's administrative costs and provide additional benefits in the form of enhanced security and effectiveness of program infrastructure, including the tracking system and auction operation. *See* ECF 7-3.

57. Although it was formed in 2011 by then-participants in the Western Climate Initiative collaboration described above, WCI, Inc. is different from the Western Climate Initiative. WCI, Inc. is a non-profit corporation, incorporated under the laws of Delaware, with an Executive Director, a staff, a budget, and contracts (including those described above). The Western Climate Initiative produced design recommendations for cap-and-trade programs, as discussed above, while WCI, Inc. provides specific technical and administrative support services for jurisdictions that support the operations of cap-and-trade programs designed by their implementing jurisdiction (e.g., CARB). WCI, Inc. has no regulatory authority; CARB is the sole entity that developed California's cap-and-trade regulation, and implements and enforces it. Since its creation, WCI, Inc. has had two executive directors. Neither executive director had any previous relationship with the Western Climate Initiative jurisdictions.

Operations of California and Quebec's Linked Programs

58. The California and Quebec programs began operating as linked starting on January 1, 2014. January 1, 2020 marked six years of successful operation as linked programs.

59. During this time, there have been 21 joint auctions, and California has raised approximately $12 billion for investments to reduce greenhouse gas emissions and to benefit vulnerable communities in the State.

60. California has also had six successful compliance surrender events where regulated entities were required to surrender compliance instruments equivalent to their emissions per the

schedule in the regulation. Each compliance event had a rate of 100, or close to 100, percent compliance, demonstrating that covered entities have grown accustomed to the regulatory requirements.

61. In addition to the auctions described above, regulated parties may acquire compliance instruments in the secondary market. The secondary market consists of transactions completed among private parties. In that market, the private parties themselves determine the terms of the transactions, including the prices to be paid for the compliance instruments, and both the instruments and the payments for them are exchanged exclusively between the private parties. While the private parties may determine these terms, the cap-and-trade regulation specifies disclosure requirements and transaction timelines to ensure effective and thorough CARB oversight and enforcement. Compliance instruments can only be transacted through CITSS and only to parties registered in CITSS.

CARB's Linkage with Ontario

62. On August 2, 2016, CARB initiated a rulemaking to, among other things, link its cap-and-trade program with Ontario's.

63. On March 16, 2017, the Governor made the four linkage findings under SB 1018 with respect to linking with Ontario.

64. On July 27, 2017, CARB approved proposed amendments to the California cap-and-trade regulation, including those establishing linkage with Ontario. That linkage became operational on January 1, 2018, meaning that CARB began accepting Ontario-issued compliance instruments and began jointly auctioning allowances with Ontario.

The 2017 Agreement

65. On September 22, 2017, two months after CARB completed its rulemaking, California, Quebec, and Ontario signed an agreement that, like the 2013 agreement between California and Quebec, expressed the parties' intentions to continue consulting and collaborating on their respective cap-and-trade program. This 2017 agreement effectively replaced the 2013 agreement between California and Quebec.

66. The 2017 agreement did not link the three programs. Those links were established independently by each jurisdiction's promulgation of its own linkage regulations.

67. The 2017 agreement included details on the process for ongoing discussions between California, Quebec, and Ontario in order to facilitate coordination. The intent of the agreement was to endeavor to continue coordinating, in light of the linkage, as each jurisdiction moved forward managing its own program.

68. As with the 2013 agreement, a key point in the 2017 agreement was that each party provide notice before any significant changes came into force in the respective programs. Again, the expression of intention to provide such notice was a key point because, as the agreement expressly recognizes, each jurisdiction retains all of its authority to amend, modify, or even repeal, its own program.

69. While the agreement describes a "Consultation Committee" (see Art. 13), intended to provide a path for more formal resolution of issues, such a committee has never been formed or met. Consultations between California and Quebec have continued to be made informally at the staff and management levels, as they briefly were with Ontario as well.

70. The provision relating to withdrawal from the agreement states that the parties will try to provide 12-months notice before withdrawing. As the express text of the agreement indicates, this is an expression of an intention to "endeavour" to provide this notice. It does not, and was not intended to, prevent any party to the agreement from withdrawing unilaterally or without providing 12-months notice.

Ontario's Cancellation of Its Program

71. In early 2018, CARB had become aware of the Ontario Progressive Conservative ("PC") Party's platform, which called for ending Ontario's cap-and-trade program if the PC Party prevailed in the June 7, 2018 Ontario General Election.

72. On June 7, 2018, the PC Party won an absolute majority in the Ontario legislature, making their leader, Doug Ford, the Premier-Designate.

73. On June 15, 2018, Premier-Designate Ford released a written statement announcing that his government's first act would be to "cancel" Ontario's cap-and-trade program, including

terminating linkage between Ontario's program and the Quebec and California cap-and-trade programs. I understand that a copy of Premier-Designate Ford's announcement is attached to the Declaration of Michael S. Dorsi as Exhibit 11.

74. On June 29, 2018, the Ontario cabinet approved a regulation revoking its cap-and-trade regulations and prohibiting further trading of compliance instruments by Ontario entities.

75. The Ontario legislature enacted the Cap and Trade Cancellation Act, effective November 15, 2018. This statute repealed the 2016 Ontario statute that had authorized Ontario's cap-and-trade program.

76. At no point during these revocation or cancellation proceedings did Ontario officials consult with CARB, nor did any Ontario official provide notice of withdrawal from the 2017 agreement it had signed with California and Quebec. Ontario only issued generally available public statements that it was terminating its program, effectively terminating its linkage with California and Quebec (*e.g.*, Declaration of Michael S. Dorsi, Exhibit 11).

77. Effective April 1, 2019, CARB amended its regulation to formally indicate that California no longer recognized Ontario as a linked program, but that it would still accept Ontario-issued compliance instruments that were held by participants in the still-linked California and Quebec programs as of June 15, 2018. CARB took this step, despite the fact that Ontario was no longer accepting California-issued instruments, to ensure that participants in its program would not be penalized by Ontario's cancellation of its program.

Post-Linkage Amendments to CARB's Regulation

78. Since linkage with Quebec became operational on January 1, 2014, CARB has amended the California cap-and-trade regulation several times – with effective dates for those regulatory amendments of July 1, 2014; January 1, 2015; November 1, 2015; October 1, 2017; May 30, 2018; and April 1, 2019. All of these amendments also post-date the signing of the 2013 agreement with Quebec, and several post-date the signing of the 2017 agreement.

79. The most recent amendments to the California regulation included significant changes pursuant to a 2017 California statute (AB 398). AB 398 required, among other things, that the

California cap-and-trade program include a hard price ceiling on the value of allowances and a lower offset usage limit after 2020.

80. While California communicated with Quebec regarding these regulatory changes so Quebec would be informed, Quebec's approval or consent was neither sought nor required in order for California to amend its cap-and-trade regulation.

81. Although California created the price ceiling and lower offset usage limit in its program, Quebec has no price ceiling and has different offset usage limits. Thus, some of California's post-linkage regulatory amendments have made the two programs less similar.

82. As described above, none of the discussions with Quebec regarding these changes CARB has made to its regulations required the establishment or use of the Consultation Committee described in the 2017 agreement.

83. The linkage between the two programs remains operational and is functioning well.

I declare that the forgoing statements are true and correct under penalty of perjury. Executed on this day, the 10th of February 2020, in Sacramento, California

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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

THE UNITED STATES OF AMERICA, Plaintiff, v. THE STATE OF CALIFORNIA; GAVIN C. NEWSOM, in his official capacity as Governor of the State of California; THE CALIFORNIA AIR RESOURCES BOARD; MARY D. NICHOLS, in her official capacity as Chair of the California Air Resources Board and as Vice Chair and a board member of the Western Climate Initiative, Inc.; WESTERN CLIMATE INITIATIVE, INC.; JARED BLUMENFELD, in his official capacity as Secretary for Environmental Protection and as a board member of the Western Climate Initiative, Inc.; KIP LIPPER, in his official capacity as a board member of the Western Climate Initiative, Inc., and RICHARD BLOOM, in his official capacity as a board member of the Western Climate Initiative, Inc., Defendants.	2:19-cv-02142-WBS-EFB **DECLARATION OF MICHAEL S. DORSI IN SUPPORT OF STATE DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND CROSS-MOTION** Date: March 9, 2020 Time: 1:30 Courtroom: 5 Judge: Honorable William B. Shubb Trial Date: Not Set Action Filed: October 23, 2019

[1] The State Defendants are State of California; Gavin C. Newsom, in his official capacity as Governor of the State of California; the California Air Resources Board; Mary D. Nichols, in her official capacity as Chair of the California Air Resources Board; and Jared Blumenfeld, in his official capacity as Secretary for Environmental Protection.

I, Michael S. Dorsi, hereby declare:

1. I am a Deputy Attorney General for the California Department of Justice and an active member of the State Bar of California. I am counsel for the State Defendants in this case. All of the statements contained herein are based on my own personal knowledge and if called to testify I could and would competently testify thereto.

2. For each of the documents described in this Declaration, I have reviewed the document. Some of the documents are lengthy. To avoid an unreasonably voluminous filing, I have attached only selected pages of documents that are excessively long.

3. Attached as **Exhibit 1** are true and correct copies of selected pages from the United States Environmental Protection Agency publication titled *Tools of the Trade: A Guide to Designing and Operating a Cap and Trade Program for Pollution Control*. The full document is already filed in this case as Exhibit A to the Request for Judicial Notice in Support of Motion to Dismiss (ECF Doc. 26-1), and is available at https://www.epa.gov/sites/production/files/2016-03/documents/tools.pdf (last visited February 7, 2020).

4. Attached as **Exhibit 2** are true and correct copies of selected pages from the California Air Resources Board's 2008 Climate Change Scoping Plan. The full document is available at https://ww3.arb.ca.gov/cc/scopingplan/document/adopted_scoping_plan.pdf (last visited February 7, 2020).

5. Attached as **Exhibit 3** is a true and correct copy of a California Air Resources Board's Notice of Public Hearing concerning the Cap-and-Trade regulation. The document is also available at https://ww3.arb.ca.gov/regact/2010/capandtrade10/capnotice.pdf (last visited February 7, 2020).

6. Attached as **Exhibit 4** is a true and correct copy of California Air Resources Board Resolution 11-32, concerning the Cap-and-Trade regulation. The document is also available at https://ww3.arb.ca.gov/regact/2010/capandtrade10/res11-32.pdf (last visited February 7, 2020).

7. Attached as **Exhibit 5** are true and correct copies of selected pages from the California Air Resources Board's Final Statement of Reasons concerning the Cap-and-Trade

regulation. The full document is available at https://ww3.arb.ca.gov/regact/2010/capandtrade10/fsor.pdf (last visited February 7, 2020).

8. Attached as **Exhibit 6** is a true and correct copy of California Air Resources Board Resolution 13-7. The document is also available at https://ww3.arb.ca.gov/regact/2012/capandtrade12/res13-7.pdf (last visited February 7, 2020).

9. Attached as **Exhibit 7** is a true and correct copy of a California Air Resources Board's notice to the Office of Administrative Law and attached Final Regulation Order. The document is also available at https://ww3.arb.ca.gov/regact/2012/capandtrade12/linkfro.pdf (last visited February 7, 2020).

10. Attached as **Exhibit 8** is a true and correct copy of a 2013 agreement between California Air Resources Board and *Gouvernement du Québec* concerning their respective cap-and-trade programs. The document is also available at https://ww3.arb.ca.gov/cc/capandtrade/linkage/ca_quebec_linking_agreement_english.pdf (last visited February 7, 2020).

11. Attached as **Exhibit 9** is a true and correct copy of California Air Resources Board Resolution 17-21. The document is also available at https://ww3.arb.ca.gov/regact/2016/capandtrade16/ctreso17-21.pdf (last visited February 7, 2020).

12. Attached as **Exhibit 10** is a true and correct copy of a California Air Resources Board's notice to Office of Administrative Law. The document is also available at https://ww3.arb.ca.gov/regact/2016/capandtrade16/finform400.pdf (last visited February 7, 2020).

13. Attached as **Exhibit 11** is a true and correct copy of the Press Release by Ontario Premier-Designate Doug Ford announcing the end of Ontario's Cap-and-Trade Program. The document is also available at https://news.ontario.ca/opd/en/2018/06/premier-designate-doug-ford-announces-an-end-to-ontarios-cap-and-trade-carbon-tax.doc (last visited February 7, 2020).

14. Attached as **Exhibit 12** is a true and correct copy of the Western Climate Initiative, Inc. 2018 Annual Report. Plaintiff cites to this document in the Amended Complaint at paragraph 151 (ECF Doc. 7) and repeatedly in the Opposition to Motion to Dismiss (ECF Doc. 36), at pages

1 (footnote 2), 9, 13, and 15–16. Although these references suffice to incorporate the document by reference, Plaintiff has not attached a copy to any filing in this matter. I obtained this copy from WCI, Inc.'s regularly maintained website, www.wci-inc.org. WCI, Inc. prepares an annual report each year; the reports can be found alongside other documents from WCI, Inc. board meetings at http://www.wci-inc.org/documents.php under the tab Board Meeting Agendas and Minutes. The document is available at http://www.wci-inc.org/docs/AnnualReport-2018-20190514f-EN.pdf (last visited February 8, 2020).

15. Attached as **Exhibit 13** is a true and correct copy of a memorandum by U.S. Department of State Legal Advisor William H. Taft, IV, sent in response to a request by Senator Byron L. Dorgan, discussing a Memorandum of Understanding (MOU) signed by the State of Missouri and the Province of Manitoba. The attached copy is the version reprinted in the Digest of United States Practice of International Law. The document is also available at https://2009-2017.state.gov/s/l/22720.htm (last visited February 8, 2020).

16. Attached as **Exhibit 14** is a true and correct copy of the White House Fact Sheet titled *President Donald J. Trump's United States-Mexico-Canada Agreement Delivers a Historic Win for American Workers*. The document is also available at https://www.whitehouse.gov/briefings-statements/president-donald-j-trumps-united-states-mexico-canada-agreement-delivers-historic-win-american-workers/ (last visited February 9, 2020).

17. Attached as **Exhibit 15** is a true and correct copy of selected pages from the book: Michael J. Glennon and Robert D. Sloane, *Foreign Affairs Federalism: the Myth of National Exclusivity* (2016). This is a secondary source authority cited in Defendants' brief that is not available on Westlaw or Lexis. Eastern District of California Local Rule 133(i)(3)(i) instructs parties to provide the Court with copies of certain authorities not available through Westlaw and Lexis. Although books are not included as authorities that must be provided under Local Rule 133(i)(3)(i), the State Defendants nonetheless provide it as a courtesy to the Court.

18. Attached as **Exhibit 16** is a true and correct copy of the article Max Farrand, *The Commercial Privileges of the Treaty of 1803*, 7 The American Historical Review 494 (1902). This is a secondary source authority cited in State Defendants' brief that is not available on

Westlaw or Lexis. Although journal articles are not included as authorities that must be provided under Local Rule 133(i)(3)(i), State Defendants provide this as a courtesy to the Court. The document is also available at https://www.jstor.org/stable/pdf/1833902.pdf (last visited February 9, 2020).

19. Attached as **Exhibit 17** are true and correct copies of excerpts from 3 Joseph Story, Commentaries on the Constitution of the United States §§ 1347–1351, 1395–1397, 1499–1510 (Boston, Hilliard, Gray & Co. 1833). This is a secondary source authority cited in State Defendants' brief that is not available on Westlaw or Lexis. Although treatises are not included as authorities that must be provided under Local Rule 133(i)(3)(i), State Defendants provide this as a courtesy to the Court.

I declare that the forgoing statements are true and correct under penalty of perjury. Executed on this day, the 10th of February 2020, in San Francisco, California.

MICHAEL S. DORSI
Deputy Attorney General
Attorneys for State Defendants

EXHIBIT LIST

Exhibit 1: U.S. Environmental Protection Agency, *Tools of the Tools of the Trade: A Guide to Designing and Operating a Cap and Trade Program for Pollution Control*, dated June 2003 (Selected Pages)

Exhibit 2: California Air Resources Board, *Climate Change Scoping Plan*, December 2008 (Selected Pages)

Exhibit 3: California Air Resources Board, *Notice of Public Hearing to Consider the Adoption of a Proposed California Cap on Greenhouse Gas Emissions and Market-Based Compliance Mechanisms Regulation, Including Compliance Offset Protocols*, dated October 19, 2010, for hearing on December 16, 2010

Exhibit 4: California Air Resources Board, *Resolution 11-32, California Cap-and-Trade Program*, dated October 20, 2011

Exhibit 5: California Air Resources Board, *California's Cap and Trade Program: Final Statement of Reasons*, dated October 2011 (Selected Pages)

Exhibit 6: California Air Resources Board Resolution 13-7, *Amendments to California Cap-and-Trade Program – Linkage*, dated April 19, 2013

Exhibit 7: California Air Resources Board, *Notice to Office of Administrative Law & Final Regulation Order, Article 5. California Cap on Greenhouse Gas Emissions and Market-Based Compliance Mechanisms to Allow for the Use of Compliance Instruments Issued by Linked Jurisdictions*, signed May 10, 2013, endorsed approved June 24, 2013

Exhibit 8: Agreement Between the California Air Resources Board and the *Gouvernement du Québec* Concerning the Harmonization And Integration of Cap-And-Trade Programs for Reducing Greenhouse Gas Emissions, dated September 27, 2013

Exhibit 9: California Air Resources Board Resolution 17-21, *California Cap-and-Trade Program (Ontario Linkage)*, dated July 27, 2017

Exhibit 10: California Air Resources Board, *Notice to Office of Administrative Law (Re: Ontario Linkage)*, signed August 4, 2017, endorsed approved September 18, 2017

Exhibit 11: Ontario Office of the Premier-Designate, *Premier-Designate Doug Ford Announces an End to Ontario's Cap-and-Trade Carbon Tax*, dated June 15, 2018

Exhibit 12: Western Climate Initiative, *Annual Report – 2018*, dated May 14, 2019

Exhibit 13: Memorandum from William H. Taft, IV, Legal Adviser of U.S. Dep't of State to Senator Dorgan of North Dakota re: Memorandum of Understanding signed by the State of Missouri and the Province of Manitoba, dated November 20, 2001

Exhibit 14: The White House, *Fact Sheet: President Donald J. Trump's United States-Mexico-Canada Agreement Delivers a Historic Win for American Workers*, issued on January 29, 2020

Exhibit 15: Michael J. Glennon and Robert D. Sloane, *Foreign Affairs Federalism: the Myth of National Exclusivity* (2016) (Selected Pages)

Exhibit 16: Max Farrand, *The Commercial Privileges of the Treaty of 1803*, 7 The American Historical Review 494 (1902)

Exhibit 17: 3 Joseph Story, Commentaries on the Constitution of the United States §§ 1347–1351, 1395–1397, 1499–1510 (Boston, Hilliard, Gray & Co. 1833) (Selected Pages)

Exhibit 1

Tools of the Trade

A Guide to Designing and Operating a Cap and Trade Program for Pollution Control

Tools of the Trade:

A Guide To Designing and Operating a Cap and Trade Program For Pollution Control

United States Environmental Protection Agency
Office of Air and Radiation

EPA430-B-03-002

www.epa.gov/airmarkets
June 2003

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Acknowledgments

The U.S. Environmental Protection Agency (EPA) would like to acknowledge the many individual contributors to this document, without whose efforts this guidebook would not be complete. Although the complete list of experts who have provided technical and editorial support is too long to list here, we would like to thank some key contributors and reviewers who have played a significant role in developing this guidebook.

In particular, we wish to acknowledge the efforts of the staff of the Clean Air Markets Division (CAMD) of the U.S. EPA – the division responsible for operating the U.S. SO_2 Allowance and Ozone Transport Commission (OTC) NOx Budget Trading Programs. Many staff contributed to this guidebook, including Rona Birnbaum, Kevin Culligan, Katia Karousakis, Stephanie Grumet, Richard Haeuber, Melanie LaCount, Sasha Mackler, Brian McLean, Beth Murray, Sam Napolitano, and Sharon Saile. Special mention is due to Jennifer Macedonia and Mary Shellabarger who did much of the planning and development of this guidebook. Joe Kruger and Jeremy Schreifels compiled and edited the completed document.

This guidebook benefited immensely from the comments and suggestions of a panel of external reviewers, including Dallas Burtraw, Resources for the Future; Andrzej Blachowicz, Center for Clean Air Policy; Tomas Chmelik, Czech Ministry of Environment; A. Denny Ellerman, Massachusetts Institute of Technology; Erik Haites, Margaree Consultants; Blas Pérez Henríquez, University of California-Berkeley; Stan Kolar, Center for Clean Air Policy; Nancy Seidman, Massachusetts Department of Environmental Protection; Jintian Yang, Chinese Research Academy of Environmental Sciences; and Peter Zapfel, European Commission. We would like to thank each of them for their insightful comments and suggestions.

We would also like to thank the staff at ERG for graphics and production support.

Introduction

Introduction

To ensure a cleaner, healthier environment, governments are increasingly using market-based pollution control approaches, such as emission trading, to reduce harmful emissions. The theory of emission trading and the potential benefits of market-based incentives relative to more traditional environmental policy approaches are well established in economic and policy literature. Until recently, however, practical applications of emission trading programs have been relatively limited. In 1990, the United States enacted legislation to implement a comprehensive national sulfur dioxide (SO_2) program using a form of emissions trading called "cap and trade." The U.S. SO_2 cap and trade program has proven to be highly effective from both an environmental and an economic standpoint. The success of this program and others that followed has spurred interest from policymakers, regulating authorities, and business and environmental organizations. Today, emission trading mechanisms are increasingly considered and used worldwide for the cost-effective management of national, regional, and global environmental problems, including acid rain, ground-level ozone, and climate change.

Purpose

This guidebook is intended as a reference for policymakers and regulators considering cap and trade as a policy tool to control pollution. It is intended to be sufficiently generic to apply to various pollutants and environmental concerns; however, it emphasizes cap and trade to control emissions produced from stationary source combustion. In the United States, SO_2 and NOx are controlled with cap and trade programs. These programs provide many illustrative examples that are described within this text.

Structure

This guidebook is organized as follows:

- The introduction explains the policy tool known as cap and trade.
- Chapter 2 provides guidance on how to determine if cap and trade is the right solution for a particular problem and describes how it varies from other policy options, including other forms of emission trading.

- Chapter 3 explains the process for developing a cap and trade program.
- Chapter 4 explains how to implement and operate a cap and trade program.
- Chapter 5 discusses how to assess the results of a cap and trade program and communicate them to the public.
- Glossary of Terms and Acronyms contains definitions of the terms and abbreviations used throughout this guidebook.
- References contains a list of articles and papers cited in this guidebook.
- The Appendices contain additional technical and reference information.

Specific examples are provided throughout the text. These examples draw on the experience from cap and trade programs, including the U.S. SO_2 Allowance Trading Program (also known as the Acid Rain Program), the Regional Clean Air Incentives Market (RECLAIM) in Southern California, the Ozone Transport Commission (OTC) Regional NOx Trading Program in the Northeastern United States, and the United Kingdom's emission trading program for carbon dioxide (CO_2). These examples were selected to illustrate various aspects of cap and trade and are not intended to endorse controls on a specific pollutant.

Cap and Trade

Cap and trade is a market-based policy tool for environmental protection. A cap and trade program establishes an aggregate emission cap that specifies the maximum quantity of emissions authorized from sources included in the program. The regulating authority of a cap and trade program creates individual authorizations ("allowances") to emit a specific quantity (e.g., 1 ton) of a pollutant. The total number of allowances equals the level of the cap. To be in compliance, each emission source must surrender allowances equal to its actual emissions. It may buy or sell (trade) them with other emissions sources or market participants. Each emission source can design its own compliance strategy – emission reductions and allowance purchases or sales – to minimize its compliance cost. And it can adjust its compliance strategy in response to changes in technology or market conditions without requiring government review and approval.

How a Cap and Trade Program Works

1. The regulating authority sets a cap on total mass emissions for a group of sources for a fixed compliance period (e.g., 1 year).
2. The regulating authority divides the cap into allowances, each representing an authorization to emit a specific quantity of pollutant (e.g., 1 ton of SO_2).
3. The regulating authority distributes allowances.
4. For the compliance period, each source measures and reports all of its emissions.
5. At the end of the compliance period, each source must surrender allowances to cover the quantity of the pollutant it emitted.

If a source does not hold sufficient allowances to cover its emissions, the regulating authority imposes penalties.

Environmental Certainty

Cap and trade programs offer a number of advantages over more traditional approaches to environmental regulation. First and foremost, cap and trade programs can provide a greater level of environmental certainty than other environmental policy options. The cap, which is set by policymakers, the regulating authority, or another governing body, represents a maximum amount of allowable emissions that sources can emit. Penalties that exceed the costs of compliance and consistent, effective enforcement deter sources from emitting beyond the cap level. In contrast, traditional policy approaches such as command-and-control regulation generally do not establish absolute limits on allowable emissions but rather rely on emission rates that can allow emissions to rise as utilization rises.

With cap and trade programs, even new emission sources may not increase the limits on emissions. The regulating authority may require new entrants to purchase or receive allocated allowances from the total allowable emissions set by the cap (see Chapter 3 for a description of different ways that new entrants may be treated). Thus, the emissions target is maintained and the price of an allowance can adjust to reflect the increased demand for allowances.

A cap and trade program may also encourage sources to pursue earlier reductions of emissions than would have otherwise occurred, which can result in

the earlier achievement of environmental and human health benefits. This is a result of two primary drivers: first, the cap and associated allowance market creates a monetary value for allowances, providing sources with a tangible incentive to decrease emissions. Second, a cap and trade program can incorporate the flexibility of banking (see Chapter 4) to provide sources with an additional incentive to reduce emissions earlier than required. Banking allows sources to carry over unused allowances for use in a later compliance period when there might be more restrictive requirements or higher expected costs to reduce emissions. Essentially, banking gives sources some flexibility in the timing of emission reductions (i.e., temporal flexibility). This is in addition to flexibility given to sources in the location at which they make emission reductions (i.e., spatial flexibility).

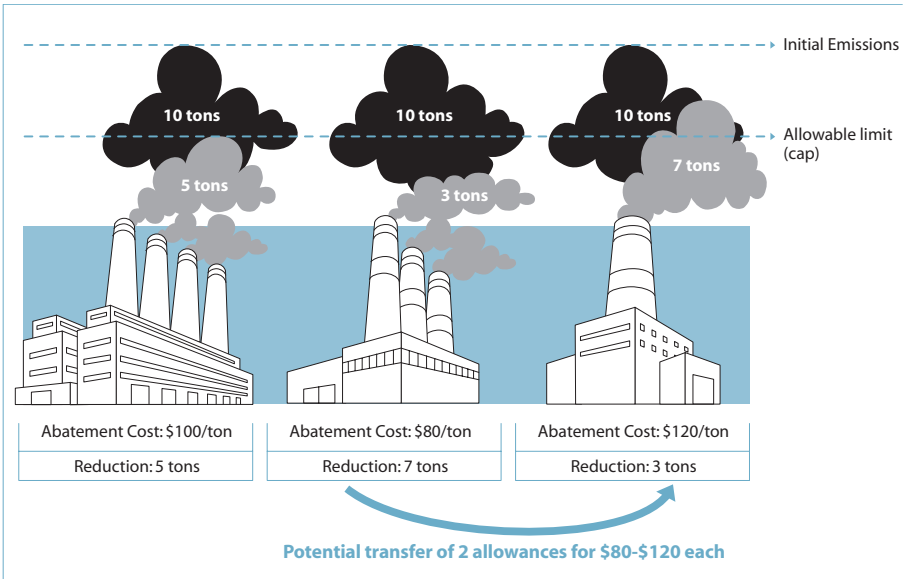
Another environmental advantage of cap and trade is improved accountability. Participating sources must fully account for every ton of emissions by following protocols to ensure completeness, accuracy, and consistency of emission measurement. This system contrasts with most environmental programs that base compliance on periodic inspections and assumptions that equipment is functioning and the source is in compliance between inspections.

Accurate measurement of emissions and timely reporting are critical to the success of a cap and trade program and the integrity of the cap. After emissions data and allowance transaction information are reported, the regulating authority can provide detailed or summary information to the public (e.g., on the Internet). This transparency, or access to information, can provide confidence in the effectiveness of the program.

Minimizing Control Costs

In addition to the environmental benefits of adopting a cap and trade program, significant economic benefits also support the use of such a mechanism. Cap and trade programs provide sources with flexibility in how they achieve their emission target, which is uncommon under traditional environmental policy approaches. The cap establishes the emission level for emission sources; the sources, however, are provided with the flexibility of choosing how they want to abate their emissions. Each source can choose to invest in abatement equipment or energy efficiency measures, to switch to fuel sources with no or reduced emissions, or to shutdown or reduce output from higher emitting sources. The regulating authority does not need to approve each source's compliance choices because the cap, accompanied by emission measurement and reporting requirements, enable the regulating authority to focus on assessing compliance results (i.e., ensuring that each source has at least one allowance for each unit of pollution emitted). Cap and trade programs also allow sources to trade allowances, providing an additional option for complying with the emissions target. Sources that have high marginal abatement costs (i.e., the cost of reducing the next unit of emissions) can purchase additional allowances from sources that have low marginal abatement costs. In this way, both buyers and sellers of allowances can benefit. Sources with low costs can reduce their emissions below their allowance holdings and earn revenues from selling their excess allowances – a reward for better environmental performance. Sources with high costs can purchase additional allowances at a price that is lower than the cost to reduce a unit of pollution at their facility (see Figure 1). This outcome is consistent with the "polluter pays" principle.

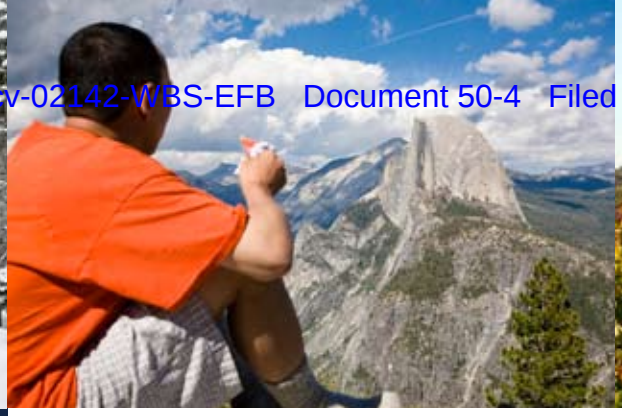
Figure 1. **Cost Minimization With Trading**



A well designed cap and trade program can also provide continuous incentives for innovation in emission abatement. Because of the value attached to allowances. The value creates an economic incentive to invest in research and development for emission abatement options that can further reduce the costs of attaining compliance.

Finally, the cost-minimizing feature of cap and trade has long-term environmental benefits. Driving down the cost of reducing a unit of pollution means that policymakers and regulating authorities can set targets that reduce more pollution at the same cost to society. This system makes it economically and politically feasible to achieve greater environmental improvement.

Exhibit 2




Climate Change Scoping Plan

a framework for change

DECEMBER 2008

Pursuant to AB 32
The California Global Warming Solutions Act of 2006

Prepared by
the California Air Resources Board
for the State of California

Arnold Schwarzenegger
Governor

Linda S. Adams
Secretary, California Environmental Protection Agency

Mary D. Nichols
Chairman, Air Resources Board

James N. Goldstene
Executive Officer, Air Resources Board

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APPENDICES

EXECUTIVE SUMMARY

On September 27, 2006, Governor Schwarzenegger signed Assembly Bill 32, the Global Warming Solutions Act of 2006 (Núñez, Chapter 488, Statutes of 2006). The event marked a watershed moment in California's history. By requiring in law a reduction of greenhouse gas (GHG) emissions to 1990 levels by 2020, California set the stage for its transition to a sustainable, clean energy future. This historic step also helped put climate change on the national agenda, and has spurred action by many other states.

The California Air Resources Board (ARB or Board) is the lead agency for implementing AB 32, which set the major milestones for establishing the program. ARB met the first milestones in 2007: developing a list of discrete early actions to begin reducing greenhouse gas emissions, assembling an inventory of historic emissions, establishing greenhouse gas emission reporting requirements, and setting the 2020 emissions limit.

ARB must develop a Scoping Plan outlining the State's strategy to achieve the 2020 greenhouse gas emissions limit. This Scoping Plan, developed by ARB in coordination with the Climate Action Team (CAT), proposes a comprehensive set of actions designed to reduce overall greenhouse gas emissions in California, improve our environment, reduce our dependence on oil, diversify our energy sources, save energy, create new jobs, and enhance public health.

This "Approved Scoping Plan" was adopted by the Board at its December 11, 2008 meeting. The measures in this Scoping Plan will be developed over the next two years and be in place by 2012.

Reduction Goals

This plan calls for an ambitious but achievable reduction in California's carbon footprint. Reducing greenhouse gas emissions to 1990 levels means cutting approximately 30 percent from business-as-usual emission levels projected for 2020, or about 15 percent from today's levels. On a per-capita basis, that means reducing our annual emissions of 14 tons of carbon dioxide equivalent for every man, woman and child in California down to about 10 tons per person by 2020. This challenge also presents a magnificent opportunity to transform California's economy into one that runs on clean and sustainable technologies, so that all Californians are able to enjoy their rights in the future to clean air, clean water, and a healthy and safe environment.

Significant progress can be made toward the 2020 goal relying on existing technologies and improving the efficiency of energy use. A number of solutions are "off the shelf," and many – especially investments in energy conservation and efficiency – have proven economic benefits. Other solutions involve improving our state's infrastructure, transitioning

to cleaner and more secure sources of energy, and adopting 21st century land use planning and development practices.

A Clean Energy Future

Getting to the 2020 goal is not the end of the State's effort. According to climate scientists, California and the rest of the developed world will have to cut emissions by 80 percent from today's levels to stabilize the amount of carbon dioxide in the atmosphere and prevent the most severe effects of global climate change. This long range goal is reflected in California Executive Order S-3-05 that requires an 80 percent reduction of greenhouse gases from 1990 levels by 2050.

Reducing our greenhouse gas emissions by 80 percent will require California to develop new technologies that dramatically reduce dependence on fossil fuels, and shift into a landscape of new ideas, clean energy, and green technology. The measures and approaches in this plan are designed to accelerate this necessary transition, promote the rapid development of a cleaner, low carbon economy, create vibrant livable communities, and improve the ways we travel and move goods throughout the state. This transition will require close coordination of California's climate change and energy policies, and represents a concerted and deliberate shift away from fossil fuels toward a more secure and sustainable future. This is the firm commitment that California is making to the world, to its children and to future generations.

Making the transition to a clean energy future brings with it great opportunities. With these opportunities, however, also come challenges. As the State moves ahead with the development and implementation of policies to spur this transition, it will be necessary to ensure that they are crafted to not just cut greenhouse gas emissions and move toward cleaner energy sources, but also to ensure that the economic and employment benefits that will accompany the transition are realized in California. This means that particular attention must be paid to fostering an economic environment that promotes and rewards California-based investment and development of new technologies and that adequate resources are devoted to building and maintaining a California-based workforce equipped to help make the transition.

A Public Process

Addressing climate change presents California with a challenge of unprecedented scale and scope. Success will require the support of Californians up and down the state. At every step of the way, we have endeavored to engage the public in the development of this plan and our efforts to turn the tide in the fight against global warming.

In preparing the Draft Scoping Plan, ARB and CAT subgroups held dozens of workshops, workgroups, and meetings on specific technical issues and policy measures. Since the release of the draft plan in late June, we have continued our extensive outreach with workshops and webcasts throughout the state. Hundreds of Californians showed up to share their thoughts about the draft plan, and gave us their suggestions for improving it. We've received thousands of postcards, form letters, emails, and over 1,000 unique comments

posted to our website or sent by mail. All told, more than 42,000 people commented on the draft Plan.

ARB catalogued and publicly posted all the comments we received. In many instances, we engaged experts and staff at our partner agencies for additional evaluation of comments and suggestions.

This plan reflects the input of Californians at every level. Our partners at other State agencies, in the legislature, and at the local government level have provided key input. We've met with members of community groups to address environmental justice issues, with representatives of California's labor force to ensure that good jobs accompany our transition to a clean energy future, and with representatives of California's small businesses to ensure that this vital part of our state's economic engine flourishes under this plan. We've heeded the advice of public health and environmental experts throughout the state to design the plan so that it provides valuable co-benefits in addition to cutting greenhouse gases. We've also worked with representatives from many of California's leading businesses and industries to craft a plan that works in tandem with the State's efforts to continue strong economic growth.

In short, we've heard from virtually every sector of California's society and economy, reflecting the fact that the plan will touch the life of almost every Californian in some way.

Scoping Plan Recommendations

The recommendations in this plan were shaped by input and advice from ARB's partners on the Climate Action Team, as well as the Environmental Justice Advisory Committee (EJAC), the Economic and Technology Advancement Advisory Committee (ETAAC), and the Market Advisory Committee (MAC). Like the Draft Scoping Plan, the strength of this plan lies in the comprehensive array of emission reduction approaches and tools that it recommends.

Key elements of California's recommendations for reducing its greenhouse gas emissions to 1990 levels by 2020 include:

- **Expanding and strengthening existing energy efficiency programs as well as building and appliance standards;**
- **Achieving a statewide renewables energy mix of 33 percent;**
- **Developing a California cap-and-trade program that links with other Western Climate Initiative partner programs to create a regional market system;**
- **Establishing targets for transportation-related greenhouse gas emissions for regions throughout California, and pursuing policies and incentives to achieve those targets;**

- **Adopting and implementing measures pursuant to existing State laws and policies, including California's clean car standards, goods movement measures, and the Low Carbon Fuel Standard; and**
- **Creating targeted fees, including a public goods charge on water use, fees on high global warming potential gases, and a fee to fund the administrative costs of the State's long term commitment to AB 32 implementation.**

After Board approval of this plan, the measures in it will be developed and adopted through the normal rulemaking process, with public input.

Key Changes

This plan is built upon the same comprehensive approach to achieving reductions as the draft plan. However, as a result of the extensive public comment we received, this plan includes a number of general and measure-specific changes. The key changes and additions follow.

Additional Reports and Supplements

1. Economic and Public Health Evaluations: This plan incorporates an evaluation of the economic and public health benefits of the recommended measures. These analyses follow the same methodology used to evaluate the Draft Scoping Plan.[1]

2. CEQA Evaluation: This plan includes an evaluation of the potential environmental impacts of the Scoping Plan under the California Environmental Quality Act (CEQA).[2]

Programmatic Changes

1. Margin of Safety for Uncapped Sectors: The plan provides a 'margin of safety,' that is, additional reductions beyond those in the draft plan to account for measures in uncapped sectors that do not, or may not, achieve the estimated reduction of greenhouse gas emissions in this plan. Along with the certainty provided by the cap, this will ensure that the 2020 target is met.

2. Focus on Labor: The plan includes a discussion of issues directly related to California's labor interests and working families, including workforce development and career technical education. This additional element reflects ARB's existing activities and expanded efforts by State agencies, such as the Employment Development Department, to ensure that California will have a green technology workforce to address the challenges and opportunities presented by the transition to a clean energy future.

[1] Staff will provide an update to the Board to respond to comments received on these analyses.

[2] This evaluation is contained in Appendix J.

3. Long Term Trajectory: The plan includes an assessment of how well the recommended measures put California on the long-term reduction trajectory needed to do our part to stabilize the global climate.

4. Carbon Sequestration: The plan describes California's role in the West Coast Regional Carbon Sequestration Partnership (WESTCARB), a public-private collaboration to characterize regional carbon capture and sequestration opportunities. In addition, the plan expresses support for near-term development of sequestration technology. This plan also acknowledges the important role of terrestrial sequestration in our forests, rangelands, wetlands, and other land resources.

5. Cap-and-Trade Program: The plan provides additional detail on the proposed cap-and-trade program including a discussion regarding auction of allowances, a discussion of the proposed role for offsets, the role of voluntary renewable power purchases, and additional detail on the mechanisms to be developed to encourage voluntary early action.

6. Implementation: The plan provides additional detail on implementation, tracking and enforcement of the recommended actions, including the important role of local air districts.

Changes to Specific Measures and Programs

1. Regional Targets: ARB re-evaluated the potential benefits from regional targets for transportation-related greenhouse gases in consultation with regional planning organizations and researchers at U.C. Berkeley. Based on this information, ARB increased the anticipated reduction of greenhouse gas emissions for Regional Transportation-Related Greenhouse Gas Targets from 2 to 5 million metric tons of CO_2 equivalent ($MMTCO_2E$).

2. Local Government Targets: In recognition of the critical role local governments will play in the successful implementation of AB 32, ARB added a section describing this role. In addition, ARB recommended a greenhouse gas reduction goal for local governments of 15 percent below today's levels by 2020 to ensure that their municipal and community-wide emissions match the State's reduction target.

3. Additional Industrial Source Measures: ARB added four additional measures to address emissions from industrial sources. These proposed measures would regulate fugitive emissions from oil and gas recovery and transmission activities, reduce refinery flaring, and require control of methane leaks at refineries. We

anticipate that these measures will provide 1.5 $MMTCO_2E$ of greenhouse gas reductions.

4. Recycling and Waste Re-Assessment: In consultation with the California Integrated Waste Management Board, ARB re-assessed potential measures in the Recycling and Waste sector. As a result of this review, ARB increased the anticipated reduction of greenhouse gas emissions from the Recycling and Waste Sector from 1 to 10 $MMTCO_2E$, incorporating measures to move toward high recycling and zero-waste.[3]

5. Green Building Sector: This plan includes additional technical evaluations demonstrating that green building systems have the potential to reduce approximately 26 $MMTCO_2E$ of greenhouse gases. These tools will be helpful in reducing the carbon footprint for new and existing buildings. However, most of these greenhouse gas emissions reductions will already be counted in the Electricity, Commercial/Residential Energy, Water or Waste sectors and are not separately counted toward the AB 32 goal in this plan.

6. High Global Warming Potential (GWP) Mitigation Fee: Currently many of the chemicals with very high Global Warming Potential (GWP)—typically older refrigerants and constituents of some foam insulation products—are relatively inexpensive to purchase. ARB includes in this plan a Mitigation Fee measure to better reflect their impact on the climate. The fee is anticipated to promote the development of alternatives to these chemicals, and improve recycling and removal of these substances when older units containing them are dismantled.

7. Modified Vehicle Reductions: Based on current regulatory development, ARB modified the expected emissions reduction of greenhouse gases from the Heavy-Duty Vehicle Greenhouse Gas Emission Reduction (Aerodynamic Efficiency) measure and the Tire Inflation measure. The former measure is now expected to achieve 0.9 $MMTCO_2E$ while the latter is now expected to achieve 0.4 $MMTCO_2E$.

8. Discounting Low Carbon Fuel Standard Reductions: ARB modified the expected emission reductions from the Low Carbon Fuel Standard to reflect overlap in claimed benefits with California's clean car law (the Pavley greenhouse gas vehicle standards). This has the result of discounting expected reduction of greenhouse gas emissions from the Low Carbon Fuel Standard by approximately 10 percent.

[3] Research to help quantify these greenhouse gas emissions reductions is continuing, so only 1 $MMTCO_2E$ of these reductions are currently counted toward the AB 32 goal in this plan. Additional tons will be considered part of the safety margin.

has been created to work with State agencies to create a statewide plan to reduce State government's greenhouse gas emissions by a minimum of 30 percent by 2020.

In the first quarter of 2009, the Climate Action Team will release a report on its activities outside of its involvement in the development of the Scoping Plan. The CAT report will focus on several cross-cutting topics with which members of the CAT have been involved since the publication of the 2006 CAT report. The topics to be covered include research on the physical and consequent economic impacts of climate change as well as climate change research coordination efforts among the CAT members. There will also be an update on the important climate change adaptation efforts led by the Resources Agency and a discussion of cross-cutting issues related to environmental justice concerns. The CAT report will be released in draft form and will be available for public review in December 2008.

4. Development of the Greenhouse Gas Emission Reduction Strategy

In developing the Scoping Plan, ARB considered the State's existing climate change policy initiatives and the Early Action measures identified by the Board. Several advisory groups were formed to assist ARB in developing the Scoping Plan, including the Environmental Justice Advisory Committee (EJAC), the Economic and Technology Advancement Committee (ETAAC), and the Market Advisory Committee (MAC).

The Environmental Justice Advisory Committee (HSC §38591(a) et seq) advises ARB on development of the Scoping Plan and any other pertinent matter in implementing AB 32. The Board appoints its members, based on nominations received from environmental justice organizations and community groups.

The Economic and Technology Advancement Advisory Committee (HSC §38591(d)) includes members who are appointed by the Board based on expertise in fields of business, technology research and development, climate change, and economics. The ETAAC advises ARB on activities that will facilitate investment in, and implementation of, technological research and development opportunities, funding opportunities, partnership development, technology transfer opportunities, and related areas that lead to reductions of greenhouse gas emissions.

Members of the Market Advisory Committee (created under Executive Order S-20-06) were appointed by the Secretary of CalEPA based on their expertise in economics and climate change. The MAC advised ARB on the design of a cap-and-trade program for reducing greenhouse gas emissions.

Along with input from the advisory groups, ARB received submittals to a public solicitation for ideas, and numerous comments during public workshops, workgroup meetings, community meetings, and meetings with stakeholder groups. ARB held numerous workshops on the Draft Scoping Plan and convened workgroup meetings focused on program design and economic analysis. ARB and other involved State

agencies also held sector-specific technical workshops to look in greater detail at potential emissions reduction measures.

ARB also looked outward to examine programs at the regional, national and international levels. ARB met with and learned from experts from the European Union, the United Kingdom, Japan, Australia, the United Nations, the Regional Greenhouse Gas Initiative, the RECLAIM program, and the U.S. Environmental Protection Agency (U.S. EPA).

After the release of the Draft Scoping Plan, ARB conducted workshops and community meetings around the state to solicit public input. The Environmental Justice Advisory Committee and the Economic and Technology Advancement Advisory Committee held meetings to review and provide additional comments on the Draft Scoping Plan. In addition, ARB held meetings with numerous stakeholder groups to discuss specific greenhouse gas emissions reduction measures.

As described before, ARB has reviewed and considered both the written comments and the verbal comments received at the public workshops and meetings with stakeholders. This input, along with additional analysis, has ultimately shaped this Scoping Plan.

5. Implementation of the Scoping Plan

The foundation of the Scoping Plan's strategy is a set of measures that will cut greenhouse gas emissions by nearly 30 percent by the year 2020 as compared to business as usual and put California on a course for much deeper reductions in the long term. In addition to pursuing the reduction of greenhouse gas emissions, other strategies to mitigate climate change, such as carbon capture and storage (underground geologic storage of carbon dioxide), should also be further explored. And, as greenhouse gas reduction measures are implemented, we will continually evaluate how these measures can be optimized to also help deliver a broad range of public health benefits.

Most of the measures in this Scoping Plan will be implemented through the full rulemaking processes at ARB or other agencies. These processes will provide opportunity for public input as the measures are developed and analyzed in more detail. This additional analysis and public input will likely provide greater certainty about the estimates of costs and expected greenhouse gas emission reductions, as well as the design details that are described in this Scoping Plan. With the exception of Discrete Early Actions, which will be in place by January 1, 2010, other regulations are expected to be adopted by January 1, 2011 and take effect at the beginning of 2012.

Some of the measures in the plan may deliver more emission reductions than we expect; others less. It is also very likely that we will figure out new and better ways to cut greenhouse gas emissions as we move forward. New technologies will no doubt be developed, and new ideas and strategies will emerge. The Scoping Plan puts

California squarely on the path to a clean energy future but it also recognizes that adjustments will probably need to occur along the way and that as additional tools become available they will augment, and in some cases perhaps even replace, existing approaches.

California will not be implementing the measures in this Plan in a vacuum. Significant new action on climate policy is likely at the federal level and California and its partners in the Western Climate Initiative are working together to create a regional effort for achieving significant reductions of greenhouse gas emissions throughout the western United States and Canada. California is also developing a state Climate Adaptation Strategy to reduce California's vulnerability to known and projected climate change impacts.

ARB and other State agencies will continue to monitor, lead and participate in these broader activities. ARB will adjust the measures described here as necessary to ensure that California's program is designed to facilitate the development of integrated and cost-effective regional, national, and international greenhouse gas emissions reduction programs. (HSC §38564)

6. Climate Change in California

The impacts of climate change on California and its residents are occurring now. Of greater concern are the expected future impacts to the state's environment, public health and economy, justifying the need to sharply cut greenhouse gas emissions.

In the Findings and Declarations for AB 32, the Legislature found that:

> "The potential adverse impacts of global warming include the exacerbation of air quality problems, a reduction in quality and supply of water to the state from the Sierra snowpack, a rise in sea levels resulting in the displacement of thousands of coastal businesses and residences, damage to the marine ecosystems and the natural environment, and an increase in the incidences of infectious diseases, asthma, and other health-related problems."

The Legislature further found that global warming would cause detrimental effects to some of the state's largest industries, including agriculture, winemaking, tourism, skiing, commercial and recreational fishing, forestry, and the adequacy of electrical power.

The impacts of global warming are already being felt in California. The Sierra snowpack, an important source of water supply for the state, has shrunk 10 percent in the last 100 years. It is expected to continue to decrease by as much as 25 percent by 2050. World-wide changes are causing sea levels to rise – about 8 inches of increase has been recorded at the Golden Gate Bridge over the past 100 years – threatening low coastal areas with inundation and serious damage from storms.

II. RECOMMENDED ACTIONS

Achieving the goals of AB 32 in a cost-effective manner will require a wide range of approaches. Every part of California's economy needs to play a role in reducing greenhouse gas emissions. ARB's comprehensive greenhouse gas emissions inventory lists emission sources ranging from the largest refineries and power plants to small industrial processes and farm livestock. The recommended measures were developed to reduce greenhouse gas emissions from key sources and activities while improving public health, promoting a cleaner environment, preserving our natural resources, and ensuring that the impacts of the reductions are equitable and do not disproportionately impact low-income and minority communities. These measures also put the state on a path to meet the long-term 2050 goal of reducing California's greenhouse gas emissions to 80 percent below 1990 levels. This trajectory is consistent with the reductions that are needed globally to help stabilize the climate. While the scale of this effort is considerable, our experience with cultural and technological changes makes California well-equipped to handle this challenge.

ARB evaluated a comprehensive array of approaches and tools to achieve these emission reductions. Reducing greenhouse gas emissions from the wide variety of sources can best be accomplished though a cap-and-trade program along with a mix of complementary strategies that combine market-based regulatory approaches, other regulations, voluntary measures, fees, policies, and programs. ARB will monitor implementation of these measures to ensure that the State meets the 2020 limit on greenhouse gas emissions.

An overall limit on greenhouse gas emissions from most of the California economy – the "capped sectors" – will be established by the cap-and-trade program. (The basic elements of the cap-and-trade program are described later in this chapter.) Within the capped sectors, some of the reductions will be accomplished through direct regulations such as improved building efficiency standards and vehicle efficiency measures. Whatever additional reductions are needed to bring emissions within the cap are accomplished through price incentives posed by emissions allowance prices. Together, direct regulation and price incentives assure that emissions are brought down cost-effectively to the level of the overall cap. ARB also recommends specific measures for the remainder of the economy – the "uncapped sectors."

Exhibit 3

TITLE 17. CALIFORNIA AIR RESOURCES BOARD

NOTICE OF PUBLIC HEARING TO CONSIDER THE ADOPTION OF A PROPOSED CALIFORNIA CAP ON GREENHOUSE GAS EMISSIONS AND MARKET-BASED COMPLIANCE MECHANISMS REGULATION, INCLUDING COMPLIANCE OFFSET PROTOCOLS

The Air Resources Board (ARB or Board) will conduct a public hearing at the time and place noted below to consider adoption of a proposed regulation to implement a California greenhouse gas emissions cap-and-trade program, including compliance offset protocols.

DATE: December 16, 2010

TIME: 9:00 a.m.

PLACE: California Environmental Protection Agency
Air Resources Board
Byron Sher Auditorium
1001 I Street
Sacramento, California 95814

This item may be considered at a two-day meeting of the Board, which will commence at 9:00 a.m. on December 16, 2010, and may continue at 8:30 a.m. on December 17, 2010. Please consult the agenda for the hearing, which will be available at least ten days before December 16, 2010, to determine the day on which this item will be considered.

INFORMATIVE DIGEST OF PROPOSED ACTION AND POLICY STATEMENT OVERVIEW

Sections Affected: Proposed adoption of California Code of Regulation, title 17, new article 5, which contains new sections 95800, 95801, 95802, 95810, 95811, 95812, 95813, 95814, 95820, 95821, 95830, 95831, 95832, 95840, 95841, 95850, 95851, 95852, 95852.1, 95852.2, 95852.3, 95853, 95854, 95855, 95856, 95857, 95870, 95890, 95891, 95892, 95893, 95910, 95911, 95912, 95913, 95914, 95915, 95920, 95921, 95922, 95940, 95941, 95942, 95943, 95970, 95971, 95972, 95973, 95974, 95975, 95976, 95977, 95978, 95979, 95980, 95981, 95982, 95983, 95984, 95985, 95986, 95987, 95988, 95990, 95991, 95992, 95993, 95994, 95995, 95996, 95997, 95998, 96010, 96011, 96012, 96013, 96020, 96021, and 96022.

Background:

The California Global Warming Solutions Act of 2006 (Assembly Bill 32; Stats. 2006, Chapter 488) (AB 32) authorizes ARB to implement a comprehensive, multi-year program to reduce greenhouse gas (GHG) emissions in California. AB 32 required ARB to develop a scoping plan to reduce GHG emissions in California to 1990 levels by 2020. ARB's adopted Scoping Plan includes a comprehensive set of actions designed

to reduce GHG emissions in California, improve the environment, reduce dependence on foreign oil, diversify energy sources, save energy, create new jobs, and enhance public health. Meeting the goals of AB 32 requires a coordinated set of strategies to reduce GHG emissions throughout the economy that work within a comprehensive tracking, reporting, verification and enforcement framework. The Scoping Plan includes a variety of measures to achieve AB 32 goals, including direct regulations, performance-based standards, and market-based mechanisms. The measures included in the Scoping Plan continue to be developed through an open public process and will be in place by 2012. Many of the measures in the Scoping Plan complement and reinforce each other.

The Scoping Plan directs ARB staff to develop a cap-and-trade regulation, which is a type of market-based compliance mechanism. Once implemented, the cap-and-trade regulation will provide a fixed limit on GHG emissions from the sources responsible for about 85 percent of the state's total GHG emissions. The cap-and-trade regulation will reduce GHG emissions by applying a declining aggregate cap on GHG emissions, and will also create a flexible compliance system through the use of tradable instruments (allowances and offset credits). The regulation is designed to link up with partners in other jurisdictions, beginning with the Western Climate Initiative (WCI).

In 2007, California helped establish the Western Climate Initiative, a cooperative effort of seven U.S. states and four Canadian provinces (the "partners") that are collaborating to identify, evaluate, and implement policies to reduce GHG emissions, including the design and implementation of a regional cap-and-trade program. ARB has consulted with the partners in formulating the proposed regulation, and anticipates linking to programs promulgated by the partners as they are adopted.

ARB staff conducted an extensive public process during the development of the California cap-and-trade regulation. Through 2009 and 2010, staff developed the overall options for program design and development. ARB staff conducted extensive public consultation, including more than 35 public meetings, to discuss and share ideas with the general public and key stakeholders on the appropriate structure of the cap-and-trade program. In November 2009, staff released a conceptual framework for the cap-and-trade regulation, called the Preliminary Draft Regulation (PDR), and held a workshop on the draft in December. Staff received over 130 written comments in response to the PDR. Staff also met regularly with individual stakeholders to hear their concerns and recommendations. ARB staff collected public comments during each public workshop, which focused on key topics and program design components.

ARB also received input and advice from the Market Advisory Committee and two advisory committees created under AB 32: the Economic and Technology Advancement Advisory Committee (ETAAC) and the Environmental Justice Advisory Committee (EJAC). In addition, in May 2009 ARB, in conjunction with Cal/EPA, convened the Economic and Allocation Advisory Committee (EAAC), which included economic, financial, and policy experts. The EAAC provided recommendations on cap-and-trade

program design and reviewed ARB's updated economic analysis on the Scoping Plan that was completed in March 2010.

Description of the Proposed Regulatory Action

After considering the comments received, ARB staff is proposing a regulation that would establish the framework and requirements for California's GHG cap-and-trade program. Cap and trade is a regulatory approach that would control GHGs from major emission sources ("covered entities") by setting a firm limit (the "cap") on GHG emissions while employing market mechanisms to cost-effectively achieve the emission reduction goals. The cap for GHG emissions from major sources would commence in 2012 and decline over time, achieving emissions reductions throughout the program's duration. The cap is measured in metric tons of carbon dioxide equivalent ($MTCO_2e$). Covered entities will be able to buy permits to emit (allowances) at auction, purchase allowances from others, or purchase offset credits (the "trade"). Allowances and offset credits are more fully discussed below.

The cap-and-trade program would establish the total amount of GHG emissions that major sources would be allowed (permitted) to emit. ARB would distribute allowances to emit GHGs, and the total number of allowances created would be equal to the total amount ("aggregate cap") set for cumulative emissions from all covered entities. Each allowance would permit the holder to emit one $MTCO_2e$ of GHG. Covered entities include major GHG emitting sources, such as electricity generation, including imports, and large stationary sources (i.e. refineries, cement production facilities, oil and gas production facilities, glass manufacturing facilities, food processing plants) that emit more than 25,000 $MTCO_2e$ per year, as well as natural gas and propane fuel providers and transportation fuel providers.

The cap-and-trade program is one of the key measures included in the Scoping Plan to reduce GHG emissions. Covered entities under the cap may also be subject to other measures, standards, and regulations, including improved building efficiency standards, vehicle efficiency measures and applicable air pollution regulations.

Applicability

Starting in 2012, the proposed regulation would include covered entities emitting more than 25,000 $MTCO_2e$. This includes GHG emissions from electricity generation, including imports; industrial combustion at large stationary sources; and industrial process emissions for which adequate quantification methods exist. The program will expand in 2015 to include fuel distributors to address emissions from transportation fuels, and from combustion of other fossil fuels not covered directly at large sources in the initial phase of the program. The first three years of the proposed regulation are known as the "first compliance period," and the second three years are known as the "second compliance period."

The first compliance period would include sources responsible for more than one-third of the economy-wide emissions in California. Starting with the second compliance

period, the program would include major sources of GHG emissions responsible for about 85 percent of emissions. ARB could choose to expand the applicability of the program to include additional covered entities over time based on new information.

The proposed regulation defines and includes requirements for covered entities, opt-in covered entities, voluntarily associated entities, and other registered participants. Opt-in covered entities are industries with processes and operations that would make them covered entities except that their emissions do not exceed the 25,000 $MTCO_2e$ threshold, and that choose to participate in the cap-and-trade program. Opt-in covered entities are subject to the proposed regulation as if they exceeded the 25,000 $MTCO_2e$ threshold, including reporting, verification and compliance requirements and eligibility for allowance distribution. Voluntarily associated entities are parties such as the general public, investment banks, land use easements and private citizen groups that would be allowed to hold allowances and offsets, and would be subject to registration and reporting requirements. Other registered participants include verifiers or verification bodies, which could be private or government organizations; these participants cannot participate in trading and cannot hold compliance instruments. Under the proposed regulation, covered entities and opt-in covered entities would be required to register with ARB, report their emissions annually, acquire compliance instruments, and surrender compliance instruments to match their emissions for the compliance period. Voluntarily associated entities would also need to apply and register with ARB.

The proposed cap-and-trade regulation would apply to the following GHGs: carbon dioxide (CO_2), methane (CH_4), nitrous oxide (N_2O), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), sulfur hexafluoride (SF_6), and nitrogen trifluoride (NF_3). In a separate rulemaking action, ARB's existing mandatory reporting regulation is also being amended to support the cap-and-trade program.

Compliance Instruments

The proposed regulation would create two kinds of "compliance instruments" to allow covered entities to meet their obligations under the cap: allowances and offset credits. Approved compliance instruments would be issued by ARB or other programs that are approved by the Board. Each allowance or offset credit would represent one $MTCO_2e$.

Allowances

The cap would be divided into annual budgets that specify the number of allowances created for each year from 2012 through 2020. The initial 2012 allowance budget is based on the best estimate of actual emissions in 2012 for those sources that would be covered at the start of the cap-and-trade regulation. The cap would then decline each year beginning in 2013, and fewer allowances would be issued on an annual basis. In 2015, the program would expand to cover providers of transportation fuels and residential and commercial fuels. Therefore, the initial 2015 allowance budget reflects the addition of these GHG emissions, with the increase based on the best estimate of the actual emissions in 2015 for those sources added to the program that year. The

cap will then decline until 2020. The 2020 cap will be set at a level designed to allow California to achieve the AB 32 target in 2020.

The allowances will be distributed through a combination of free allocation and sale at auction. The proposed regulation includes a basic framework for the distribution of allowances. Staff anticipates significant comments on this framework, and will consider those comments in working to develop a more specific system for allowance distribution that can be incorporated into the final regulation.

Offset Credits

An offset credit is a compliance instrument that represents a reduction or removal of one $MTCO_2e$ of GHGs resulting from an activity not covered by the cap that can be measured, quantified, and verified. This credit can then be sold and used by a covered entity to meet a portion of its compliance obligation under the regulation. Covered entities can use offset credits to satisfy up to eight percent of the entity's total compliance obligations. Although the source that produces an offset would not be covered under the regulation, it can generate reductions for use by entities that must comply with the cap. Offset credits would need to meet criteria identified in the proposed regulation that demonstrate that the emission reductions are real, permanent, verifiable, enforceable, quantifiable, and additional.

The proposed regulation also includes a process for offset credits from qualified existing offset projects operating under specific offset protocols to be accepted into the compliance offsets program. The proposed regulation also establishes a framework for accepting sector-based offset credits from developing countries, though additional evaluation would be needed before such credits could come into the program.

Offset Protocols

ARB is proposing four compliance offset protocols for the Board to consider as part of the regulation: Compliance Offset Protocol for U.S. Ozone Depleting Substances Projects, Compliance Offset Protocol for Livestock Manure (Digester) Projects, Compliance Offset Protocol for Urban Forest Projects, and Compliance Offset Protocol for U.S. Forest Projects. The Board will consider each of these protocols as part of the proposed regulation and staff is proposing that approval of the regulation will include approval of these offset protocols. Projects using the offset protocols are subject to verification and enforcement requirements that are specified in the proposed regulation. The protocols are incorporated into the regulation by reference, and changes will require future Board action. However, changes to quantification methodologies are exempt from the Administrative Procedure Act (APA). An offset project operator using ARB approved protocols would need to publicly list its project and register with ARB or an ARB approved Offset Protocol Registry, which could include private or other government entities.

Linking to Other Cap-and-Trade Programs

The proposed regulation includes general requirements for linking to other programs. Establishing linkage with other programs will require ARB approval under the APA before allowances and/or offset credits from an external program can be used for compliance with California's regulation. The regulation does not propose linking to any specific programs at this time. Four other WCI Partner jurisdictions (New Mexico, British Columbia Ontario, and Quebec) are moving forward to initiate their cap-and-trade programs in 2012. ARB staff will evaluate those programs in 2011 and expects to make recommendations to the Board on whether linkages to these WCI programs can be in place when California's program starts in 2012.

Registration and Accounts

Under the proposed regulation, ARB would be responsible for tracking information regarding compliance instrument ownership, including transfers of ownership. The proposed regulation will require entities to register with ARB and provide information to ARB regarding ownership and submittal of compliance instruments. ARB will also require reporting of information regarding certain transactions between market participants. Some participants submitting information could be entities that do not have compliance obligations or that are not located within California. All covered entities would be required to register and create an account with ARB or designated account administrator to comply with the regulation. Voluntarily associated entities would need to register with the tracking system to hold ARB allowances or offsets.

The California Cap-and-Trade Market Tracking System (MTS) would track compliance instrument ownership, submittals and transactions. The primary goal of the MTS is to support ARB in effective implementation of the proposed regulation and to reduce the costs and administrative burden associated with long-term regulation responsibilities. The MTS will also provide information necessary for a secure, liquid, and transparent allowance market. ARB staff is working closely on development of the MTS with our partners in the WCI, since coordinated approaches to a tracking system will simplify linking the individual programs into a regional market system.

Compliance Requirements for Covered Entities

The regulation would apply an emissions threshold to determine the entities that would have a regulatory compliance obligation under the program. The inclusion threshold for each covered entity is based on the subset of GHG emissions that generate a compliance obligation for that entity. Fuel suppliers will be covered starting in 2015 based on a threshold applied to emissions associated with combustion of the fuels they deliver. Any entity whose emissions exceed the threshold in any year of a compliance period has a compliance obligation for that compliance period and the next compliance period, unless it has shut down all processes. For an entity that has shut down all processes, units, and supply operations subject to reporting, an emissions data report must be submitted for the year in which a facility or supplier's GHG-emitting processes

and operations ceased to operate, and for the first full year of non-operation following a permanent shutdown. The verification requirements in section 95103 of the Mandatory Reporting Requirements do not apply to the first full year of non-operation following a permanent shutdown.

The proposed regulation includes three-year compliance periods with the first period commencing on January 1, 2012. A compliance period is the length of time for which covered entities must submit compliance instruments equal to their verified GHG emissions. Covered entities would be required to submit a portion of the compliance instruments annually, with the remaining due following the end of the three-year compliance period. Establishing compliance periods that last for three years (instead of one year) provides some compliance flexibility.

When the covered entity surrenders the compliance instruments, ARB permanently retires them. If a covered entity does not surrender sufficient compliance instruments by the compliance date, the regulation would require the entity to cover its deficit by submitting additional allowances.

Greenhouse Gas Emission Reductions

Staff estimates that implementation of the proposed regulation would reduce GHG emissions by 18 to 27 $MMTCO_2e$ in 2020.

Documents Incorporated by Reference

(1) ASTM 6751-08, “Standard Specification for Biodeisel Fuel Blendstock (B100) for Middle Distillate Fuels” approved September 15, 2007, revised October 1, 2008;
(2) ASTM D1835-05, “Standard Specification for Liquefied Petroleum (LP) Gases;” April 1, 2005;
(3) ASTM D6751 - 09a, “Standard Specification for Biodiesel Fuel Blend Stock (B100) for Middle Distillate Fuels,” approved September 15, 2007, revised October 1, 2008;
(4) ASTM D6866 – 10, “Standard Test Methods for Determining the Biobased Content of Solid, Liquid, and Gaseous Samples Using Radiocarbon Analysis,” August 6, 2010 and
(5) Z’berg-Nejedly Forest Practices Act of 1973, as amended January 1, 1998.

The following documents are ARB-drafted documents that will be incorporated by reference into the cap-and-trade regulation when it is adopted. Any changes to these documents will be made available in accordance with the Administrative Procedure Act (Government Code section 11340 et seq.). The final date of these documents, if approved, will be the date of final adoption by ARB.

Compliance Offset Protocol for Forest Projects
Compliance Offset Protocol for Livestock Manure (Digester) Projects
Compliance Offset Protocol for U.S. Ozone Depleting Substances Projects
Compliance Offset Protocol for Urban Forest Projects

COMPARABLE FEDERAL REGULATIONS

This regulation is not mandated by federal law or regulations, and there are no comparable federal regulations.

AVAILABILITY OF DOCUMENTS AND AGENCY CONTACT PERSONS

The Board staff has prepared an Initial Statement of Reasons (ISOR) for the proposed regulatory action, which includes a summary of the economic and environmental impacts of the proposal. The report is entitled "Initial Statement of Reasons: Proposed Regulation to Implement the California Cap-and-Trade Program".

Copies of the ISOR and the full text of the proposed regulatory language may be accessed on ARB's website listed below, or may be obtained from the Public Information Office, Air Resources Board, 1001 I Street, Visitors and Environmental Services Center, First Floor, Sacramento, California 95814, (916) 322-2990, at least 45 days prior to the scheduled hearing on December 16, 2010.

Upon its completion, the Final Statement of Reasons (FSOR) will be available and copies may be requested from the agency contact persons identified in this notice, or may be accessed on ARB's website listed below.

Inquiries concerning the substance of the proposed regulation may be directed to Mr. Steve Cliff, Manager of the Program Evaluation Branch, at (916) 322-7194 or Ms. Brieanne Aguila, Air Pollution Specialist at (916) 324-0919.

Further, the agency representative and designated back-up contact persons to whom nonsubstantive inquiries concerning the proposed administrative action may be directed are Ms. Lori Andreoni, Manager, Board Administration & Regulatory Coordination Unit, (916) 322-4011, or Ms. Amy Whiting, Regulations Coordinator, (916) 322-6533. The Board has compiled a record for this rulemaking action, which includes all the information upon which the proposal is based. This material is available for inspection upon request to the contact persons.

This notice, the ISOR and all subsequent regulatory documents, including the FSOR, when completed, are available on ARB's website for this rulemaking at http://www.arb.ca.gov/regact/2010/capandtrade10/capandtrade10.htm

ECONOMIC ANALYSIS

Two models were used for the economic analysis of the proposed regulation. The Energy 2020 model was used to estimate the potential GHG emission reductions and the changes in investment and fuel use. The Environmental Dynamic Revenue Analysis Model (E-DRAM) was used to estimate the macroeconomic impacts of the proposed cap-and-trade regulation on the statewide economy including impacts on gross state product, personal income, and employment, based in part on outputs from Energy 2020. These analyses are presented in 2007 dollars and focus on the impacts of the proposed regulation in 2020.

Under the proposed regulation, projected economic growth would continue virtually on par with current forecasts. At likely allowance prices ($15 to $30 in the year 2020), gross state product will grow annually by about 2.3 percent instead of 2.4 percent. Impacts on long-term projected growth rates in personal income and employment are similarly small.

Investment in more energy efficient vehicles, buildings and industrial processes will help reduce fuel use between 2 and 4 percent in 2020. These reductions will help offset potential increases in the price of electricity, natural gas, and gasoline. In 2020, net expenditures (i.e., investment less fuel savings) are estimated to slightly increase by approximately 0.2 percent.

ARB's economic analysis is not meant to predict the increased growth in sectors that could result because of new opportunities created by imposing a carbon price, such as those that design or manufacture renewable technologies, or predict the creation of so called "green jobs." This analysis can therefore be considered a cautious estimate of the potential statewide impacts from the imposition of a cap-and-trade program.

The economic analysis also focuses exclusively on the economic effects in California of implementing the cap-and-trade program, and does not consider the avoided costs of inaction. The potential effects of climate change that are expected to occur in California, such as increased water scarcity, reduced crop yield, sea level rise, and increased incidence of wildfires, could cause severe economic impacts. While California has developed a Climate Adaptation Strategy to help alleviate these potential costs, the risk of potentially high economic costs from climate change in California remains real.

COSTS TO PUBLIC AGENCIES AND TO BUSINESSES AND PERSONS AFFECTED

The determinations of the Board's Executive Officer concerning the costs or savings necessarily incurred by public agencies and private persons and businesses in reasonable compliance with the proposed regulation are presented below.

Costs to State Government and Local Agencies

The Executive Officer has determined that the proposed regulatory action would create costs or savings, as defined in Government Code sections 11346.5(a)(5) and 11346.5(a)(6), to State agencies or in federal funding to the State. The proposed regulatory action would create costs and would impose a mandate on some State and local agencies, but would not create costs or impose a mandate on school districts. At least eight California public universities, several municipal utilities, two correctional facilities and the California Department of Water Resources would have a compliance obligation under the proposed regulation. These entities would be required to surrender allowances or offsets equal to the amount of their GHG emissions during the compliance period.

Because the regulatory requirements apply equally to all covered entities and unique requirements are not imposed on local agencies, the Executive Officer has determined that the proposed regulatory action imposes no costs on local agencies that are required to be reimbursed by the State pursuant to part 7 (commencing with section 17500), division 4, title 2 of the Government Code, and does not impose a mandate on local agencies or school districts that is required to be reimbursed pursuant to section 6 of Article XIII B of the California Constitution.

Costs to Businesses and Private Individuals

In developing this regulatory proposal, ARB staff evaluated the potential economic impacts on representative private persons or businesses. The Executive Officer has determined that representative private persons and businesses would be affected by the cost impacts from the proposed regulatory action. Representative private persons and businesses that do not exceed the emissions threshold would not be directly regulated under the proposed action, but would be indirectly affected by changes to the cost of using fossil-fuel based energy. Pursuant to Government Code section 11346.5(a)(7)(C), the Executive Officer has made an initial determination that the proposed regulatory action would not have a significant statewide adverse economic impact directly affecting businesses, and little or no impact on the ability of California businesses to compete with businesses in other states.

The proposed regulation imposes direct costs on businesses that are required to quantify and report their GHG emissions and acquire and surrender compliance instruments. Regulated businesses may face additional indirect costs due to increased energy and input prices, and some businesses might be impacted based on the compliance path they choose to meet their obligations under the proposed regulation. However, the proposed regulation would not impose sufficient direct or indirect costs to eliminate businesses in California. It is not possible to quantify the number of businesses that will be created in response to opportunities that arise as a result of the proposed regulation. However, staff believes that startups in emerging sectors such as renewable energy and biofuel production could represent significant numbers of new, small and medium sized businesses.

Therefore, in accordance with Government Code section 11346.3, the Executive Officer has determined that the proposed regulatory action would not eliminate existing businesses within the State of California, but would affect the creation of new businesses or the expansion of existing businesses currently doing business in California. The proposed regulatory action would not eliminate jobs within the State of California, but would affect the creation of jobs within California.

ARB estimates that 360 businesses or covered entities would participate in the proposed cap-and-trade program from the year of initial implementation through 2020. These businesses include: electricity generators; electricity importers; industrial facilities including cement plants, cogeneration facilities, hydrogen plants, petroleum refiners,

and general stationary combustion facilities; and many fuel providers including wholesalers of gasoline, distillate, propane, and natural gas.

In general, most small businesses in regulated sectors would not be subject to the proposed regulation because their total GHG emissions are below the GHG reporting threshold, thereby exempting them from compliance obligations under the proposed regulation. However, small businesses may experience similar cost impacts as consumers. Cost impacts on consumers would result from changes in energy prices. Households and small businesses that consume less energy (directly by reducing their consumption of energy or indirectly by utilizing goods and services that are produced using less energy) will be less affected by higher prices than those that consume more energy. Incentive programs available to small businesses and consumers will provide access to funds for investing in energy efficient technologies, which includes low interest loans, rebates and credits. Energy savings from efficiency improvements are likely to partially offset or fully mitigate the impact of any increase in electricity prices and could mean decreased energy bills. Most California businesses will likely pass along the cost increases to consumers in the form of slightly higher prices for their products or services.

ARB staff has considered whether any proposed alternatives would lessen potential adverse economic impacts on businesses. The alternatives that staff has considered are described in more detail in the Initial Statement of Reasons.

The Executive Officer has also determined, pursuant to California Code of Regulations, title 1, section 4, that the proposed regulatory action would affect small businesses.

In accordance with Government Code sections 11346.3(c) and 11346.5(a)(11), the Executive Officer has found that the reporting requirements of the proposed regulation which apply to businesses are necessary for the health, safety, and welfare of the people of the State of California.

Before taking final action on the proposed regulatory action, the Board must determine that no reasonable alternative considered by the Board, or that has otherwise been identified and brought to the attention of the Board, would be more effective in carrying out the purpose for which the action is proposed or would be as effective and less burdensome to affected private persons than the proposed action.

A detailed assessment of the economic impacts of the proposed regulatory action can be found in the Economic Impacts chapter of the Initial Statement of Reasons and in Appendix N – Supporting Documentation for the Economic Analysis.

SUBMITTAL OF COMMENTS

Interested members of the public may present comments orally or in writing at the meeting, and comments may also be submitted by postal mail or by electronic submittal before the meeting. The public comment period for this regulatory item will begin on November 1, 2010. To be considered by the Board, written comments not physically

submitted at the meeting must be submitted on or after November 1, 2010, and received **no later than 12:00 noon, December 15, 2010,** and must addressed to the following:

Postal mail: Clerk of the Board, Air Resources Board
1001 I Street, Sacramento, California 95814

Electronic submittal: http://www.arb.ca.gov/lispub/comm/bclist.php

Please note that under the California Public Records Act (Government Code section 6250 et seq.), your written and oral comments, attachments, and associated contact information (e.g., your address, phone, email, etc.) become part of the public record and can be released to the public upon request. Additionally, this information may become available via Google, Yahoo, and other search engines.

The Board requests but does not require that 20 copies of any written statement be submitted and that all written statements be filed at least 10 days prior to the hearing so that ARB staff and Board Members have time to fully consider each comment. The Board encourages members of the public to bring to the attention of staff in advance of the hearing any suggestions for modification of the proposed regulatory action.

STATUTORY AUTHORITY AND REFERENCES

This regulatory action is proposed under the authority granted in sections 38510, 38560, 38562, 38570, 38571, 38580, 39600 and 39601 of the Health and Safety Code. This regulatory action is proposed to implement, interpret, or make specific sections 38530, 38560.5, 38564, 38565, 38570 and 39600 of the Health and Safety Code.

HEARING PROCEDURES

The public hearing will be conducted in accordance with the California Administrative Procedure Act, title 2, division 3, part 1, chapter 3.5 (commencing with section 11340) of the Government Code.

Following the public hearing, the Board may adopt the regulatory language as originally proposed, or with non substantial or grammatical modifications. The Board may also adopt the proposed regulatory language with other modifications if the text as modified is sufficiently related to the originally proposed text that the public was adequately placed on notice that the regulatory language as modified could result from the proposed regulatory action; in such event the full regulatory text, with the modifications clearly indicated, will be made available to the public, for written comment, at least 15 days before it is adopted.

The public may request a copy of the modified regulatory text from ARB's Public Information Office, Air Resources Board, 1001 I Street, Visitors and Environmental Services Center, First Floor, Sacramento, California 95814, (916) 322-2990.

SPECIAL ACCOMMODATION REQUEST

Special accommodation or language needs can be provided for any of the following:

- An interpreter to be available at the hearing;
- Documents made available in an alternate format (i.e., Braille, large print, etc.) or another language;
- A disability-related reasonable accommodation.

To request these special accommodations or language needs, please contact the Clerk of the Board at (916) 322-5594 or by facsimile at 916) 322-3928 as soon as possible, but no later than 10 business days before the scheduled Board hearing. TTY/TDD/Speech to Speech users may dial 711 for the California Relay Service.

Comodidad especial o necesidad de otro idioma puede ser proveído para alguna de las siguientes:

- Un intérprete que esté disponible en la audiencia
- Documentos disponibles en un formato alterno (por decir, sistema Braille, o en impresión grande) u otro idioma.
- Una acomodación razonable relacionados con una incapacidad.

Para solicitar estas comodidades especiales o necesidades de otro idioma, por favor llame a la oficina del Consejo al (916) 322-5594 o envíe un fax a (916) 322-3928 lo más pronto posible, pero no menos de 10 días de trabajo antes del día programado para la audiencia del Consejo. TTY/TDD/Personas que necesiten este servicio pueden marcar el 711 para el Servicio de Retransmisión de Mensajes de California.

CALIFORNIA AIR RESOURCES BOARD

/s/

_____

James N. Goldstene
Executive Officer

Date: October 19, 2010

The energy challenge facing California is real. Every Californian needs to take immediate action to reduce energy consumption. For a list of simple ways you can reduce demand and cut your energy costs see our Website at www.arb.ca.gov.

Exhibit 4

State of California
AIR RESOURCES BOARD

California Cap-and-Trade Program

Resolution 11-32

October 20, 2011

Agenda Item No.: 11-8-1

WHEREAS, sections 39600 and 39601 of the Health and Safety Code authorize the Air Resources Board (ARB or Board) to adopt standards, rules, and regulations and to do such acts as may be necessary for the proper execution of the powers and duties granted to and imposed upon the Board by law;

WHEREAS, the California Global Warming Solutions Act of 2006 (AB 32; Chapter 488, Statutes of 2006; Health and Safety Code section 38500 et seq.) declares that global warming poses a serious threat to the economic well-being, public health, natural resources, and environment of California and creates a comprehensive multi-year program to reduce California's greenhouse gas (GHG) emissions to 1990 levels by 2020;

WHEREAS, AB 32 added section 38501 to the Health and Safety Code, which expresses the Legislature's intent that ARB coordinate with State agencies and consult with the environmental justice community, industry sectors, business groups, academic institutions, environmental organizations, and other stakeholders in implementing AB 32; and design emissions reduction measures to meet the statewide emissions limits for greenhouse gases in a manner that minimizes costs and maximizes benefits for California's economy, maximizes additional environmental and economic co-benefits for California, and complements the State's efforts to improve air quality;

WHEREAS, section 38501(c) of the Health and Safety Code declares that California has long been a national and international leader on energy conservation and environmental stewardship efforts, and the program established pursuant to AB 32 will continue this tradition of environmental leadership by placing California at the forefront of national and international efforts to reduce GHG emissions;

WHEREAS, section 38501(d) of the Health and Safety Code confirms that national and international actions are necessary to fully address the issue of global warming, but action taken by California to reduce GHG emissions will have far reaching effects by encouraging other states, the federal government, and other countries to act;

WHEREAS, section 38510 of the Health and Safety Code designates ARB as the State agency charged with monitoring and regulating sources of GHG emissions in order to reduce these emissions;

WHEREAS, section 38560 of the Health and Safety Code directs ARB to adopt rules and regulations in an open public process to achieve the maximum technologically feasible and cost-effective GHG emissions reductions from sources or categories of sources;

WHEREAS, section 38562 of the Health and Safety Code requires ARB to adopt GHG emissions limits and emissions reduction measures by regulation to achieve the maximum technologically feasible and cost-effective reductions in GHG emissions in furtherance of achieving the statewide GHG emissions limit, to become operative beginning on January 1, 2012;

WHEREAS, section 38562 of the Health and Safety Code requires ARB, to the extent feasible and in furtherance of achieving the statewide GHG emissions limit, to do all of the following:

> Design the regulations, including distribution of emissions allowances where appropriate, in a manner that is equitable, seeks to minimize costs and maximize total benefits to California, and encourages early action to reduce GHG emissions;
>
> Ensure that activities undertaken to comply with the regulations do not disproportionately impact low-income communities;
>
> Ensure that entities that have voluntarily reduced their GHG emissions prior to the implementation of this section receive appropriate credit for early voluntary reductions;
>
> 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 standards and to reduce toxic air contaminant emissions;
>
> Consider cost-effectiveness of these regulations;
>
> Consider overall societal benefits, including reductions in other air pollutants, diversification of energy sources, and other benefits to the economy, environment, and public health;
>
> Minimize the administrative burden of implementing and complying with these regulations;
>
> Minimize leakage; and

Consider the significance of the contribution of each source or category of sources to statewide emissions of greenhouse gases.

WHEREAS, sections 38562(c) and 38570 of the Health and Safety Code authorize ARB to adopt regulations that utilize market-based compliance mechanisms;

WHEREAS, section 38570 of the Health and Safety Code also directs ARB, to the extent feasible and in furtherance of achieving the statewide GHG emissions limit, to do all of the following before including any market-based compliance mechanism in the regulations:

Consider the potential for direct, indirect, and cumulative emissions impacts from these mechanisms, including localized impacts in communities that are already adversely impacted by air pollution;

Design any market-based compliance mechanism to prevent any increase in the emissions of toxic air contaminants or criteria air pollutants; and

Maximize additional environmental and economic benefits for California, as appropriate.

WHEREAS, section 38570(c) of the Health and Safety Code further directs ARB to adopt regulations governing how market-based compliance mechanisms may be used by regulated entities subject to GHG emissions limits and mandatory emissions reporting requirements to achieve compliance with their GHG emissions limits;

WHEREAS, section 38571 of the Health and Safety Code directs ARB to adopt methodologies for the quantification of voluntary GHG emissions reductions and regulations to verify and enforce any voluntary GHG emissions reductions that are authorized by ARB for use to comply with GHG emissions limits established by ARB; the adoption of methodologies is exempt from the rulemaking provisions of the Administrative Procedure Act;

WHEREAS, California is participating in the Western Climate Initiative (WCI), with several Canadian Partner jurisdictions considering implementing GHG cap-and-trade programs and formally linking them to form a regional market for compliance instruments;

WHEREAS, by linking California's program to WCI Partner jurisdictions, the combined programs will result in more emission reductions, generate greater potential for lower cost emissions reductions, enhance market liquidity, and will likely reduce the compliance costs of covered sources more than could be realized through a California-only program;

WHEREAS, establishing and implementing a California and regional GHG cap-and-trade program requires ARB and WCI Partner jurisdictions to harmonize a number of

specific regulatory and operational provisions, including, but not limited to, sources subject to compliance obligations, cost-containment mechanisms, evaluation of regulatory baselines for existing offset protocols, procedures for developing new offset protocols, market tracking system development and operation, auction services, financial services, and market monitoring and oversight;

WHEREAS, ARB and the WCI Partner jurisdictions are working towards establishing a Regional Administrative Organization similar to other established cap-and-trade programs (e.g., Regional Greenhouse Gas Initiative) to meet the goal of regionally coordinated administration of cap-and-trade services;

WHEREAS, staff has completed a Final Regulation Order establishing a GHG cap-and-trade program for California; the regulation is set forth in Attachment A hereto and includes the following elements:

Addresses emissions of carbon dioxide (CO_2), methane (CH_4), nitrous oxide (N_2O), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), sulfur hexafluoride (SF_6), and nitrogen trifluoride (NF_3);

Identifies the program scope: starting in 2012, electricity, including imports, and large (emissions >25,000 metric tons carbon dioxide per year) industrial facilities are included; starting in 2015, distributors of transportation fuels, natural gas, and other fuels are included;

Establishes a declining aggregated emissions cap on included sectors. The cap starts at 162.8 million allowances in 2013, which is equal to the emissions forecast for that year. The cap declines approximately 2 percent per year in the initial period (2013–2014). In 2015, the cap increases to 394.5 million allowances to account for the expansion in program scope to include fuel suppliers. The cap declines at approximately 3 percent per year between 2015 and 2020. The 2020 cap is set at 334.2 million allowances;

Provides for distribution of allowances through a mix of direct allocation and auction in a system designed to reward early action and investment in energy efficiency and GHG emissions reductions; allowances will be distributed for the purposes of price containment, industry transition and assistance, and fulfillment of AB 32 statutory objectives;

Establishes a market platform for allowance auction and sale;

Establishes cost-containment mechanisms and market flexibility mechanisms, including trading of allowances and offsets, allowance banking, a two year compliance period and two 3-year compliance periods, the ability to use offsets for up to 8 percent of an entity’s compliance obligation, and an allowance reserve that provides allowances at fixed prices to those with compliance obligations;

Establishes a mechanism to link with other GHG trading programs and approve the use of compliance instruments issued by a linked external GHG trading program;

Establishes requirements and procedures for ARB to issue offset credits according to offset protocols adopted by the Board;

Includes four offset protocols to be considered for adoption by the Board as part of this regulatory package;

Establishes a mechanism to include international offset programs from an entire sector within a region;

Establishes a robust enforcement mechanism that will discourage gaming of the system and deter and vigorously punish fraudulent activities; and

Provides an opt-in provision for entities whose annual GHG emissions are below the threshold to voluntarily participate in this program.

WHEREAS, staff conducted over forty public workshops regarding the Final Regulation Order during the period 2008–2011, and also participated in numerous other meetings with various stakeholders to provide additional opportunities to participate in the regulatory development process;

WHEREAS, the Board has considered the community impacts of the Final Regulation Order, including environmental justice concerns;

WHEREAS, staff had prepared a document entitled “Staff Report: Initial Statement of Reasons for Proposed Regulation to Implement the California Cap-and-Trade Program” (ISOR), which presents the rationale and basis for the Final Regulation Order and identifies the data, reports, and information relied upon;

WHEREAS, public hearings and other administrative proceedings were held in accordance with the provisions of Chapter 3.5 (commencing with section 11340), part 1, division 3, title 2 of the Government Code;

WHEREAS, the Final Regulation Order was made available to the public at least 10 days prior to the public hearing to consider the Final Regulation Order;

WHEREAS, in consideration of the Final Regulation Order, written comments, and public testimony it has received to date, the Board finds that:

GHG emissions associated with entities covered by the cap-and-trade regulation account for about 85 percent of GHG emissions in the State;

Covered entities can reduce emissions to comply with the cap-and-trade regulation using a variety of currently available GHG reduction strategies, including those complementary measures identified in the Scoping Plan;

In addition to the complementary measures identified in the Scoping Plan, the cap-and-trade regulation is expected to significantly reduce GHG emissions. The cap-and-trade regulation will ensure GHG emissions levels in 2020 are equal to 1990 levels;

The cap-and-trade regulation was developed using the best available economic and scientific information and will achieve the maximum technologically feasible and cost-effective GHG emissions reductions from covered entities and offset projects;

The GHG emissions reductions resulting from the implementation of the cap-and-trade regulation are expected to be real, permanent, quantifiable, verifiable, and enforceable by ARB, and the cap-and-trade regulation complements and does not interfere with other air quality efforts;

The cap-and-trade regulation meets the statutory requirements identified in section 38562 of the Health and Safety Code;

The cap-and-trade regulation meets the statutory requirements for a market-based mechanism identified in section 38570 of the Health and Safety Code;

The cap-and-trade regulation was developed in an open public process, in consultation with affected parties, through numerous public workshops, individual meetings, and other outreach efforts;

The cap-and-trade regulation is predicated on GHG regulations that are clear, consistent, enforceable, and transparent and helps meet the goals of AB 32;

The benefits to human health, public safety, public welfare, or the environment justify the costs of the cap-and-trade regulation;

The cost-effectiveness of the cap-and-trade regulation has been considered, and the regulation will achieve cost-effective GHG emissions reductions;

The cap-and-trade regulation is consistent with ARB's environmental justice policies and will equally benefit residents of any race, culture, or income level;

Robust reporting and verification requirements associated with the cap-and-trade regulation are necessary for the health, safety, and welfare of the people of the State; and

No reasonable alternative considered, or that has otherwise been identified and brought to the attention of ARB, would be more effective at carrying out the purpose for which the regulation is proposed or would be as effective and less burdensome to affected entities than the proposed regulation.

WHEREAS, the Board further finds that:

The integrity of offsets is critical to the success of a cap-and-trade program;

It is in the interest of the State of California to pursue a comprehensive approach that aligns the incentives provided by AB 32 programs, including the cap-and-trade regulation, with statewide policy for handling solid waste, including recycling, remanufacturing of recovered materials in state, composting and anaerobic digestion, waste-to-energy facilities, landfilling, and the treatment of biomass;

Electricity rates should create the appropriate incentives for electricity conservation, greenhouse gas efficient technologies, and efficient distributed electricity generation such as combined heat and power;

Carbon pricing is an important function of the cap-and-trade regulation, and that it is equally important that if allowance value provided to electric distribution utilities for ratepayer benefit is returned directly to customers it is consistent with State efforts to promote energy efficiency and energy conservation;

Incentives created by the cap-and-trade program should motivate investment and innovation in clean technology;

The cap-and-trade regulation will establish a greenhouse gas market that allows business flexibility to comply with the regulation while also ensuring strong oversight and transparency;

State universities serve an important public service in providing affordable higher education;

Water rates should create the appropriate incentives for water conservation, greenhouse gas efficient technologies, and the efficient supply and use of water;

Carbon pricing is an important function of the cap-and-trade regulation, and that it is equally important that if allowance value is used for the benefit of water ratepayers it is used consistent with State efforts to promote efficient use and supply of water and water conservation; and

The cap-and-trade program should properly account for the emissions associated with generation and transmission of both in-State and imported electricity in accordance with AB 32.

WHEREAS, at a public hearing held December 16, 2010, the Board considered the proposed regulations for sections 95800 to 96023, title 17, California Code of Regulations (CCR). The Board considered the ISOR released on October 28, 2010, and adopted Resolution 10-42 directing several modifications proposed by staff and guidance on implementation. The Board advised staff that additional changes were necessary. As a result, on July 25, 2011, the first Notice of Public Availability of Modified Text and Availability of Additional Documents (1st 15-Day Change Notice) was issued. The public comment period for the 1st 15-Day Change Notice ended at 5:00 p.m. on August 11, 2011;

WHEREAS, additional modifications to the regulatory text were proposed in a Second Notice of Public Availability of Modified Text (2nd 15-Day Change Notice). The additional modifications addressed comments ARB staff received in the first 15-day Change Notice and were the result of additional staff analysis and stakeholder engagement. The 2nd 15-Day Change Notice was posted September 12, 2011. The public comment period for the 2nd 15-Day Change Notice ended at 5:00 p.m. on September 27, 2011;

WHEREAS, in the Final Statement of Reasons, staff is preparing responses to comments received on the record during the initial 45-day comment period, comments presented at the December 16, 2010 Board hearing both orally and in writing, comments received during the first 15-day Change Notice released July 25, 2011, and the comments received during second 15-Day Change Notice released September 12, 2011;

WHEREAS, ARB has a regulatory program certified under Public Resources Code section 21080.5, and pursuant to this program ARB conducts environmental analyses to meet the requirements of the California Environmental Quality Act (CEQA);

WHEREAS, ARB staff prepared an environmental analysis for the cap-and-trade regulation pursuant to its certified regulatory program; this analysis is contained in the Functional Equivalent Document (FED) in Appendix O to the ISOR;

WHEREAS, the FED, which sets forth a programmatic analysis of the potential environmental impacts associated with the cap-and-trade regulation and the offset protocols, including potential alternatives to the regulation, was released for public review on October 28, 2010, with a 45-day written comment period from November 1, 2010 to December 16, 2010;

WHEREAS, in Resolution 10-42, the Board also directed the Executive Officer to complete the regulatory modifications and the environmental review process in accordance with the requirements of the Administrative Procedure Act and CEQA under ARB's certified regulatory program, and to either take final action to adopt the proposed regulation or return the matter to the Board for further consideration;

WHEREAS, ARB received written comments on the potential environmental impacts of the cap-and-trade regulation during the initial 45-day public comment period, and the two subsequent 15-day comment periods associated with the two Notices of Public Availability of Modified Text;

WHEREAS, ARB staff has reviewed the written comments on the potential environmental impacts received during the comment periods and prepared written responses to these comments;

WHEREAS, on October 10, 2011, ARB released a document called the *Response to Comments on the Functional Equivalent Document Prepared for the California Cap on GHG Emissions and Market-Based Compliance Mechanisms* (Response to FED Comments) which includes a summary of written comments received on the FED that raise significant environmental issues and staff's written responses as set forth in Attachment B to this Resolution;

WHEREAS, in the FED, ARB committed to pursue an adaptive management approach to monitor and respond as appropriate to address unanticipated, adverse, localized air quality impacts and impacts from the U.S. Forest Protocol on special states, species, sensitive habitats, and federally protected wetlands as part of the implementation of the cap-and-trade regulation and the U.S. Forest Protocol;

WHEREAS, on October 10, 2011, ARB released the proposed *Adaptive Management Plan for the Cap-and-Trade Regulation* (Adaptive Management Plan) that describes ARB's commitment and process to monitor for unanticipated and unintended adverse impacts related to localized air quality resulting from implementation of the cap-and-trade regulation and adverse forestry impacts from implementation of the U.S. Forest Protocol, and ARB's commitment to developing and implementing appropriate actions to address any impacts identified as set forth in Attachment C to this Resolution;

WHEREAS, ARB has the authority under sections 39600, 39601, and 38500 et seq. of the Health and Safety Code to adopt standards, rules and regulations to address unanticipated and unintended adverse impacts related to localized air quality resulting from implementation of the cap-and-trade regulation and adverse forestry impacts from implementation of the U.S. Forest Protocol;

WHEREAS, at a duly noticed public hearing held on October 20**,** 2011, staff presented the Response to FED Comments and the Adaptive Management Plan for Board for approval, and the Final Regulation Order for adoption;

WHEREAS, the Board has reviewed and considered the FED, the Response to FED Comments, and the Adaptive Management Plan;

WHEREAS, CEQA and ARB's certified regulatory program require that before taking final action on any proposal for which significant environmental comments have been raised, the decision maker must approve a written response to each such comment; and

WHEREAS, CEQA and ARB's certified regulatory program require that any proposal for which significant adverse environmental impacts have been identified during the review process shall not be approved if there are feasible mitigation measures or feasible alternatives which would substantially reduce such adverse impacts.

NOW, THEREFORE, BE IT RESOLVED that the Board hereby certifies that the FED was completed in compliance with CEQA under ARB's certified regulatory program, reflects the agency's independent judgment and analysis, and was presented to the Board whose members reviewed, considered, and approved the information therein prior to acting on the proposed regulation.

BE IT FURTHER RESOLVED that the Board approves the written responses to comments raising significant environmental issues included in the Response to FED Comments.

BE IT FURTHER RESOLVED that in consideration of the FED and the Response to FED Comments, and in accordance with the requirements of CEQA and ARB's certified regulatory program, the Board adopts the Findings and Statement of Overriding Considerations as set forth in Attachment D to this Resolution.

BE IT FURTHER RESOLVED that the Board approves the *Adaptive Management Plan for the Cap-and-Trade Regulation*.

BE IT FURTHER RESOLVED that the Board adopts sections 95800 to 96023, title 17, California Code of Regulations (including the four compliance protocols incorporated by reference in the regulation: the Compliance Offset Protocols for Livestock Projects, Ozone Depleting Substances Projects, Urban Forest Projects, and U.S. Forest Projects) as set forth in Attachment A to this Resolution.

BE IT FURTHER RESOLVED that the Board directs the Executive Officer to finalize the FSOR and submit the rulemaking package to Office of Administrative Law by October 28, 2011.

BE IT FURTHER RESOLVED that the Board directs the Executive Officer to continue discussions with stakeholders to identify and propose, as necessary, during the initial implementation of the cap-and-trade program, potential amendments to the Regulation including, but not limited to the following areas:

1. Provisions to balance flexibility and accumulation of market power including auction frequency, and holding and purchase limits or other methods;

2. Definition of Resource Shuffling to: (a) provide appropriate incentives for accelerated divestiture of high-emitting resources by recognizing that these divestitures can further the goals of AB 32; and (b) ensure changes in reported emissions from imported electricity that serves California do not result merely in a shift of emissions within the Western Electricity Coordinating Council region, but reduces overall emissions;

3. Allocation of allowances for emissions associated with natural gas combustion emissions as written in section 95852 of the cap-and-trade regulation; and

4. Distribution of allowance value associated with cap-and-trade compliance costs from using electricity to supply water, and the expected ability of allowance allocation and other measures to adequately address the incidence of these costs equitably across regions of the State.

BE IT FURTHER RESOLVED that the Board directs the Executive Officer to continue to review information concerning the emissions intensity, trade exposure, and in-State competition of industries in California, and to recommend to the Board changes to the leakage risk determinations and allowance allocation approach, if needed, prior to the initial allocation of allowances for the first or second compliance period, as appropriate, for industries identified in Table 8-1 of the cap-and-trade regulation, including refineries and glass manufacturers.

BE IT FURTHER RESOLVED that the Board directs the Executive Officer to continue to work with stakeholders to further develop the allowance allocation approach for the petroleum refining sector and associated activities in the second and third compliance periods. This evaluation should include additional analysis of the Carbon Weighted Tonne approach and treatment of hydrogen production, coke calcining, and other activities that may operate under a variety of ownership structures.

BE IT FURTHER RESOLVED that the Board directs the Executive Officer to initiate a study to analyze the ability of the agricultural industry, including food processors, to pass on regulatory costs to consumers, given domestic and international competition and continually fluctuating global markets. The Executive Officer shall identify and propose regulatory amendments, as appropriate.

BE IT FURTHER RESOLVED that the Board directs the Executive Officer to identify and propose new benchmarks and allowance allocation for manufacturing of new products in California, as appropriate. The allowance allocation should incorporate efforts to minimize leakage.

BE IT FURTHER RESOLVED that the Board directs the Executive Officer to monitor protocol development and to propose technical updates to adopted protocols, as needed.

BE IT FURTHER RESOLVED that the Board directs the Executive Officer to develop implementation documents laying out the process for review and consideration of new offset protocols, including a description of how staff will evaluate additionality.

BE IT FURTHER RESOLVED that the Board directs the Executive Officer to continue to work with Cal/Recycle and other stakeholders to characterize lifecycle emissions reduction opportunities for different options for handling solid waste, including recycling, remanufacturing of recovered materials in state, composting and anaerobic digestion, waste-to-energy facilities, landfilling, and the treatment of biomass. The Executive Officer shall identify and propose regulatory amendments, as appropriate, so that AB 32 implementation, including the cap-and-trade regulation, aligns with statewide waste management goals, provides equitable treatment to all sectors involved in waste handling, and considers the best available information. The Executive Officer shall report to the Board on progress in summer of 2012.

BE IT FURTHER RESOLVED that the Board directs the Executive Officer to continue to evaluate the definition of position holders relative to railroads and other specific types of fueling operations, work with interested stakeholders, and propose modifications to the regulations as appropriate to become effective prior to the start of the second compliance period.

BE IT FURTHER RESOLVED that the Board directs the Executive Officer to coordinate with stakeholders to develop a mechanism to achieve GHG emission reductions from the national security/military sector (NAICS 92811) beginning January 1, 2014.

BE IT FURTHER RESOLVED that the Board directs the Executive Officer to coordinate with the State universities and stakeholders to evaluate options for compliance, with amendments to the regulation as appropriate, including options on the use of auction revenue and report back to the Board in summer of 2012.

BE IT FURTHER RESOLVED that the Board directs the Executive Officer to monitor progress on bilateral negotiations between counterparties with existing contracts that do not have a mechanism for recovery of carbon costs associated with cap-and-trade for industries receiving free allowances pursuant to Section 95891, and identify and propose a possible solution, if necessary. For fixed-price contracts between independent generators and Investor Owned Utilities, the Board further directs the Executive Officer to work with the California Public Utilities Commission (CPUC) to encourage resolution between contract counterparties.

BE IT FURTHER RESOLVED that the Board directs the Executive Officer to work with the CPUC and Publicly Owned Utilities to reflect the findings of the Board that the impact of the cap-and-trade regulation on electricity rates creates appropriate incentives to further the goals of AB 32.

BE IT FURTHER RESOLVED that the Board directs the Executive Officer to work with the CPUC and the Publicly Owned Utilities to reflect the finding of the Board that if

allowance value provided to the electric distribution utilities for ratepayer benefit is returned directly to customers, it is consistent with State efforts to promote energy efficiency and energy conservation.

BE IT FURTHER RESOLVED that the Board directs the Executive Officer to work with the CPUC, California Energy Commission, California Independent System Operator and stakeholders to evaluate requirements for first jurisdictional deliverers of electricity and to report back to the Board in summer of 2012.

BE IT FURTHER RESOLVED that the Board directs the Executive Officer to coordinate with the Market Surveillance Committee and stakeholders to evaluate the effectiveness of the cost containment provisions of this program, including the Allowance Price Containment Reserve, offsets, banking and the three-year compliance period.

BE IT FURTHER RESOLVED that the Board directs the Executive Officer to contract with an external entity and work closely with regulated entities and other stakeholders to evaluate potential market conditions, trading dynamics, the Allowance Price Containment Reserve, and other key design features of the program prior to the beginning of the compliance obligation on January 1, 2013. The Executive Officer will make recommendations for changes, if any, necessary to address potential market design issues that are identified by or from these evaluations.

BE IT FURTHER RESOLVED that the Board directs the Executive Officer to continue to coordinate with the Commodity Futures Trading Commission and California State Attorney General's office on market oversight of the program, including the possibility of tracking forward contracts for sales of allowances.

BE IT FURTHER RESOLVED that the Board directs the Executive Officer to develop recommendations for the appropriate use of auction revenue. These recommendations should consider the Board's direction in Resolution 10-42.

BE IT FURTHER RESOLVED that the Board directs the Executive Officer to partner with the air quality management districts and air pollution control districts in the implementation of the cap-and-trade regulation, including, but not limited to, an evaluation of the impacts of the cap-and-trade program on industrial source greenhouse gas permitting and implementation of the Adaptive Management Plan. The Board further directs the Executive Officer to report back periodically to the Board on the nature and extent of this Partnership with the first report due in the first quarter of calendar year 2012.

BE IT FURTHER RESOLVED that the Board directs the Executive Officer to continue working with the WCI Partner jurisdictions to harmonize the programs by developing appropriate regulatory amendments necessary to formally link the programs, developing appropriate policy and technical protocols necessary to effectively implement the jurisdictions' programs, and working toward the establishment of a Regional Administration Organization.

BE IT FURTHER RESOLVED that the Board directs the Executive Officer, as described in Resolution 10-42, to update the Board at least annually on the status of the cap-and-trade program. These annual updates should include elements described in Resolution 10-42, as well as the following:

The effectiveness of the cap-and-trade program;

How the cap-and-trade program is stimulating investment and innovation in clean technology;

Shifts in transportation fuel use and supply;

The status of existing offset protocols, and potential new offset protocols that could be proposed to the Board;

The status of carbon capture and sequestration technology; and

Federal greenhouse gas activities, including federal equivalency for a State program.

I hereby certify that the above is a true and correct copy of Resolution 11-32, as adopted by the Air Resources Board.

Mary Alice Morency, Clerk of the Board

Resolution 11-32

October 20, 2010

Identification of Attachments to the Board Resolution

Attachment A: Final Regulation Order for the California Cap on Greenhouse Gas Emissions and Market-Based Compliance Mechanisms, title 17, California Code of Regulations, section 95800 to 96023, including the four Final Compliance Offset Protocols.

Attachment B: Response to FED Comments as found at: http://www.arb.ca.gov/cc/capandtrade/fed/staff-responses.pdf

Attachment C: Adaptive Management Plan as found at: http://www.arb.ca.gov/cc/capandtrade/adaptive_management/plan.pdf

Attachment D: Findings and Statement of Overriding Considerations, distributed at the October 20, 2011 Board hearing.

Exhibit 5

State of California
Environmental Protection Agency
AIR RESOURCES BOARD

CALIFORNIA'S CAP-AND-TRADE PROGRAM

FINAL STATEMENT OF REASONS

October 2011

The benchmarking method used to support direct allocation of allowances is also designed to benefit capped entities that have already undertaken action to reduce GHG emissions.

B-7. Comment: The usage of recycled glass deserves early action credit since it meets all of the necessary qualifications. The regulations for the glass manufacturing sector should permit an early action credit of a three percent energy savings for each 10 percent of recycled content and an equivalent offset for carbonate raw material usage which would have otherwise been utilized. (OWENSIL)

Response: The glass manufacturing sector is subject to the cap, and any reductions achieved by an individual facility would result in that facility having to surrender fewer GHG allowances. Offset credits cannot be generated for activities that reduce emissions in capped sectors. Offset credits for those reductions would be double-counted within the cap-and-trade program. Therefore, offset credits can only be issued for activities that are not capped.

Emissions Levels/Targets/Forecasts

B-8. (multiple comments)
Comment: When considering the 2020 emission limit of 427 million metric tons of carbon dioxide equivalent ($MMTCO_2E$) of GHGs, what method of GHG accounting is used? (ASMMANDEVORE2)

Comment: When considering the 2020 emission limit of 427 million metric tons of carbon dioxide equivalent ($MMTCO_2E$) of greenhouse gases in conjunction with the Western Climate Initiative (WCI), will emissions leakage be considered? (ASMMANDEVORE1)

Response: The statewide 2020 emission limit of 427 $MMTCO_2e$ is based on the net amount of GHGs emitted to and removed from the air through forest sequestration of CO_2. The 2020 emission limit is California's 1990 emissions based on an inventory of the amount and type of GHGs emitted by different sources on an annual basis. The 2020 emissions limit was endorsed by the Board at its December 2007 hearing. California's program has been designed to minimize emissions leakage. As part of the regular program monitoring, ARB will monitor for potential leakage. Furthermore, as ARB proceeds to link with the Western Climate Initiative, potential emission leakage issues will be identified and addressed.

B-9. Comment: The regulation should contain a clear updated summary and accounting of emission reduction goals and contributions from various measures. Since there have been updates to emissions forecasts, necessary emission reductions to get to 1990 levels, and contributions from various measures, it would be useful to see all these numbers reconciled and summarized in a single place in the regulation. This would include an update to Table 2 of the Scoping Plan. (BP)

Response: We agree and released a status update on AB 32 Scoping Plan measures that includes revised GHG emissions reduction estimates for recommended measures in the Scoping Plan. This information is posted on ARB's website at: http://www.arb.ca.gov/cc/scopingplan/status_of_scoping_plan_measures.pdf.

B-10. (multiple comments)
Comment: The aim to return California's emissions to 1990 levels by 2020 lacks ambition, and does not respond to demands by developing countries facing climate change who are calling for wealthy states like California (that use a disproportionate amount of our global atmosphere related to global population) to reduce emissions much more radically. (CTW)

Comment: Please do your best to strengthen the Proposed California Cap on Greenhouse Gas Emissions and Market-Based Compliance Mechanisms Regulations (LANEW)

Comment: Please make sure our GHG emissions are reduced by providing as low as possible caps for all GHG emitters, which are reduced annually to reach scientific targets. (DISENHOUSE)

Response: AB 32 authorizes ARB to implement a comprehensive, multi-year program to reduce GHG emissions in California. This statute includes the goal of reducing California's GHG emissions to 1990 levels by 2020. ARB's regulations must meet all AB 32 requirements, balancing technical feasibility, cost-effectiveness, improving public health, attaining ambient air quality standards, and many other objectives. We believe that cap-and-trade regulation appropriately balances these objectives.

Cap-and-Trade

General

B-11. Comment: We support your idea to hire an expert to look at the impact of the regulation on the state energy markets. (WSPA2)

Response: Thank you for your support.

B-12. Comment: We commend CARB for designing the Cap and Trade regulation with numerous flexible cost-containment mechanisms, in particular banking, rolling three-year compliance periods, and offsets and linkage. (CLIMATEWEDGE)

Response: Thank you for your support.

B-13. Comment: Cap and trade models are not successful prophylactic measures and have proven to be ineffective tools for phasing out carbon use. Pollution trading is an ineffective air quality policy with the arguable exception of the Acid Trading Program. Due to over allocation of allowances, low carbon prices, fraudulent transactions and banking (which may result in short term reductions followed by a spike in emissions when banked credits are utilized), pollution trading programs do not significantly reduce air pollution. Additionally, pollution trading often does not result in emissions reductions because of difficulty monitoring and enforcing emission reductions. (CRPE1)

Response: We do not agree that a well-designed cap-and-trade regulation is an ineffective tool at reducing GHGs. The declining cap on emissions ensures there will be emission reductions.

We used several years' worth of emissions data to determine the number of allowances that would be made available. It is unlikely that the California market will be over allocated. Banking is a necessary design feature intended to prevent price variability. It also provides an incentive for covered entities to make early reductions.

We will implement a market tracking system that will track and monitor compliance instruments (allowances and offset credits). The cap-and-trade regulation also has provisions that provide market oversight. These provisions involve information disclosures to assist in monitoring the market and prohibitions on trading activities that involve fraud, reporting false or misleading information, misrepresentations, and other commonly used techniques used to manipulate markets.

The premise that pollution trading programs do not significantly reduce air pollution is contradicted by experiences in other programs. The RECLAIM program in the South Coast Air Quality Management District has achieved reductions well beyond original expectations and continues to show increased reductions, including in areas adversely impacted by pollution and consistent with the ozone SIP for the South Coast Air Basin. As noted, the federal Acid Rain program has also gone well beyond the original emission reduction estimates and has lowered control costs over what would otherwise have occurred under a command-and-control system. In both cases, as in other market-based regulatory systems, adjustments have been made as problems are identified, and cost-effective emission reductions continue to occur.

B-14. Comment: It is important that the cap-and-trade rule encourage innovations that convert GHGs to stable non-GHG forms. Calera urges ARB to revise the proposed Cap and Trade rule to encourage out-of-state sources to reduce emissions through any means, including conversion of greenhouse gases to non-GHG forms. Specifically, add the following definition: "'Carbon Conversion' means the generally permanent conversion of carbon dioxide to non-GHG forms, such as carbonate, calcium carbonate, magnesium carbonate, bicarbonate, and other stable chemicals that are not

B-42. (multiple comments)
Comment: Benchmarks must be reduced even further, while the dates for these caps to be made even earlier. Secondly, I believe the earlier we make the dates for meeting benchmarks of emissions and the earlier we start creating jobs with that goal in mind the better. We are currently in a global economic depression, and only by taking immediate action do we give the citizens of our country and of our world the ability to rise up out of this recession. Therefore, the caps and dates in the regulation should be reduced and brought closer to present time, respectively. (JACOBSONFRIED)

Comment: A more realistic time frame would either involve a later period for reducing the cap, or would involve a less restrictive cap in the early years. (HOR)

> **Response:** We disagree with any adjustments to the start and end dates. We will initiate all elements of the program throughout 2012. However, the first year of compliance for covered entities starts in 2013, to ensure that all central elements of the program are fully developed and tested. This provides the market with certainty about the program's direction. The cap declines at a steady level from 2013 to 2020 in order to meet the 2020 emissions goal.

B-43. (multiple comments)
Comment: We have significant concerns regarding the slope of the cap particularly in the first and second compliance periods. The first compliance period may be significantly impacted by the potential lack of supply of offsets and because it is unlikely that California's program will be broadly linked with other state, federal or international programs in the early years. Our concern is that the combined effects of the steeper cap slope and the tightening of the allowance due to reserve deductions and the increased auction and the potential entry of transportation fuels all in the second compliance period are likely to result in serious impacts to the economy. Chevron recommends that the cap slope be revised to reflect a smoother transition of 1 percent in 2013 and 2014, and 2 percent per year in the second compliance period. Even with these recommended changes, the AB 32 cap is still likely to be equally or more stringent than duplicative, command and control regulations under the Federal CAA scheduled to come into effect in 2011. ARB should consider proposing that reductions under AB 32 will constitute conformance with the CAA. (CHEVRON1)

Comment: The rate of reduction of the cap (cap slope) is too aggressive. The aggressive rate of reduction in the first compliance period is a particular concern because ARB does not expect to have linkage with other larger GHG cap and trade programs, and due to the limited protocols and administrative burdens, there will likely be a limited supply of offsets. These factors, coupled with the aggressive rate of reduction in the early years, place unreasonable pressure on sources that are struggling to identify and implement the best and most efficient methods to reduce GHG emissions. The aggressive cap slope, steep rise of allowance reserve deductions from the allowance pool, increased compliance obligations caused by ARB's finding of refining as a medium trade exposed sector, and the potential for placing transportation fuels under the cap (all scheduled to occur in the second compliance period), are likely

to combine and cause adverse impacts to the economy in 2015. WSPA recommends that ARB significantly ease the required reductions in the first compliance period, decrease to 2 percent of the required reductions in the second compliance period and back-load more of the required emission reductions into the third compliance period. Back-loading will facilitate an orderly transition that may help achieve the emission reductions required under AB 32 and allow facilities time to implement their particular emission reduction strategies, and prevent significant economic impacts until California can realistically link its program to other GHG markets. Such linkage will allow California to achieve cost effective reductions without significant economic impacts. (WSPA1, WSPA2)

Comment: CCEEB recommends that the cap slope be revised to reflect a smoother transition of 1 percent in 2013 and 2014, and 2 percent per year in the second compliance period. This creates a smooth transition and realistically addresses the potential that California's cap and trade program will operate without the possibility of broad linkage to other State or federal programs in the first five years. (CCEEB1, CCEEB2)

> **Response:** We believe the cap trajectory and slope provides a gradual GHG emission reduction path toward the 2020 target. This is appropriate because the starting allowance budget levels are equal to expected GHG emissions for the year that a category of covered sources enters the cap-and-trade program. The allowance budget levels increase in 2015 as fuel suppliers are phased into the program to cover GHG emissions from distributed fuel use. We have also evaluated offset supply and believe that offset supply is unlikely to be a concern during the first compliance period. We will consider linkage with other jurisdictions as soon as practicable, as early as mid-2012.

B-44. Comment: The accuracy of the cap is significant in a modified “market based” regulatory system. Scarcity drives up prices of CO_2e, and therefore drives up prices of the underlying goods or services. A small scarcity generates significant market disruption and price spikes. A large scarcity results in massive economic disruption that will make the program unsustainable. The inability to know in advance whether the cap will be too high or too low means that individual market participants have no way of knowing how to bid for or price compliance instruments. It is therefore essential to set the cap at the “correct” level to achieve the purposes of the proposed rule.
Ensure that the cap is set for a period of at least five years at a level that exceeds existing emissions levels. This will allow for an orderly transition to a lower-cap environment, constrain growth in GHG emissions, and avoid unproductive price spikes or reductions in economic activity. (HOR)

> **Response:** Setting the cap above existing emission levels for five years would require having to decline the cap at a very rapid rate to meet the 2020 goal. However, we believe the regulation includes cost-containment mechanisms that protect against market disruption and price spikes. We established an allowance reserve account, which allows covered entities access to allowances at set prices

as a hedge against higher costs and helps reduce compliance costs without compromising the environmental goals of the cap-and-trade program.

B-45. Comment: Carbon allowances should be like voting. We have one person one vote. Why not one person one carbon allowance? A person should be able to benefit from selling his carbon allowances to, say, Chevron. There would be much less administrative overhead to tax carbon as it comes out of the ground or into California. (KRINOCK)

Response: We do not agree with the commenter's suggestion that each person should directly receive allowances. It would not be administratively efficient to allocate allowances to all residents of the State and ask them to participate in allowance trading. However, we recognize the public asset nature of the atmospheric carbon sink; in making decisions on allowance allocation we did consider the notion that the atmosphere is a global commons to which all individuals have equal claims.

We have performed an analysis of alternatives to the cap-and-trade program, including a carbon tax, and have found that none were as, or more, effective than a cap-and-trade program in carrying out the goals of AB 32. More information can be found in the Alternatives Analysis of the Staff Report. We also considered alternative points of regulation for the cap-and-trade program, including a fully "upstream" system where the obligation is assessed where fossil fuels are extracted or imported into California. We chose not to pursue this upstream approach due to administrative concerns including harmonizing with the existing framework for reporting of greenhouse gases which is primarily source-based.

Support the Cap

B-46. (multiple comments)
Comment: We are pleased to see that the proposed regulation contains several elements that I believe will make the program effective. These include a declining cap that starts at a level less than 2008 emissions and declines 2-3 percent per year to reach 1990 levels by 2020. (LUDLOW, UCS1, WALTERS)

Comment: Parts of the proposal are strong, such as setting a limit that declines each year, and setting a minimum price on carbon pollution. This steady price signal will help businesses make long-term investments in strategies to reduce global warming emissions. (MSCG2, FORMLETTER06)

Comment: We support the cap established in the regulation to reduce emissions by at least 18 $MMTCO_2e$ and potentially as much as 27 $MMTCO_2e$. This is consistent with the goals outlined in the Scoping Plan. (NC1)

Comment: TNC supports the overall declining cap. (NC2)

throughout the economy and ensures a level playing field across all fuels and consumers. We believe that there are important benefits from the inclusion of transportation fuels and fuels for residential, commercial, and small industrial users.

The commenter states that subjecting diesel to a declining cap in conjunction with the Low Carbon Fuel Standard (LCFS) violates the spirit and letter of AB 32 because they are not cost-effective ways to lower carbon emissions. The LCFS regulates fuel producers by requiring them to reduce the carbon intensity of their fuels 10 percent by 2020. This is accomplished by creating various "fuel pathways" for fuels based on their lifecycle emissions, accounting for feedstocks, production processes, transporting fuels, and other means. Thus, the LCFS works in conjunction with the cap-and-trade regulation to help meet the objectives of AB 32.

B-54. Comment: CARB's projected baseline emissions inventories do not appear to account for the expected shift from petroleum transportation fuels to biofuels in the future (see http://www.arb.ca.gov/cc/inventory/data/tables/2020_ghg_emissions_forecast_2010-10-28.pdf). While some of this increase may be accomplished with lower carbon biofuels, this shift would set back CARB's efforts to achieve 2020 GHG goals unless transportation biofuels are included in cap and trade or the overall level of the cap and trade is reduced to account for leakage due to expected increasing levels of transportation biofuels. We strongly recommend that emissions from all transportation liquid fuels be treated equally and fuel providers should be held accountable under the cap for the carbon emissions of all biofuels. (KUSTIN03)

Response: The cap-and-trade regulation will help transition California away from carbon-intensive fossil fuels to cleaner and more-efficient fuels. The fossil fuel portions of biofuels and bioenergy are under the cap. Transportation fuels and fuel suppliers will have a compliance obligation. However, biomass-derived fuels are exempt from a compliance obligation since CO_2 emissions resulting from the combustion of biomass are considered biogenic. Emissions from biomass-derived fuels must be reported and verified pursuant to the MRR. Source categories that are not listed under section 95852.2 (Emissions without a Compliance Obligation) or that have not received a qualified positive or positive verification statement must be reported as "other biomass CO_2." Other biomass emissions that cannot be verified pursuant to the MRR are not considered biomass-derived, and will hold a compliance obligation.

B-55. Comment: The regulation does not contain sufficient design information on the important issue of transportation fuels. More detail is needed. BP strongly urges CARB staff to consider use of a fee on transportation fuels linked to the price of carbon in the cap and trade system. (BP)

Response: ARB considered the use of a carbon fee, either alone or in concert with a cap-and-trade program, and determined that the proposed cap-and-trade program provides acceptable price certainty while assuring that emissions do not exceed the 2020 target. For further details, please see the Analysis of Alternatives to the Proposed Regulation in the Staff Report. Further, as noted in the Supplement to the Scoping Plan Functional Equivalent Document (pages 94-95) there are significant challenges to adopting a fee in California. (see http://www.arb.ca.gov/cc/scopingplan/document/final_supplement_to_sp_fed.pdf)

Further details on the incorporation of transportation fuels into the cap-and-trade program in the second compliance period will be released as part of future rulemakings for the cap-and-trade regulation, and will occur in the first compliance period.

B-56. Comment: Placing diesel fuel under a declining cap as part of the Cap and Trade Program in 2015 will cause warehousing in California irreparable harm. Leakage of cargo and the associated value added services that California warehouse and supply chain partners provide to other ports, specifically Seattle, Houston, Panama and Canada do not improve overall carbon emissions. CARB must not adopt such an economically devastating regulation on California warehouse businesses without understanding the industry and careful economic monitoring through annual reporting back to this board. IWLA requests CARB abandon placing transportation emission under a declining cap. If you must move ahead against our counsel, we ask for the following safeguards to be put in place so that CARB doesn't inadvertently cause significant damage to CA's economy and irreparable harm to California third party logistics providers. IWLA is seeking:

1. Annual reporting of diesel prices of California and other port facilities including Washington, Texas, British Columbia and Panama.
2. Working to ensure a robust offset program to achieve compliance obligations post 2015 and ensure linkage to other programs.
3. Waiting until 2018 to place diesel fuel under the cap and reopening the discussion prior to 2015 of placing fuels under the cap to ensure a reliable, adequate, affordable supply of fuels to the consumers.
4. Expand offset use from eight percent to 25 percent so that warehousing can engage in distributed energy solutions for dealing with climate change instead of expensive fuel mandates. (IWLA1, IWLA2)

Response: The cap-and-trade program calls for periodic reviews, during which ARB staff will analyze fuel prices in California and neighboring states to ensure that prices in the State are not significantly higher than other regional prices. If we determine that the cap-and-trade program is not achieving the objectives as defined by AB 32, or if substantial, unanticipated adverse economic or environmental effects are identified (e.g., substantial leakage), we will revise the operation and/or design of the program accordingly. There are also several cost-containment measures that are integrated into the program, including the use of

offsets, three-year compliance periods, and the Allowance Price Containment Reserve.

The fossil-fuel portions of biofuels are under the cap and have a compliance obligation. However, biomass-derived fuels are exempt from a compliance obligation since CO_2 emissions resulting from the combustion of biomass are considered biogenic. Separately, facilities must report biofuel data as part of the mandatory reporting regulation.

We have chosen to allow the use of offsets—up to the specified limit of eight percent—for compliance in the proposed cap-and-trade program.

B-57. Comment: We strongly advocate that transportation fuels should be included in the program from the start, while emissions from trade exposed, heavy industries should be brought in at a later date. This would make defending the proposal against claims of competitiveness impacts easier and should also have made agreeing a more ambitious target easier. Additional costs in electricity and fossil fuel markets can be passed through since the demand cannot easily be met by imports from uncapped states/countries or, where it can, the requirement to comply with caps can also be applied to the imported commodity. (SANDBAGCC)

Response: We do not agree that transportation fuels should be included in the first phase of the program. The program will expand in 2015 to include fuel distributors to address emissions from combustion of transportation fuels and combustion of natural gas and propane at sources not covered in the first phase of the program.

Including transportation fuels in the program in 2015 provides a consistent price on GHG pollution throughout the economy and ensures a level playing field across all fuels and consumers. We believe that there are important benefits of including transportation fuels and fuels for residential, commercial, and small industrial users. We also believe that it is appropriate to initially bring these fuels into the program on a reporting-only basis for the first compliance period. This will provide time for ARB and transportation fuel deliverers to work through any issues in the reporting system before they have a compliance obligation in 2015.

B-58. Comment: ATA supports ARB's decision to maintain a phase-in approach for the incorporation of transportation fuels during the second compliance period in 2015 as opposed to requiring compliance for all sources beginning in 2012. As noted in ATA's comments on the PDR, the phase-in approach allows for the smoother implementation of a complex regulation, while also allowing additional time for harmonization with regulations in other jurisdictions, especially given the interstate nature of transportation fuel consumption and associated emissions. (ATAA)

Response: No response necessary.

Linkage

General

B-79. Comment: IETA is pleased to see ARB's Cap and Trade draft regulations consider the issue of linkage, not only with other WCI jurisdictions but with other regional and international schemes as well. Based on evidence and experience, linking regional and worldwide emissions trading markets would provide greater market liquidity while encouraging the realization of the most cost-effective reduction opportunities for GHG emissions. (IETA1)

Response: No response is necessary

B-80. (multiple comments)
Comment: The proposed regulation is doomed to failure because of the limited participation by other jurisdictions and the demise of a federal cap and trade program. The California only program, which the Board appears determined to pass before it is fully baked, poses huge risks of harm to jobs and the California economy due to among other factors, economic leakage. Moreover, the associated GHG emissions leakage will undermine any integrity the Board may have hoped for in the program. We believe that many proposed aspects of the program will unnecessarily exacerbate this risk and CARB should give full consideration to both the limited linkage to competing jurisdictions and the incompleteness of the regulation and put this measure over until it is complete and there are enough real trading partners to avoid massive leakage. This damn the torpedoes, full speed ahead whether the regulation is complete or not mentality reminds us of the ill-fated electricity deregulation scheme and we believe that CARB's rush to pass the Cap and Trade Regulation before it is ready will blow up, just as deregulation blew up, as soon as allocation gives way to auction with the only question being how dire the resulting economic consequences. (PLOTKIN)

Comment: IETA's membership is appreciative of progress in adapting flexible approaches and would like to stress the importance of the considering future linkages to comparable markets that have broadly symmetrical regulations. (IETA2)

Comment: CERP supports linkage with other programs and urges ARB to move forward with linkage with qualified programs as soon as possible in 2011. (CERP1)

Comment: The regulation needs to demonstrate a greater sense of urgency on linking with other programs. This should include a specific timeline for evaluation and decision, and consideration of other cost control measures should significant and timely linkage not be accomplished. CARB should state in the resolution (or elsewhere before adoption of the regulation), what specific programs will be considered for linkage, and the timeline by which decisions on specific linkages will be rendered. CARB must accept that if no linkage is attained by a date certain early within the first compliance period, then a reconsideration of linkage criteria should occur and/or other, additional cost-control measures (such as additional use of offsets) should be implemented. (BP)

Comment: The ARB Board Resolution adopting final AB 32 regulation should reflect the Staff Report's statement on the importance of linkage and offset availability. The Staff Report recognizes the importance of California linking to other cap and trade programs but the regulation itself does not yet establish a path to achieving that linkage. We believe that strong support from the Board is needed to ensure that linkage with WCI partners in 2011, and linkage with the EU after 2013 can become a reality. (CHEVRON1)

Comment: If a California cap-and-trade program is linked with others through the Western Climate Initiative (WCI), California should negotiate reciprocity with other WCI participants. (NEXTERAENERGY)

Comment: The Western Climate Initiative (WCI) is not yet fully in place as originally proposed to be an integral link for California's Cap-and-Trade. (SDCHAMBER)

Comment: Linkage to WCI and other Cap and Trade Programs is mentioned in the Cap and Trade Regulation; however such linkages are not expected to be in place until late 2011. To date, California and New Mexico are the only states who intend to participate in the WCI, and New Mexico's plans for participation are subject to change. A California only Cap-and-Trade Program in lieu of a regional program will be too restrictive and limited, and should not be implemented until other state partnerships are in place. (MWDSC1)

Comment: At this point it appears the only imminent linkage is at the regional level with the WCI, which can only happen if other participants can agree to the program's implementation and will be ready for the 2012 start date. Without linkage to other programs, a California-only Cap and Trade program ignores the opportunity for economic growth and puts California at significant economic risk. It is important that CARB create a program that California can seamlessly interface with the WCI partners with ultimate linkage to a national and international platform. (CALCHAMBER1)

Comment: ARB should ensure that its Cap and Trade program will link directly to a U.S. federal program and to regional programs such as WCI. Although California has been a leader with respect to climate change, California businesses will suffer and environmental goals will not be met if regulators do not closely coordinate and link market programs. CLFP believes that a "go-it-alone" approach is not a viable option. (CALFP1)

Comment: The Council is encouraged that the California Air Resources Board envisions linking its Cap and Trade program with other WCI Partners to create a regional market system. We are also encouraged by indications that California is discussing opportunities to link with the Cap and Trade program in the Regional Greenhouse Gas Initiative (RGGI) states. These linkages will be critical for consistency among programs and will facilitate what we hope will be an eventual transition to a national program. (BCFSE)

Comment: We are very concerned about the proposed regulation because of the limited participation by other jurisdictions including those in WCI and the dim prospect of a federal cap and trade program anytime on the horizon. This poses huge risks of harm to jobs and the California economy due to economic leakage, and the associated GHG emissions leakage would undermine integrity of the program. (AB32IG)

Comment: In designing its program, California should strive for compatibility with the European Union trading system and offset policies. Given the importance of interstate and international trade to California's economy, we must design our program to ensure that California companies are appropriately positioned to compete under any future federal or international program. (LADWP1)

Comment: CARB has always maintained that in order to be effective the cap and trade program must be part of a regional multi-state effort, yet the regulation before you does not propose linking to any specific programs outside California at this time. If widespread equitable linkage cannot be accomplished, serious consideration should be given to postponing a cap and trade regulation. (CAHISPCHMBR)

Response: We recognize the importance of linkage with other jurisdictions to provide an additional cost containment mechanism, prevent leakage, and secure additional GHG reductions. Staff analyzed the potential of a cap-and-trade program on California businesses, and the proposed regulation includes methods to reduce competitiveness loss through the allocation process.

The proposed regulation establishes a framework for linkage and considers the issue of linkage with other GHG emissions trading systems. Subarticle 12 of this regulation provides possibilities for linkage, including procedures to evaluate external GHG emissions trading system. Establishing linkage with other programs will require further assessment and establishment of a formal rulemaking process under the APA before allowances and/or offset credit from an external program can be used for compliance with this regulation. When evaluating whether we should link to another program, we will consider criteria that the potential linked program must meet, to ensure that the linked program has provisions for cost-containment, market tracking, registration, monitoring, reporting, verification, and enforcement that are reliable and sufficient to ensure its environmental integrity. California is a partner state of WCI and has been actively involved in WCI activity and the design element. We are looking to link to WCI partner states and provinces that may be ready to implement their cap-and-trade programs in the near term. We modified the first compliance year from 2012 to 2013 to ensure a robust program. The WCI partner jurisdictions—Quebec, Ontario, and British Columbia—are in the process of developing and adopting cap-and-trade programs.

Exhibit 6

State of California
AIR RESOURCES BOARD

Amendments to California Cap-and-Trade Program - Linkage

Resolution 13-7

April 19, 2013

Agenda Item No.: 13-4-1

WHEREAS, sections 39600 and 39601 of the Health and Safety Code authorize the Air Resources Board (ARB or Board) to adopt standards, rules, and regulations and to do such acts as may be necessary for the proper execution of the powers and duties granted to and imposed upon the Board by law;

WHEREAS, the California Global Warming Solutions Act of 2006 (AB 32; Chapter 488, Statutes of 2006; Health & Safety Code section 38500 et seq.) declares that global warming poses a serious threat to the economic well-being, public health, natural resources, and environment of California and creates a comprehensive multi-year program to reduce California's greenhouse gas (GHG) emissions to 1990 levels by 2020;

WHEREAS, AB 32 added section 38501 to the Health and Safety Code, which expresses the Legislature's intent that ARB coordinate with State agencies and consult with the environmental justice community, industry sectors, business groups, academic institutions, environmental organizations, and other stakeholders in implementing AB 32; and design emissions reduction measures to meet the statewide emissions limits for greenhouse gases in a manner that minimizes costs and maximizes benefits for California's economy, maximizes additional environmental and economic co-benefits for California, and complements the State's efforts to improve air quality;

WHEREAS, section 38501(c) of the Health and Safety Code declares that California has long been a national and international leader on energy conservation and environmental stewardship efforts, and the program established pursuant to AB 32 will continue this tradition of environmental leadership by placing California at the forefront of national and international efforts to reduce GHG emissions;

WHEREAS, section 38501(d) of the Health and Safety Code confirms that national and international actions are necessary to fully address the issue of global warming, but action taken by California to reduce GHG emissions will have far reaching effects by encouraging other states, the federal government, and other countries to act;

WHEREAS, section 38501(e) of the Health and Safety Code states that by exercising a global leadership role, California will also position its economy, technology centers, financial institutions, and businesses to benefit from national and international efforts to

reduce emissions of greenhouse gases. More importantly, investing in the development of innovative and pioneering technologies will assist California in achieving the 2020 statewide limit on emissions of greenhouse gases and will provide an opportunity for the state to take a global economic and technological leadership role in reducing emissions of greenhouse gases;

WHEREAS, section 38510 of the Health and Safety Code designates ARB as the State agency charged with monitoring and regulating sources of GHG emissions in order to reduce these emissions;

WHEREAS, section 38560 of the Health and Safety Code directs ARB to adopt rules and regulations in an open public process to achieve the maximum technologically feasible and cost-effective GHG emissions reductions from sources or categories of sources;

WHEREAS, section 38562(a) of the Health and Safety Code requires ARB to adopt GHG emissions limits and emissions reduction measures by regulation to achieve the maximum technologically feasible and cost-effective reductions in GHG emissions in furtherance of achieving the statewide GHG emissions limit, to become operative beginning on January 1, 2012;

WHEREAS, section 38564 of the Health and Safety Code directs ARB to consult with other states, and the federal government, and other nations to identify the most effective strategies and methods to reduce greenhouse gases, manage greenhouse gas control programs, and to facilitate the development of integrated and cost-effective regional, national, and international greenhouse gas reduction programs;

WHEREAS, California is participating in the Western Climate Initiative (WCI), with other Partner jurisdictions considering implementation and linkage of GHG Cap-and-Trade programs;

WHEREAS, over the course of 6 years, the WCI Partner jurisdictions have coordinated on developing recommendations for greenhouse gas reporting, compliance offsets, and cap-and-trade as models for jurisdictions to develop their own programs;

WHEREAS, the WCI Partner jurisdictions developed recommendations in a public and transparent manner with over 130 public documents, 86 stakeholder meetings, webinars, and calls, and received comments on 48 occasions;

WHEREAS, by linking California's Program to WCI Partner jurisdictions, the combined Programs will result in more emission reductions, generate greater potential for lower cost emissions reductions, enhance market liquidity, and will increase opportunities for GHG emissions reductions for covered sources more than could be realized through a California-only program;

WHEREAS, establishing and implementing a California and regional GHG Cap-and-Trade Program requires ARB and WCI Partner jurisdictions to harmonize specific

regulatory and operational provisions, including, but not limited to, sources subject to compliance obligations, emissions reporting requirements, cost-containment mechanisms, evaluation of regulatory baselines for existing offset protocols, procedures for developing new offset protocols, compliance instrument tracking system development and operation, auction services, financial services, and market monitoring and oversight;

WHEREAS, ARB and the WCI Partner jurisdictions established a regional administrative organization in November 2011, similar to other regional Cap-and-Trade Programs, called Western Climate Initiative, Inc. to meet the goal of regionally coordinated administration of cap-and-trade services;

WHEREAS, the Board adopted the Final Regulation Order establishing a GHG Cap-and-Trade Program for California after a three-year development process that included hundreds of stakeholder meetings, workshops, and comments; the regulation became effective January 1, 2012, and includes the following elements:

Addresses emissions of carbon dioxide (CO_2), methane (CH_4), nitrous oxide (N_2O);

Identifies the Program scope: starting in 2012, electricity, including imports, and large industrial facilities are included; starting in 2015, distributors of transportation fuels, natural gas, and other fuels are included;

Establishes a declining aggregated emissions cap on included sectors. The cap starts at 162.8 million allowances in 2013, which is equal to the emissions forecast for that year. The cap declines approximately 2 percent per year in the initial period (2013–2014). In 2015, the cap increases to 394.5 million allowances to account for the expansion in Program scope to include fuel suppliers. The cap declines at approximately 3 percent per year between 2015 and 2020. The 2020 cap is set at 334.2 million allowances;

Provides for distribution of allowances through a mix of direct allocation and auction in a system designed to reward early action and investment in energy efficiency and GHG emissions reductions; allowances will be distributed for the purposes of price containment, industry transition and assistance, and fulfillment of AB 32 statutory objectives;

Establishes a market platform for allowance auction and sale;

Establishes cost-containment mechanisms and market flexibility mechanisms, including trading of allowances and offsets, allowance banking, a two year compliance period and two 3-year compliance periods, the ability to use offsets

for up to 8 percent of an entity's compliance obligation, and an allowance reserve that provides allowances at fixed prices to those with compliance obligations;

Establishes a mechanism to link with other GHG trading programs and approve the use of compliance instruments issued by a linked external GHG trading program;

Establishes requirements and procedures for ARB to issue offset credits according to offset protocols adopted by the Board;

Includes four offset protocols adopted by the Board as part of the regulatory package;

Establishes a mechanism to include international offset programs from an entire sector within a region;

Establishes a robust enforcement mechanism that will discourage gaming of the system and deter and vigorously punish fraudulent activities; and

Provides an opt-in provision for entities whose annual GHG emissions are below the threshold to voluntarily participate in this program.

WHEREAS, staff has proposed amendments to the Cap-and-Trade Regulation set forth in Attachment A hereto that includes the following elements:

The use of allowances and compliance offsets from a linked jurisdiction by California entities for compliance in the Cap-and-Trade Program;

The use of California issued allowances and compliance offsets for compliance by entities in a linked jurisdiction;

Joint quarterly auctions that include allowances from California and its linked jurisdictions;

Adjustments to the "Annual allowance budget" used in the calculation of the holding limits to include allowances from California and its linked jurisdictions;

Mechanisms to allow for auction bidding and settlement in two currencies;

Requirements for each covered entity to register in its jurisdiction;

Requirements for all voluntary participants located in the United States to register with California and voluntarily submit themselves to the jurisdiction of the State of California; and

Requirements where only covered entities in California would be eligible to participate in the California Allowance Price Containment Reserve sales.

WHEREAS, staff held two public workshops on the linkage amendments and also participated in numerous other meetings with various stakeholders to provide additional opportunities for participation in the regulatory development process;

WHEREAS, the Board believes the success of a Cap-and-Trade Program is predicated on GHG regulations that are clear, consistent, enforceable, and transparent;

WHEREAS, staff prepared a document entitled "Staff Report: Initial Statement of Reasons for the Proposed Amendments to the California Cap on Greenhouse Gas Emissions and Market-Based Compliance Mechanisms to Allow for the Use of Compliance Instruments Issued by Linked Jurisdictions" (ISOR), which presents the rationale and basis for the proposed regulation and identifies the data, reports, and information relied upon;

WHEREAS, the proposed regulatory language was made available to the public at least 45 days prior to the public hearing to consider the proposed regulation, with three subsequent comment periods of 15 days to add documents to the record and propose additional modifications to the regulatory text;

WHEREAS, Senate Bill 1018 (Government Code section 12894(f)) was enacted requiring state agencies to notify the Governor that the agency intends to take action to link with another greenhouse gas emissions trading program; and the Governor must make specified findings prior to the agency taking action to approve the linkage;

WHEREAS, on February 22, 2013, the Executive Officer sent a letter to the Governor requesting the Governor's consideration of the four findings that are necessary before ARB can adopt a regulation that would link the greenhouse gas emissions trading programs developed by California and the Province of Québec;

WHEREAS, on April 8, 2013, the Governor provided ARB a letter stating that the four requirements of Government Code section 12894(f) have been satisfied and describing additional steps the Board will take prior to implementing linkage with the Québec Cap-and-Trade Program;

WHEREAS, in consideration of the ISOR, written comments, and public testimony it has received to date, the Board finds that:

The goal of the Québec's 2020 greenhouse gas emissions target is at least as stringent as California's 2020 greenhouse gas emissions target;
The scope of Québec's Cap-and-Trade Program is consistent with the scope of California's Program;

Québec's greenhouse gas reporting program is rigorous and will provide accurate greenhouse gas emissions data to support a Cap-and-Trade Program;

Québec's greenhouse gas reporting program verification requirements are consistent with California's requirements;

Québec's Cap-and-Trade Program is designed with mechanisms consistent with the California Program to prevent the ability of entities to exert market power;

Québec's auction mechanics are consistent with those in California's Program and will enable the administration of joint auctions;

Québec's identity verification requirements are consistent with those in the California Program;

Québec's compliance offset program design is consistent with California's Program requirements;

Québec's offset criteria are consistent with AB 32 and California's Program;

Québec's offset verification requirements are consistent with those recommended by WCI and included in California's Program;

Québec's offset protocols for the destruction of ozone depleting substances and livestock digesters are based on and consistent with ARB's Compliance Offset Protocol Ozone Depleting Substances Projects and ARB's Compliance Offset Protocol Livestock Projects;

Québec's offset protocol for small landfills requires the capture and destruction of landfill methane similar to ARB's landfill early action measure;

Québec's offset protocol for small landfills would not give compliance offset credit to large landfills which would be subject to the landfill early action measure in California and is therefore harmonized with California's Program;

The staff's proposed regulatory text meets the statutory requirements identified in section 38562 of the Health and Safety Code including equitable and cost effective distribution of allowances to maximize total benefits to California; minimizing leakage, and cost effectiveness;

The staff's proposed regulatory text meets the statutory requirements for a market-based mechanism identified in section 38570 of the Health and Safety Code including: consideration of the potential for direct; indirect, and cumulative emission impacts; prevention of increases in emissions of toxic air contaminates or criteria pollutants and maximizing additional environmental and economic benefits for California;

The staff's proposed regulatory text was developed in an open public process, in consultation with affected parties, through public workshops, individual meetings, and other outreach efforts;

The staff's proposed regulatory text is predicated on GHG regulations that are clear, consistent, enforceable, and transparent and helps meet the goals of AB 32; and

The staff's proposed regulatory text would provide for a linked Cap-and-Trade Program between California and Québec, effective January 1, 2014, where allowances and compliance offsets issued by each jurisdiction would be fungible across both Programs.

WHEREAS, the WCI coordination process to have a linked Cap-and-Trade Program between California and any of the WCI Partner jurisdictions as described in the ISOR does not set a precedent for other mechanisms for California to accept compliance instruments from other types of programs;

WHEREAS, the California Environmental Quality Act (CEQA) requires that a public agency not approve a project as proposed if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental impacts of such a project; in the event that specific economic, social, or other conditions make infeasible the alternatives or mitigation measures, the project may be approved if it is determined that any remaining unavoidable significant impacts are acceptable due to overriding considerations;

WHEREAS, Public Resources Code section 21080.5 allows public agencies with regulatory programs to prepare a plan or other written document in lieu of an environmental impact report or negative declaration once the Secretary of the Resources Agency has certified the regulatory program;

WHEREAS, that portion of ARB's regulatory program that involves the adoption, approval, amendment, or repeal of standards, rules, regulations, or plans has been certified by the Secretary of Resources Agency (CEQA Guidelines, section 15251(d));

WHEREAS, ARB's certified regulatory program provides that prior to taking final action on any proposal for which significant environmental issues have been raised, the decision maker shall approve a written response to each such issue;

WHEREAS, in accordance with ARB's certified regulatory program at title 17, CCR, section 60005 (b), and the policy and substantive requirements of CEQA, ARB staff prepared an assessment of the potential for significant adverse and beneficial environmental impacts associated with the proposed action and a succinct analysis of those impacts in Chapter IV of the ISOR;

WHEREAS, the environmental analysis (EA) in Chapter IV of the ISOR set forth a programmatic level of analysis of broadly defined types of indirect impacts that could occur as a result of the proposed action, including potential alternatives;

WHEREAS the environmental analysis was circulated as part of the ISOR for a 45-day written public comment period from May 14, 2012, until June 27, 2012;

WHEREAS, ARB reviewed written comments on the potential for environmental impacts associated with the proposed action received during the initial 45-day comment period and subsequent 15-day comment periods and prepared written responses to these comments;

WHEREAS, on April 9, 2013, ARB posted a document called the *Response to Comments on the Environmental Analysis Prepared for the Proposed Amendments to the California Cap on Greenhouse Gas Emissions and Market-Based Compliance Mechanisms to Allow for the Use of Compliance Instruments Issued by Linked Jurisdictions* (Response to EA Comments);

WHEREAS, at a duly noticed public hearing held on April 19, 2013, staff presented the Response to EA Comments for approval, and the Final Regulation Order for adoption; and

WHEREAS, the Board has reviewed and considered the EA and the Response to EA Comments.

NOW, THEREFORE, BE IT RESOLVED that the Board hereby certifies that the EA was completed in compliance with CEQA under ARB's certified regulatory program, reflects the agency's independent judgment and analysis, and was presented to the Board whose members reviewed, considered and approved the information therein prior to acting on the proposed Final Regulation Order.

BE IT FURTHER RESOLVED that the Board approves the written responses to comments raising significant environmental issues included in the Response to EA Comments.

BE IT FURTHER RESOLVED that in consideration of the EA and Response to EA Comments, and in accordance with the requirements of CEQA and ARB's certified regulatory program, the Board adopts the Findings and Statement of Overriding Consideration as set forth in Attachment C to this Resolution.

BE IT FURTHER RESOLVED that the Board adopts the amendments to the California Greenhouse Gas Emissions and Market-Based Compliance Mechanisms to Allow for the Use of Compliance Instruments Issued by Linked Jurisdictions set forth in Attachment A to this Resolution.

BE IT FURTHER RESOLVED that the Board directs the Executive Officer to finalize the Final Statement of Reasons and submit the rulemaking package to the Office of Administrative Law by May 8, 2013.

BE IT FURTHER RESOLVED that the Board directs the Executive Officer to report to the Board at least annually on the status of the linked Cap-and-Trade Program.

BE IT FURTHER RESOLVED that at least six months prior to any of the following taking effect in a linked jurisdiction, the Executive Officer will provide a report to the Board that includes an assessment of environmental factors and will provide a recommendation for

Board action if appropriate. The report to the Board will also include an opportunity for public review and input.

Changes to the stringency of the Program, including changes to the cap;

The adoption of a new compliance offset protocol or significant amendments to an existing compliance offset protocol;

Linkage to another Cap-and-Trade Program; and

Any other change to a linked jurisdiction's Program which would significantly affect the stringency, integrity, enforceability or successful functioning of the combined Programs.

BE IT FURTHER RESOLVED that the Board directs the Executive Officer to work with Québec to complete pre-linkage activities prior to the effective date of January 1, 2014. These activities should include those steps needed to ensure implementation readiness, which may include, but are not limited to, testing of the auction platform to allow for a joint auction, a practice joint auction between California and Québec, testing of the tracking system to enable transfers across program participants, and a review (and adjustments as needed) of processes, procedures and systems of California's and Québec's programs to ensure consistency and compatibility.

BE IT FURTHER RESOLVED that the Board directs the Executive Officer to coordinate with the Government of Québec to ensure both jurisdictions maintain an enforceable linked Cap-and-Trade Program, and that the implementation of the Cap-and-Trade Program in linked jurisdictions is as rigorous as California's implementation of its Cap-and-Trade Program. This coordination should include the reporting and verification of emissions, reports on implementation of offset programs, market surveillance, and updates on investigations and enforcement actions.

BE IT FURTHER RESOLVED that the Board directs the Executive Officer to coordinate with the Government of Québec to implement the linked Cap-and-Trade Program in an efficient and transparent manner, and directs the Executive Officer to document the coordination process in a written agreement with the Government of Québec and provide it to the Board and make it available to the public.

BE IT FURTHER RESOLVED that the Board directs the Executive Officer to work with linked jurisdictions to ensure that information is shared between the jurisdictions to ensure robust surveillance, oversight and enforcement, and that enforcement is applied in an equivalent manner in all linked jurisdictions.

BE IT FURTHER RESOLVED that the Board directs the Executive Officer to update the Board in Fall 2013 on the status of the auction platform and trading system to support linkage and progress toward implementing the linked markets prior to providing a report to the Secretary of Cal/EPA and the Governor's office by November 1, 2013, as directed in the Governor's April 8, 2013, letter to ARB.

BE IT FURTHER RESOLVED that the Board directs the Executive Officer to continue working with the non-linked WCI Partner jurisdictions to harmonize the Programs by developing appropriate regulatory amendments necessary to formally link the Programs, and by developing appropriate policy and technical protocols necessary to effectively implement the linked jurisdictions' Programs.

I hereby certify that the above is a true and correct copy of Resolution 13-7, as adopted by the Air Resources Board.

Tracy Jensen

Tracy Jensen, Clerk of the Board

Resolution 13-7

April 19, 2013

Identification of Attachments to the Board Resolution

Attachment A:	Amendments to the California Cap on Greenhouse Gas Emissions and Market-Based Compliance Mechanisms to allow for the Use of Compliance Instruments Issued by Linked Jurisdictions.
Attachment B:	Response to EA Comments are found at: http://www.arb.ca.gov/board/books/2013/041913/start.pdf
Attachment C:	Findings and Statement of Overriding Consideration

Exhibit 7

STATE OF CALIFORNIA--OFFICE OF ADMINISTRATIVE LAW

NOTICE PUBLICATION/REGULATIONS SUBMISSION

REGULAR

See instructions on reverse

For use by Secretary of State only

STD. 400 (REV. 01-2013)

OAL FILE NUMBERS	NOTICE FILE NUMBER	REGULATORY ACTION NUMBER	EMERGENCY NUMBER
	Z-2012-0501-07	2013-0510-03S	

For use by Office of Administrative Law (OAL) only

2013 MAY 10 PM 12:43

OFFICE OF ADMINISTRATIVE LAW

ENDORSED FILED IN THE OFFICE OF

2013 JUN 24 PM 2:17

NOTICE | REGULATIONS

AGENCY WITH RULEMAKING AUTHORITY: Air Resources Board

AGENCY FILE NUMBER (If any)

A. PUBLICATION OF NOTICE (Complete for publication in Notice Register)

1. SUBJECT OF NOTICE	TITLE(S)	FIRST SECTION AFFECTED	2. REQUESTED PUBLICATION DATE
Cap and Trade Linkage 2012	17	95802	May 11, 2012

3. NOTICE TYPE	4. AGENCY CONTACT PERSON	TELEPHONE NUMBER	FAX NUMBER (Optional)
[X] Notice re Proposed Regulatory Action [ ] Other	Amy J. Whiting	916-322-6533	916-322-3928

OAL USE ONLY	ACTION ON PROPOSED NOTICE	NOTICE REGISTER NUMBER	PUBLICATION DATE
	[ ] Approved as Submitted [ ] Approved as Modified [ ] Disapproved/ Withdrawn	2012, 19Z	05-11-2012

B. SUBMISSION OF REGULATIONS (Complete when submitting regulations)

1a. SUBJECT OF REGULATION(S): Cap-and-Trade Reg. to Link the CA and Quebec Cap-and-Trade Programs

1b. ALL PREVIOUS RELATED OAL REGULATORY ACTION NUMBER(S)

2. SPECIFY CALIFORNIA CODE OF REGULATIONS TITLE(S) AND SECTION(S) (Including title 26, if toxics related)

SECTION(S) AFFECTED (List all section number(s) individually. Attach additional sheet if needed.)	
	ADOPT: 95843 per agency request
	AMEND: 95802, 95830, 95833, 95910, 95911, 95912, 95913, 95920, 95921, 95942, ~~95943,~~ 96010, and 96022
TITLE(S): 17	REPEAL

3. TYPE OF FILING

- [X] Regular Rulemaking (Gov. Code §11346)
- [ ] Resubmittal of disapproved or withdrawn nonemergency filing (Gov. Code §§11349.3, 11349.4)
- [ ] Emergency (Gov. Code, §11346.1(b))
- [ ] Certificate of Compliance: The agency officer named below certifies that this agency complied with the provisions of Gov. Code §§11346.2-11347.3 either before the emergency regulation was adopted or within the time period required by statute.
- [ ] Resubmittal of disapproved or withdrawn emergency filing (Gov. Code, §11346.1)
- [ ] Emergency Readopt (Gov. Code, §11346.1(h))
- [ ] File & Print
- [ ] Other (Specify) _____
- [ ] Changes Without Regulatory Effect (Cal. Code Regs., title 1, §100)
- [ ] Print Only

4. ALL BEGINNING AND ENDING DATES OF AVAILABILITY OF MODIFIED REGULATIONS AND/OR MATERIAL ADDED TO THE RULEMAKING FILE (Cal. Code Regs. title 1, §44 and Gov. Code §11347.1)
June 11, 2012 - June 27, 2012; January 8, 2013 - January 23, 2013; March 22, 2013 - April 6, 2013

5. EFFECTIVE DATE OF CHANGES (Gov. Code, §§ 11343.4, 11346.1(d); Cal. Code Regs., title 1, §100)

- [X] Effective January 1, April 1, July 1, or October 1 (Gov. Code §11343.4(a))
- [ ] Effective on filing with Secretary of State
- [ ] §100 Changes Without Regulatory Effect
- [ ] Effective other (Specify) _____

6. CHECK IF THESE REGULATIONS REQUIRE NOTICE TO, OR REVIEW, CONSULTATION, APPROVAL OR CONCURRENCE BY, ANOTHER AGENCY OR ENTITY

- [X] Department of Finance (Form STD. 399) (SAM §6660)
- [ ] Fair Political Practices Commission
- [ ] State Fire Marshal
- [ ] Other (Specify) _____

7. CONTACT PERSON	TELEPHONE NUMBER	FAX NUMBER (Optional)	E-MAIL ADDRESS (Optional)
Amy Whiting	916-322-6533	916-322-3928	awhiting@arb.ca.gov

8. **I certify that the attached copy of the regulation(s) is a true and correct copy of the regulation(s) identified on this form, that the information specified on this form is true and correct, and that I am the head of the agency taking this action, or a designee of the head of the agency, and am authorized to make this certification.**

SIGNATURE OF AGENCY HEAD OR DESIGNEE	DATE
Ellen M. Peter	05/10/2013

TYPED NAME AND TITLE OF SIGNATORY: Ellen M. Peter, Chief Counsel - ~~For Richard W. Corey, Executive Officer~~ per agency request

For use by Office of Administrative Law (OAL) only

ENDORSED APPROVED

JUN 24 2013

Office of Administrative Law

FINAL REGULATION ORDER

Amend sections 95802, 95830, 95833, 95910, 95911, 95912, 95913, 95920, 95921, 95942, 95943, 96010, and 96022, title 17, California Code of Regulations to read as follows:

Note: The original regulatory text is shown in plain type. The amendments are shown in underline and ~~strikethrough~~ to indicate additions and deletions, respectively. All other portions of the Cap and Trade regulation remain unchanged and are indicated by "****" for reference.

Article 5. California Cap on Greenhouse Gas Emissions and Market-Based Compliance Mechanisms to Allow for the Use of Compliance Instruments Issued by Linked Jurisdictions

§ 95802. Definitions.

(a) Definitions. For the purposes of this article, the following definitions shall apply:

***

(17) "Auction" means the process of selling California Greenhouse Gas Allowances, along with allowances from External Greenhouse Gas Emissions Trading Systems with which California has linked its Cap-and-Trade Program pursuant to subarticle 12, by offering them up for bid, taking bids, and then distributing the allowances to winning bidders.

***

(53) Compliance Instrument" means an allowance or offset, issued by ARB or by an External Greenhouse Gas Emissions Trading System to which California has linked its Cap-and-Trade Program pursuant to

subarticle 12, ~~ARB offset credit~~ or sector-based offset credit. Each compliance instrument can be used to fulfill a compliance obligation equivalent to up to one metric ton of CO_2e.

***

(62) "Covered Entity" means an entity within California that has one or more of the processes or operations and has a compliance obligation as specified in subarticle 7 of this regulation; and that has emitted, produced, imported, manufactured, or delivered in 2009~~8~~ or any subsequent year more than the applicable threshold level specified in section 95812(a) of this rule.

***

(131) "Hold" in the context of a compliance instrument, is to have the serial number assigned to that instrument registered into an account assigned to an entity that is registered into the California Cap-and-Trade Program or an External Greenhouse Gas Emissions Trading System to which California has linked its Cap-and-Trade Program pursuant to subarticle 12, or an account under the control of the Executive Officer.

***

NOTE: Authority cited: Sections 38510, 38560, 38562, 38570, 38571, 38580, 39600 and 39601, Health and Safety Code. Reference: Sections 38530, 38560.5, 38564, 38565, 38570 and 39600, Health and Safety Code.

Subarticle 5. Registration and Accounts

§ 95830. Registration with ARB.

***

(h) Linking. When California links to an External GHG ETS, each entity must register into a jurisdiction based on the physical location information the entity must provide pursuant to section 95830(c)(1)(A).

(1) An entity located in California or in a jurisdiction operating an External GHG ETS to which California has linked pursuant to subarticle 12 must register with the jurisdiction in which they are located.

(2) An entity located in the United States may only register with California to participate in its Cap-and-Trade Program.

(3) California will recognize the registration of an entity that registers into an External GHG ETS to which California has linked pursuant to subarticle 12 and allow that entity to participate in the California Cap-and-Trade Program.

NOTE: Authority cited: Sections 38510, 38560, 38562, 38570, 38571, 38580, 39600 and 39601, Health and Safety Code. Reference: Sections 38530, 38560.5, 38564, 38565, 38570 and 39600, Health and Safety Code.

§ 95833. Disclosure of Corporate Associations.

***

(f) Consolidation of Accounts for Corporate Associations.

***

(3) To opt out of consolidation of accounts, the primary account representative or alternate account representative for an entity within the corporate association must provide to the Executive Officer by October 1, 2012:

***

(4) If an entity registered in the California Cap-and-Trade Program has a direct corporate association with an entity(ies) registered in an External Greenhouse Gas Emissions Trading System to which California has linked its Cap-and-Trade Program pursuant to subarticle 12, the entity registered in the California Cap-and-Trade Program must opt out of consolidation with the entity(ies) registered in an External Greenhouse Gas Emissions Trading System and meet all the requirements of section 95833(f)(3) except for the October 1, 2012 deadline.

(45) To consolidate the accounts for a corporate association the Executive Officer shall instruct the accounts administrator to:

***

NOTE: Authority cited: Sections 38510, 38560, 38562, 38570, 38571, 38580, 39600 and 39601, Health and Safety Code. Reference: Sections 38530, 38560.5, 38564, 38565, 38570 and 39600, Health and Safety Code.

Subarticle 10. Auction and Sale of California Greenhouse Gas Allowances

§ 95910. Auction of California GHG Allowances.

(a) Timing of the Allowance Auctions.

(1) In 2012, an auction will be held on November 14.

(2) Beginning in 2013, auctions shall be conducted on the twelfth business day in California or a jurisdiction operating an External GHG ETS to which California has linked pursuant to subarticle 12 of the second month of each calendar quarter.

***

NOTE: Authority cited: Sections 38510, 38560, 38562, 38570, 38571, 38580, 39600 and 39601, Health and Safety Code. Reference: Sections 38530, 38560.5, 38564, 38565, 38570 and 39600, Health and Safety Code.

§ 95911. Format for Auction of California GHG Allowances.

(a) Auction Bidding Format.

***

(5) The allowances for auction in section 95911(a)(3) will also include allowances from a jurisdiction operating an External GHG ETS system to which California has linked pursuant to subarticle 12.

***

(c) Method for Setting the Auction Reserve Price.

***

(3) The auction administrator will calculate the Auction Reserve Price using the following procedure:

***

(C) The auction administrator shall set the exchange rate as the most recently available noon daily buying rate for U.S. and Canadian dollars as published by the Bank of Canada, and shall announce the exchange rate prior to the opening of the auction window.

(D) The Auction Reserve Price in Canadian dollars shall be the Canadian dollar Auction Reserve Price for the previous calendar year increased annually by 5 percent plus adjusted in the manner provided for in section 83.3 of the Financial Administration Act (R.S.Q., c. A-6.001) of Quebec.

(E) The auction administrator will use the announced exchange rate to convert to a common currency the Auction Reserve Prices previously calculated separately in U.S. and Canadian dollars. The auction administrator will set the Auction Reserve Price equal to the higher of the two values.

***

(5) The Auction Reserve Price in section 95911(c)(2) will be announced on the first day in December that is a business day in California and in any jurisdiction operating an External GHG ETS to which California has linked pursuant to subarticle 12 and the Reserve Price shall also be stated in the currency (or currencies) used in an External GHG ETS to which California has linked pursuant to subarticle 12.

***

NOTE: Authority cited: Sections 38510, 38560, 38562, 38570, 38571, 38580, 39600 and 39601, Health and Safety Code. Reference: Sections 38530, 38560.5, 38564, 38565, 38570 and 39600, Health and Safety Code.

§ 95912. Auction Administration and Participant Application.

***

(c) Auction Notification. At least 60 days prior to each auction, the auction administrator shall publish the following information:

***

(8) If California has linked to a jurisdiction operating an External GHG ETS pursuant to subarticle 12, the number of allowances in section 95912(c)(6) will also include the allowances made available by the linked jurisdiction.

***

(i) Auction participants must provide a bid guarantee to the financial services administrator at least 12 days prior to the auction.

(1) The bid guarantee must be in one or a combination of the following forms:

(A) Cash in the form of a wire transfer or certified funds, such as a bank check or cashier's check;

(B) An irrevocable letter of credit issued by a financial institution with a United States banking license; or

(C) A bond issued by a financial institution with a United States banking license.

(D) The bid guarantee submitted by any entity registered with California will be in U.S. dollars.

(E) The bid guarantee will be in the currency used by the jurisdiction with which the entity has registered.

***

NOTE: Authority cited: Sections 38510, 38560, 38562, 38570, 38571, 38580, 39600 and 39601, Health and Safety Code. Reference: Sections 38530, 38560.5, 38564, 38565, 38570 and 39600, Health and Safety Code.

§ 95913. Sale of Allowances from the Allowance Price Containment Reserve.

***

(d) Timing of Reserve Sales.

***

(4) The subsequent Reserve sales in section 95913((d)(2), shall be conducted on the first day six weeks after each quarterly allowances auction scheduled pursuant to section 95910 that is also a business day in California and any linked jurisdiction operating an External GHG ETS to which Calfornia has linked pursuant to subarticle 12.

***

(i) Entities registered in an External GHG ETS to which California has linked pursuant to subarticle 12 are not eligible to purchase from the Reserve.

NOTE: Authority cited: Sections 38510, 38560, 38562, 38570, 38571, 38580, 39600 and 39601, Health and Safety Code. Reference: Sections 38530, 38560.5, 38564, 38565, 38570 and 39600, Health and Safety Code.

Subarticle 11. Trading and Banking

§ 95920. Trading.

***

(g) The holding limit in section 95920(a) shall include holdings of any allowances issued by a jurisdiction operating an External GHG ETS to which California has linked pursuant to subartcle 12.

(h) The "Annual Allowance Budget" in section 95920(d) is calculated as the sum for the current budget year of the annual compliance budgets of California and all External GHG ETS programs to which California has linked pursuant to subarticle 12. The "Annual Allowance Budget" in section 95920(e) is calculated as the sum for a budget year of the annual compliance budgets of California and all External GHG ETS programs to which California has linked pursuant to subarticle 12.

NOTE: Authority cited: Sections 38510, 38560, 38562, 38570, 38571, 38580, 39600 and 39601, Health and Safety Code. Reference: Sections 38530, 38560.5, 38564, 38565, 38570 and 39600, Health and Safety Code.

§ 95921. Conduct of Trade.

***

(b) Information Requirements for Transfer Requests. Parties to the transfer request agree to provide documentation about the transaction for which the transfer request was submitted upon the request of the Executive Officer. The following information must be reported to the accounts administrator as part of a transfer request before any transfer of allowances can be recorded on the tracking system:

***

(7) If California links to Canadian jurisdictions pursuant to subarticle 12, the price of the compliance instrument may be reported in Canadian dollars in section 95921(b)(6).

***

NOTE: Authority cited: Sections 38510, 38560, 38562, 38570, 38571, 38580, 39600 and 39601, Health and Safety Code. Reference: Sections 38530, 38560.5, 38564, 38565, 38570 and 39600, Health and Safety Code.

Subarticle 12. Linkage to External Greenhouse Gas Emissions Trading Systems

§ 95942. ~~Approval~~ Interchange of Compliance Instruments ~~from~~ with Linked External Greenhouse Gas Emissions Trading Systems~~GHG ETS~~.

***

(d) Once a linkage is approved, a compliance instrument issued by California may be used to meet a compliance obligation within the approved External GHG ETS.

(e) Once a linkage is approved, a compliance instrument issued by the linked jurisdiction may be used to meet a compliance obligation in California.

(f) The administrator of the approved External GHG ETS must agree to inform the Executive Officer of any California compliance instruments that the External GHG ETS accepts for compliance.

(g) The Executive Officer will agree to inform the appropriate official in the approved External GHG ETS of any compliance instrument accepted by California for compliance.

(h) The Executive Officer will register into the Retirement Account compliance instruments issued by California that are used for compliance within the approved External GHG ETS, along with information identifying the External GHG ETS actually retiring the compliance instruments.

NOTE: Authority cited: Sections 38510, 38560, 38562, 38570, 38571, 38580, 39600 and 39601, Health and Safety Code. Reference: Sections 38530, 38560.5, 38564, 38565, 38570 and 39600, Health and Safety Code.

§ 95943. ~~Reserved for Linkage~~Linked External GHG ETS. ~~[Repealed]~~

Covered or opt-in entities may use compliance instruments issued by the following programs to meet their compliance obligation under this article:

(a) Government of Quebec (effective January 1, 2014).

NOTE: Authority cited: Sections 38510, 38560, 38562, 38570, 38571, 38580, 39600 and 39601, Health and Safety Code. Reference: Sections 38530, 38560.5, 38564, 38565, 38570 and 39600, Health and Safety Code.

Subarticle 15. Enforcement and Penalties

§ 96010. Jurisdiction.

***

(b) The purchase or holding of a compliance instrument issued by ARB~~:~~, unless the entity holding the compliance instrument is registered in an approved External GHG ETS pursuant to subarticle 12;

***

NOTE: Authority cited: Sections 38510, 38560, 38562, 38570, 38571, 38580, 39600 and 39601, Health and Safety Code. Reference: Sections 38530, 38560.5, 38564, 38565, 38570 and 39600, Health and Safety Code.

Subarticle 16. Other Provisions

§ 96022. Jurisdiction of California.

Any party that participates in the Cap-and-Trade Program is subject to the jurisdiction of the State of California unless the party is subject to the jurisdiction of an External GHG ETS to which California has linked its Cap-and-Trade Program pursuant to section 95830(h) and subarticle 12.

NOTE: Authority cited: Sections 38510, 38560, 38562, 38570, 38571, 38580, 39600 and 39601, Health and Safety Code. Reference: Sections 38530, 38560.5, 38564, 38565, 38570 and 39600, Health and Safety Code.

Exhibit 8

California Environmental Protection Agency
Air Resources Board

Québec

AGREEMENT

BETWEEN

THE CALIFORNIA AIR RESOURCES BOARD

AND

THE *GOUVERNEMENT DU QUÉBEC*

CONCERNING

THE HARMONIZATION AND INTEGRATION OF CAP-AND-TRADE PROGRAMS FOR REDUCING GREENHOUSE GAS EMISSIONS

THE CALIFORNIA AIR RESOURCES BOARD

represented by the Chairman of the California Air Resources Board, Mary Nichols,

AND

THE *GOUVERNEMENT DU QUÉBEC*

represented by the Minister of International Relations, La Francophonie and External Trade, Jean-François Lisée and the Minister of Sustainable Development, Environment, Wildlife and Parks, Yves-François Blanchet,

hereafter referred to as "the Parties".

WHEREAS the California Air Resources Board is a part of the California Environmental Protection Agency, an organization which reports directly to the Governor's Office in the Executive Branch of California State Government;

WHEREAS, in 2006, the State of California enacted Assembly Bill 32 (AB 32) titled "California Global Warming Solutions Act," requiring it to reduce its greenhouse gas emissions to its 1990 level by 2020 and to consult with other governments to facilitate the development of integrated and cost-effective regional, national and international greenhouse gas reduction programs;

WHEREAS, the *Gouvernement du Québec*, by Order in Council 1187-2009 of November 18, 2009, adopted a greenhouse gas emissions reduction target for 2020 of 20% below the 1990 level;

WHEREAS, California covered entities are required to report their greenhouse gas emissions under the Regulation for the Mandatory Reporting of Greenhouse Gas Emissions (Title 17, California Code of Regulations, Sections 95100-95157);

WHEREAS, Québec emitters are required to report their greenhouse gas emissions in accordance with the Regulation respecting mandatory reporting of certain emissions of contaminants into the atmosphere (CQLR, chapter Q-2, r. 15);

WHEREAS, in October, 2011, the California Air Resources Board adopted the California Cap on Greenhouse Gas Emissions and Market-based Compliance Mechanisms (Subchapter 10 Climate Change, Article 5, Sections 95800 to 96023, Title 17, California Code of Regulations);

WHEREAS, in December, 2011, the *Gouvernement du Québec* adopted the Regulation respecting a cap-and-trade system for greenhouse gas emission allowances (CQLR, chapter Q-2, r. 46.1);

WHEREAS, the State of California and the *Gouvernement du Québec* are among the founding participants of Western Climate Initiative, Inc. (WCI, Inc.), a non-profit corporation incorporated in October 2011, providing administrative and technical services to its participants to support and facilitate the implementation of their cap-and-trade programs for reducing greenhouse gas emissions;

WHEREAS, the Parties share a common interest in working jointly and collaboratively toward the harmonization and integration of their mandatory greenhouse gas emissions reporting programs and of their cap-and-trade programs for reducing greenhouse gas emissions;

WHEREAS, the Parties recognize that the harmonization and integration of their mandatory greenhouse gas emissions reporting programs and their cap-and-trade programs are to be attained by means of regulations adopted by each Party;

WHEREAS, the Parties have developed constructive working relationships among their respective staff and officials, and have demonstrated the ability to harmonize their regulations and integrate their program operations, including by enabling staff to work jointly through workgroups to develop proposed harmonized approaches for consideration by each Party on topics including, but not limited to, mandatory reporting, issuance of compliance instruments, program scopes, compliance requirements, offset protocols, program registry, auction design and execution, auction platform, market regulations, invalidation of offset credits, enforcement, public disclosure of information, and information sharing among the Parties;

WHEREAS, the Parties further recognize that this Agreement is intended to facilitate continued consultation, using and building on existing working relationships, during the implementation and the operation of the Parties' respective programs and supporting the development of any proposed program changes, new offset protocols, and new program elements, with the objective of maintaining and developing harmonized and integrated approaches that may be considered by each Party;

WHEREAS, the Parties further recognize the importance of effective and timely public consultation regarding their respective program operations, program changes, new offset protocols, and new program elements;

WHEREAS, the Parties further recognize that the present Agreement does not, will not and cannot be interpreted to restrict, limit or otherwise prevail over each Party's sovereign right and authority to adopt, maintain, modify or repeal any of their respective program regulations;

WHEREAS, pursuant to section 46.14 of the Environment Quality Act (CQLR, chapter Q-2), the Minister of Sustainable Development, Environment, Wildlife and Parks is required to enter into an agreement regarding the harmonization and integration of cap-and-trade system with a government other than that of Québec, with a department of such a government, with an international organization or with an agency of such a government or organization before the *Gouvernement du Québec* is authorized to adopt regulations giving effect to such an agreement;

WHEREAS, such an agreement must also comply with the Act respecting the *Ministère des Relations internationales* (CQLR, chapter M-25.1.1);

WHEREAS, on April 8, 2013, the Governor of the State of California, as required by California Government Code section 12894, found that the four requirements of Government Code section 12894(f) have been satisfied.

THE PARTIES AGREE TO THE FOLLOWING:

CHAPTER I

GENERAL PROVISIONS

ARTICLE 1

OBJECTIVES

The objective of this Agreement is for the Parties to work jointly and collaboratively toward the harmonization and integration of the Parties' mandatory greenhouse gas emissions reporting programs and cap-and-trade programs for reducing greenhouse gas emissions.

The intended outcome of the harmonization and integration is to enable each Party under its own legislative or regulatory authority to:

a) achieve the harmonization of its regulation for mandatory reporting of greenhouse gas emissions and regulation for the cap-and-trade program for reducing greenhouse gas emissions and that such regulations will be compatible between the Parties;

b) provide for the equivalence and interchangeability of compliance instruments issued by the Parties for the purpose of compliance with their respective cap-and-trade programs;

c) permit the transfer and exchange of compliance instruments between entities registered with the Parties' respective cap-and-trade programs using a common secure registry;

d) develop compatible market regulations that are applied and enforced for all participants in the Parties' respective cap-and-trade programs;

e) allow for planning and holding joint auctions of California emission allowances and Québec emission units;

f) enable the sharing of information to support effective analysis, operation, enforcement and supervision of the market for compliance instruments.

The Parties shall report to the public annually on the status of achieving these objectives.

ARTICLE 2

DEFINITIONS

For the purposes of this Agreement:

"**Auction**" means the process in which one Party sells a determined number of emission allowances or emission units by offering them up for bid, taking bids, and then distributing the emission allowances or emission units to winning bidders;

"**Auction platform**" means the auction system used to conduct auctions;

"**Compliance instruments**" means an instrument, such as a California emission allowance or Québec emission unit, an offset credit or an early reduction credit, issued by one of the Parties that can be used by a covered entity or an emitter to fulfill a compliance obligation and having a value corresponding to the emission of one metric ton of CO_2 equivalent greenhouse gas;

"**Covered entity**" or "**emitter**" means an entity with an obligation to surrender compliance instruments for its greenhouse gas emissions under the regulation for the applicable cap-and-trade program for reducing greenhouse gas emissions;

"**Greenhouse gas**" or "**GHG**" means carbon dioxide (CO_2), methane (CH_4), nitrous oxide (N_2O), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), sulphur hexafluoride (SF_6) as well as nitrogen trifluoride (NF_3);

"**Offset protocol**" means a documented set of procedures and requirements to quantify ongoing GHG emission reductions or GHG removal enhancements achieved by an offset project and to calculate the project baseline;

"**Participant**" or "**voluntarily associated entities**" means a person or an entity, other than a covered entity or an emitter, who is registered in the program registry and participates in one of the respective cap-and-trade program for reducing greenhouse gas emissions;

"**Program**" means California's cap-and-trade program or Québec's cap-and-trade system for reducing greenhouse gas emissions, and either of the Parties' greenhouse gas emissions reporting programs;

"**Program registry**" means the data system in which covered entities, emitters, participants and voluntarily associated entities are registered, and in which compliance instruments are recorded and tracked;

"**Registered entity**" means a covered entity, an emitter, a participant or a voluntarily associated entity;

"**State, province or territory**" means the states of the United States of America and the provinces or territories of Canada.

CHAPTER II

HARMONIZATION AND INTEGRATION PROCESS

ARTICLE 3

CONSULTATION PROCESS

The Parties shall consult each other regularly and constructively to achieve the objectives of this harmonization and integration Agreement. Consultation shall build on existing working relationships and shall enable Parties' staff to work constructively through workgroups under the direction of the Parties' officials.

The procedural requirements of each Party shall be respected, including appropriate and effective openness and transparency of each Party's public consultations.

The topics of the collaboration and the joint work shall include, but are not limited to, those of the articles in this chapter.

ARTICLE 4

REGULATORY HARMONIZATION

The Parties shall continue to examine their respective regulation for mandatory reporting of greenhouse gas emissions and for the cap-and-trade program for reducing greenhouse gas emissions in order to promote continued harmonization and integration of the Parties' programs.

In the case where a difference between certain elements of the Parties' programs is identified, the Parties shall determine if such elements need to be harmonized for the proper functioning and integration of the programs. If so determined, the Parties shall consult each other regarding a harmonized approach.

Either Party, or the Parties together, may consider making changes to their respective programs, including changes or additions to emissions reporting regulation, cap-and-trade program regulation, and program related operating procedures. To support the objective of harmonization and integration of the programs, any proposed changes or additions to those programs shall be discussed between the Parties. The Parties acknowledge that sufficient time is required to enable effective public review and comment prior to adoption. The Parties shall consult regarding changes that may affect the harmonization and integration process or have other impacts on either Party. Each Party's public process for making program changes must be respected.

In the event that program conditions arise that indicate a need for rapid or emergency program changes or other actions by one or both Parties, the Parties shall work to harmonize such changes to maintain regulatory harmonization and to resolve the conditions.

ARTICLE 5

OFFSET PROTOCOLS

In order to achieve harmonization and integration of the Parties' cap and trade programs for reducing greenhouse gas emissions, the offset protocols in each of the Parties' program regulation require that all offset emission reductions and enhanced sequestration achieve the essential qualities of being real, additional, quantifiable, permanent, verifiable, and enforceable.

Either Party, or the Parties together, may consider making changes to their respective offset protocols, adding additional offset protocols, or changing procedures for issuing offset credits. To support the objective of maintaining the harmonization and integration of the programs, any proposed changes or additions shall be discussed between the Parties. The Parties acknowledge that sufficient time is required to enable effective public review and comment prior to adoption. The Parties shall consult regarding changes or additions that may affect the harmonization and integration process or have other impacts on either Party. Each Party's public process for making program changes must be respected.

ARTICLE 6

MUTUAL RECOGNITION OF COMPLIANCE INSTRUMENTS

In order to achieve harmonization and integration of the Parties' cap and trade programs for reducing greenhouse gas emissions, mutual recognition of the Parties' compliance instruments shall occur as provided for under their respective cap-and-trade program regulations.

If a Party determines that a compliance instrument that it has issued should not have been issued or must be voided, it shall notify the other Party. Each Party recognizes and respects the authority of the other Party to take actions to recover or void compliance instruments that have been surrendered or that are held by registered entities in their respective cap-and-trade programs.

ARTICLE 7

TRADE OF COMPLIANCE INSTRUMENTS

In order to achieve harmonization and integration of the Parties' cap and trade programs for reducing greenhouse gas emissions, trading of compliance instruments among registered entities in the Parties' respective programs shall occur as provided for under their respective cap-and-trade program regulations.

The Parties shall keep each other informed of any investigation, pertaining to but not limited to acts or omissions on the part of any of its registered entities or other persons authorized to act under the programs and any violation, penalty or fine, or decision rendered with respect to those acts or omissions.

ARTICLE 8

JOINT AUCTIONS

In order to achieve harmonization and integration of the Parties' cap and trade programs for reducing greenhouse gas emissions, the auctioning of emission allowances and emission units by the Parties' respective programs shall occur jointly and in accordance with the harmonized procedures developed by the Parties, as provided for under their respective cap-and-trade program regulations.

ARTICLE 9

COMMON PROGRAM REGISTRY AND AUCTION PLATFORMS

The Parties shall work together to develop and use common electronic platforms in order to ensure program compatibility, integrity, and integration, including but not limited to a program registry platform and an auction platform.

The common program registry and auction platforms shall be available in English and French and allow for recording and performing transactions in Canadian and US dollars. The program registry and auction platforms shall conform to the requirements of the Parties' respective program regulations and operating procedures.

CHAPTER III

OPERATION OF THE AGREEMENT

ARTICLE 10

SUPERVISION AND ENFORCEMENT

The Parties shall work cooperatively to prevent fraud, abuse and market manipulation and to ensure the reliability of the joint auction and their respective program. The Parties shall work cooperatively in applying the rules, laws and regulations governing the supervision of all transactions carried out among registered entities of each of the Parties and of any auction or reserve sale.

The Parties shall facilitate, in accordance with the privacy legislation applicable in each of their territories and the provisions of article 14 hereunder, the sharing of information to support each Party's effective analysis, supervision and enforcement of the applicable laws and regulations.

ARTICLE 11

COORDINATED ADMINISTRATIVE AND TECHNICAL SUPPORT

The Parties shall continue coordinating administrative and technical support through the WCI, Inc., which was created to perform such tasks for one or both of the Parties as applicable.

If one of the Parties wishes to consider approaches other than WCI, Inc. for coordinating administrative and technical support, it shall consult the other Party with the objective of developing jointly a harmonized approach.

If one of the Parties wishes to contract the services of a third party for technical or administrative support, or services of another nature required for the development or the operation of common program registry and auction platforms, it shall consult the other Party with the objective of developing jointly a harmonized approach.

ARTICLE 12

CONSULTATION COMMITTEE

To facilitate the harmonization and integration process of the programs and the operation of the Agreement, the Parties shall create a Consultation Committee composed of one representative from each of the Parties. This Consultation Committee shall meet as needed to ensure timely and effective consultation in support of the objectives of this Agreement.

The California Air Resources Board designates as its Consultation Committee representative the Executive Officer of the Air Resources Board.

The *Gouvernement du Québec* designates as its Consultation Committee representative the Assistant Deputy Minister for Climate Change, Air and Water at the *Ministère du Développement Durable, de l'Environnement, de la Faune et des Parcs*.

The Consultation Committee shall:

a) monitor the implementation of all measures that are required for the effective harmonization and integration of the Parties' greenhouse gas emissions reporting programs and cap-and-trade programs for reducing greenhouse gas emissions;

b) report the results of the Agreement annually to the Parties in light of the objectives that have been set out and recommend measures to improve the harmonization and integration of the Parties' greenhouse gas emissions reporting programs and cap-and-trade programs for reducing greenhouse gas emissions; and

c) address any other issues at the request of the Parties.

The Consultation Committee shall receive and review updates from the Parties on each area of activity as needed under this Agreement in a timely manner. If the Consultation Committee identifies or becomes aware of differences between the Parties regarding how to maintain the harmonization and integration of their programs, the Consultation Committee shall undertake to resolve the differences in accordance with Article 18.

CHAPTER IV

MISCELLANEOUS PROVISIONS

ARTICLE 13

JURISDICTION

This Agreement does not modify any existing laws and regulations, nor may any of its provisions be interpreted as amending any agreement or provision of an agreement entered into or to be entered into by either Party.

ARTICLE 14

CONFIDENTIALITY OF INFORMATION

To support and enhance the supervision and enforcement of the Parties' respective program regulations, the Parties shall jointly arrange to share information collected and developed under their respective programs. Nothing in this Agreement requires a Party to breach confidentiality obligations or requirements prohibiting disclosure to which it is bound under its own laws, nor compromise the security with which information is held, nor disclose confidential information such as commercially sensitive or personal information.

When information is shared between the Parties, each Party shall undertake to protect the information they provide and receive, in accordance with the privacy legislation applicable in each of their jurisdictions, and take all necessary measures to such end, particularly with respect to their mode of communication, control, management and destruction. Shared information is to be used solely to the purpose of the objectives of this Agreement.

If confidential information must be communicated by a Party to a non-Party to this Agreement under a law or following a court order, it shall notify the other Party as soon as possible.

ARTICLE 15

PUBLIC ANNOUNCEMENT

The Parties shall keep each other informed in advance of any public announcement related to the mandatory reporting of greenhouse gas emissions and the cap-and-trade programs for reducing greenhouse gas emissions.

Any announcement concerning the harmonization or integration of the Parties' programs shall be prepared and, if possible, made public jointly.

CHAPTER V

FINAL PROVISIONS

ARTICLE 16

WITHDRAWAL PROCEDURE

A Party may withdraw from this Agreement by giving 12 months prior written notice to the other Party. A Party that withdraws from this Agreement shall endeavor to provide notification of withdrawal at least 12 months prior to the end of a compliance period so that withdrawal would be effective at the end of a compliance period.

Withdrawal from this Agreement does not end a Party's obligations under article 14 regarding confidentiality of information which continue to remain in effect.

ARTICLE 17

AMENDMENTS AND THIRD PARTIES

Any amendment to this Agreement shall be in writing and requires the unanimous consent of the Parties.

When so agreed, and subsequently approved in accordance with the requisite legal procedures of each Party, the amendment shall constitute an integral part of this Agreement beginning on the date of its coming into force.

Recognizing that the Parties welcome effective, timely, and meaningful action to reduce GHG emissions by states, provinces and territories, this Agreement may be amended to include additional parties that have adopted programs that are harmonized with each of the Parties' programs. For such purposes, the requisite legal and regulatory procedures of each Party shall be respected.

ARTICLE 18

RESOLUTION OF DIFFERENCES

The Parties shall consult each other constructively to resolve differences that may arise regarding how to achieve the objective of harmonizing and integrating their greenhouse gas emissions reporting programs and cap-and-trade programs for reducing greenhouse gas emissions.

The Parties shall resolve differences by using and building on established working relationships, including enabling staff to work jointly through workgroups to develop proposed harmonized and integrated approaches for consideration by each Party. If approaches for resolving differences that are acceptable to the Parties cannot be developed in a timely manner through staff workgroups, the Parties shall constructively engage through the Consultation Committee, and if needed with additional officials of the Parties, or their

designees. The Parties endeavor to resolve differences in a timely manner, so that the harmonization and integration of the programs can be maintained.

ARTICLE 19

COMMUNICATIONS

The Parties agree to communicate on matters regarding this Agreement in writing and hand delivered or transmitted by telegram, fax, e-mail, messenger, courier or registered mail to the address of the Party concerned as indicated below.

For the California Air Resources Board:

Executive Officer
California Air Resources Board
1001 I Street
Sacramento, California 95814
Phone: (916) 322-7077
Fax: (916) 323-1045

For the *Gouvernement du Québec*:

Director
Bureau des changements climatiques
Ministère du Développement durable, de l'Environnement,
de la Faune et des Parcs
675 René-Lévesque Blvd. East, 6th Floor, Box 31
Québec (Québec) G1R 5V7
Phone: 418 521-3868
Fax: 418 646-4920

Notice of any change of address of one of the Parties or representative identified in this Article must be given to the other Party.

ARTICLE 20

COMING INTO FORCE AND DURATION OF THE AGREEMENT

Each of the Parties shall notify the other once the internal procedure required for the Agreement's entry into force has been completed.

The Agreement shall enter into full force and effect on the first day of the month following the date of receipt of notification from the last of the Parties informing the other Party that the legally required measures have been completed.

The Agreement is concluded for an indefinite period of time as of the date of its entry into force. It shall be terminated pursuant to unanimous consent of the Parties given in writing to such effect. Termination of the Agreement shall be effective 12 months following such consent.

Termination of this Agreement does not end a Party's obligations under article 14 regarding confidentiality of information which continue to remain in effect.

Done in duplicate, in the English and French languages, both versions being equally authentic.

FOR THE CALIFORNIA AIR RESOURCES BOARD

At Sacramento, California, on September 25, 2013

Mary Nichols

Chairman of the California Air Resources Board

FOR THE *GOUVERNEMENT DU QUÉBEC*

At Montreal, on 27/9/13

Jean-François Lisée
Minister of International Relations, La Francophonie and External Trade

At Montreal, on 27/9/2013

Yves-François Blanchet

Minister of Sustainable Development, Environment, Wildlife and Parks

Exhibit 9

State of California
AIR RESOURCES BOARD

California Cap-and-Trade Program

Resolution 17-21

July 27, 2017

Agenda Item No.: 17-8-1

WHEREAS, sections 39600 and 39601 of the Health and Safety Code authorize the Air Resources Board (ARB or Board) to adopt standards, rules, and regulations and to do such acts as may be necessary for the proper execution of the powers and duties granted to and imposed upon the Board by law;

WHEREAS, the Legislature has enacted the Global Warming Solutions Act of 2006 (Assembly Bill 32 or AB 32; Chapter 488, Statutes of 2006; Health & Safety Code section 38500 et seq.), which declares that global warming poses a serious threat to the economic well-being, public health, natural resources, and the environment of California, and creates a comprehensive multi-year program to reduce California's greenhouse gas (GHG) emissions to 1990 levels by 2020;

WHEREAS, section 38551 of the Health and Safety Code directs that the statewide GHG limit shall remain in place indefinitely, and that emissions reductions be continued and maintained beyond 2020;

WHEREAS, section 38566 of the Health and Safety Code, added pursuant to Senate Bill 32 (SB 32; Chapter 250, Statutes of 2016), further directs that ARB shall ensure that state GHG emissions are reduced to at least 40 percent below the statewide GHG limit no later than December 31, 2030;

WHEREAS, section 38501 to the Health and Safety Code expresses the Legislature's intent that ARB coordinate with State agencies and consult with the environmental justice community, industry sectors, business groups, academic institutions, environmental organizations, and other stakeholders in implementing AB 32; and design emissions reduction measures to meet the statewide emissions limits for GHGs in a manner that minimizes costs and maximizes benefits for California's economy, maximizes additional environmental and economic co-benefits for California, and complements the State's efforts to improve air quality;

WHEREAS, section 38501(c) of the Health and Safety Code declares that California has long been a national and international leader on energy conservation and environmental stewardship efforts, and the targets established pursuant to AB 32 and SB 32 will continue this tradition of environmental leadership by placing California at the forefront of national and international efforts to reduce GHG emissions;

WHEREAS, section 38501(d) of the Health and Safety Code confirms that national and international actions are necessary to fully address the issue of global warming, but action taken by California to reduce GHG emissions will have far reaching effects by encouraging other states, the federal government, and other countries to act;

WHEREAS, section 38501(e) of the Health and Safety Code states by exercising a global leadership role, California will also position its economy, technology centers, financial institutions, and businesses to benefit from national and international efforts to reduce GHG emissions. More importantly, investing in the development of innovative and pioneering technologies will assist California in achieving the 2020 and 2030 statewide limits on GHG emissions and will provide an opportunity for the state to take a global economic and technological leadership role in the reduction of GHG emissions;

WHEREAS, section 38510 of the Health and Safety Code designates ARB as the State agency charged with monitoring and regulating sources of GHG emissions in order to reduce these emissions;

WHEREAS, section 38560 of the Health and Safety Code directs ARB to adopt rules and regulations in an open public process to achieve the maximum technologically feasible and cost-effective GHG emissions reductions from sources or categories of sources;

WHEREAS, section 38562 of the Health and Safety Code requires ARB to adopt GHG emissions limits and emissions reduction measures by regulation to achieve the maximum technologically feasible and cost-effective reductions in GHG emissions in furtherance of achieving the statewide GHG emissions limit, to become operative beginning on January 1, 2012;

WHEREAS, section 38562(b) of the Health and Safety Code requires ARB, to the extent feasible and in furtherance of achieving the statewide GHG emissions limit, to do all of the following:

> Design the regulations, including distribution of emissions allowances where appropriate, in a manner that is equitable, seeks to minimize costs and maximize total benefits to California, and encourages early action to reduce GHG emissions;
>
> Ensure that activities undertaken to comply with the regulations do not disproportionately impact low-income communities;
>
> Ensure that entities that have voluntarily reduced their GHG emissions prior to the implementation of this section receive appropriate credit for early voluntary reductions;

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 standards and to reduce toxic air contaminant emissions;

Consider cost-effectiveness of these regulations;

Consider overall societal benefits, including reductions in other air pollutants, diversification of energy sources, and other benefits to the economy, environment, and public health;

Minimize the administrative burden of implementing and complying with these regulations;

Minimize leakage; and

Consider the significance of the contribution of each source or category of sources to statewide GHG emissions;

WHEREAS, the Legislature has enacted AB 197 (Chapter 250, Statutes of 2016), which directs ARB to follow the requirements of section 38562(b) of the Health and Safety Code, consider the social cost of GHG emissions, and prioritize direct emission reductions from sources in California;

WHEREAS, sections 38562(c) and 38570 of the Health and Safety Code authorize ARB to adopt regulations that utilize market-based compliance mechanisms;

WHEREAS, section 38570(b) of the Health and Safety Code also directs ARB, to the extent feasible and in furtherance of achieving the statewide GHG emissions limit, to do all of the following before including any market-based compliance mechanism in the regulations:

Consider the potential for direct, indirect, and cumulative emissions impacts from these mechanisms, including localized impacts in communities that are already adversely impacted by air pollution;

Design any market-based compliance mechanism to prevent any increase in the emissions of toxic air contaminants or criteria air pollutants; and

Maximize additional environmental and economic benefits for California, as appropriate.

WHEREAS, section 38570(c) of the Health and Safety Code further directs ARB to adopt regulations governing how market-based compliance mechanisms may be used by regulated entities subject to GHG emissions limits and mandatory emissions reporting requirements to achieve compliance with their GHG emissions limits;

WHEREAS, section 38571 of the Health and Safety Code directs ARB to adopt methodologies for the quantification of voluntary GHG emissions reductions and regulations to verify and enforce any voluntary GHG emissions reductions that are authorized by ARB for use to comply with GHG emissions limits established by ARB; the adoption of methodologies is exempt from the rulemaking provisions of the Administrative Procedure Act;

WHEREAS, section 38564 of the Health and Safety Code directs ARB to consult with other states, the federal government, and other nations to identify the most effective strategies and methods to reduce GHG emissions, manage GHG control programs, and to facilitate the development of integrated and cost-effective regional, national, and international GHG reduction programs;

WHEREAS, California is a participant in the Western Climate Initiative (WCI) with other Partner jurisdictions considering implementation and linkage of GHG cap-and-trade programs;

WHEREAS, over the course of four years, the WCI Partner jurisdictions coordinated on developing recommendations for GHG reporting, compliance offsets, and cap-and-trade programs as models for jurisdictions to develop their own programs;

WHEREAS, the WCI Partner jurisdictions developed recommendations in a public and transparent manner with over 130 public documents; 86 stakeholder meetings, webinars, and calls; and received comments on 48 occasions;

WHEREAS, by linking California's Program to WCI Partner jurisdictions, the combined Programs will result in more emission reductions, generate greater potential for lower cost emissions reductions, enhance market liquidity, and will increase opportunities for GHG emissions reductions for covered sources relative to what could be realized through a California-only program;

WHEREAS, establishing and implementing a California and regional GHG cap-and-trade program requires ARB and WCI Partner jurisdictions to harmonize specific regulatory and operational provisions, including, but not limited to, sources subject to compliance obligations, emissions reporting requirements, cost-containment mechanisms, evaluation of regulatory baselines for existing offset protocols, procedures for developing new offset protocols, compliance instrument tracking system development and operation, auction services, financial services, and market monitoring and oversight;

WHEREAS, ARB and the WCI Partner jurisdictions established a regional administrative organization in November 2011, similar to that used by other regional

cap-and-trade programs, called Western Climate Initiative, Inc., to meet the goal of regionally coordinated administration of cap-and-trade services;

WHEREAS, the Board adopted the Final Regulation Order establishing a GHG cap-and-trade program for California; the Regulation first became effective January 1, 2012, and includes the following elements:

Addresses emissions of carbon dioxide (CO_2), methane (CH_4), nitrous oxide (N_2O), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), sulfur hexafluoride (SF_6), and nitrogen trifluoride (NF_3);

Identifies the program scope: starting in 2012, electricity, including imports, and large (emissions ≥25,000 metric tons carbon dioxide equivalent ($MTCO_2e$) per year) stationary sources are included; starting in 2015, distributors of transportation fuels, natural gas, and other fuels are included;

Establishes a declining aggregated emissions cap on included sectors. The cap starts at 162.8 million allowances in 2013, which is equal to the emissions forecast for that year. The cap declines approximately 2 percent per year in the initial period (2013–2014). In 2015, the cap increases to 394.5 million allowances to account for the expansion in program scope to include fuel suppliers. The cap declines at approximately 3 percent per year between 2015 and 2020. The 2020 cap is set at 334.2 million allowances;

Provides for distribution of allowances through a mix of direct allocation and auction in a system designed to reward early action and investment in energy efficiency and GHG emissions reductions; allowances are distributed for the purposes of price containment, emissions leakage prevention, ratepayer benefit, transition assistance, and fulfillment of AB 32 statutory objectives;

Provides for distribution of allowances to industrial covered entities on the basis of direct and indirect GHG costs with the exception of indirect GHG costs for purchased electricity. These indirect costs for electricity are compensated through electrical distribution utilities;

Establishes a market platform for allowance auction and sale;

Establishes cost-containment mechanisms and market flexibility mechanisms, including trading of allowances and offsets, allowance banking, a 2-year compliance period and two 3-year compliance periods, the ability to use offsets for up to 8 percent of an entity's compliance obligation, and an allowance reserve that provides allowances at fixed prices to those with compliance obligations;

Establishes a mechanism to link with other GHG trading programs and approve the use of compliance instruments issued by a linked external GHG trading program;

Establishes requirements and procedures for ARB to issue offset credits according to offset protocols adopted by the Board;

Includes four offset protocols adopted by the Board as part of the regulation;

Establishes a robust enforcement mechanism that will discourage gaming of the system and deter and vigorously punish fraudulent activities; and

Provides an opt-in provision for entities whose annual GHG emissions are below the threshold to voluntarily participate in this program.

WHEREAS, the California Public Utilities Commission and some industrial covered entities requested that ARB allocate allowances directly to industrial covered entities for the GHG costs associated with purchased electricity;

WHEREAS, Senate Bill 350 (SB 350, Statutes of 2015) directs ARB to "identify and adopt appropriate policies, rules, or regulations to remove regulatory disincentives preventing" electrical distribution utilities from reducing GHG emissions through increased transportation electrification, including allowance allocation to recognize increased electric sector GHG emissions from transportation electrification;

WHEREAS, investor-owned electrical distribution utilities are required to consign all allocated allowances to auction, natural gas suppliers are required to consign a minimum percentage of allowances to auction, and that percentage increases every year. Consignment of these allocated allowances allows for GHG cost pass through, which encourages consumer energy conservation, and auction proceeds can be used for GHG emissions reductions and/or returned to ratepayers to protect them from increased energy costs;

WHEREAS, the Board adopted amendments to the Regulation in 2012 to make targeted implementation changes that became effective September 1, 2012;

WHEREAS, the Board adopted amendments to the Regulation in 2013 to formally link the Cap-and-Trade Program with the Province of Québec's cap-and-trade-program that became effective October 1, 2013, making California and Québec allowances and offsets available for compliance purposes in both jurisdictions;

WHEREAS, the Board adopted amendments to the Regulation in 2014 to adopt an additional compliance offset protocol for Mine Methane Capture, and make additional implementation changes that became effective July 1, 2014;

WHEREAS, the Board adopted a second set of amendments to the Regulation in 2014 to adopt updates to the compliance offset protocols for Livestock, Ozone Depleting Substances, and U.S. Forests, and make additional implementation changes that became effective January 1, 2015;

WHEREAS, the Board adopted amendments to the Regulation in 2015 to adopt an additional compliance offset protocol for Rice Cultivation, adopt an update to the compliance offset protocol for U.S. Forests, and make additional implementation changes that became effective November 1, 2015;

WHEREAS, staff has proposed amendments to the Cap-and-Trade Regulation; the amended Regulation is set forth in Attachment A hereto and includes the following elements:

A framework for GHG allowance budgets from 2021 through 2050, with the 2030 cap set at 200.5 million $MTCO_2e$;

Modifying the Allowance Price Containment Reserve beginning in 2021 to contain a single tier and set the Reserve Sale Price as the sum of the Auction Reserve Price plus a fixed amount initially equal to the difference between the Auction Reserve Price and the highest Allowance Containment Reserve Price tier in 2020;

A process for transferring State-owned allowances that remain unsold for more than 24 months to the Allowance Price Containment Reserve;

Linkage with the Ontario cap-and-trade program beginning in 2018;

Inclusion of provisions to allow for two new forms of linkage: Retirement-Only Limited Linkage and Retirement-Only Agreement. These provisions specify that any future such linkage would require further public process and Board approval;

Modifications to include requirements for electricity generating facilities to implement and comply with the U.S. EPA Clean Power Plan such as by including all electrical generating units (EGUs) regardless of emissions in the Cap-and-Trade Program, aligning compliance periods, calculating compliance targets, and creating a backstop mechanism;

Modification or creation of several product-based benchmarks for the third compliance period;

Clarifications to the allowed uses of electrical distribution utility (EDU) and natural gas supplier allocated allowance value;

Extension of EDU and natural gas supplier allowance allocation for ratepayer benefit beyond 2020;

Extension of allowance allocation to universities, public service facilities, and water agencies beyond 2020;

Modifications to the requirements about the return of free allowance allocation;

Modifications to ensure full accounting of emissions from electricity imports within the California Independent System Operator (CAISO) Energy Imbalance Market (EIM), including through the retirement of allowances that remain unsold at auction for more than 24 months to account for these EIM emissions;

Expansion of eligibility requirements for allowance retirement through the Voluntary Renewable Electricity Program;

Modifications to remove the qualified export adjustment to imported electricity in 2018, continue the limited exemption for waste-to-energy facilities through the second compliance period, and provide a limited exemption for liquid natural gas providers through the second compliance period; remove the exemption for natural gas hydrogen fuel cell producers starting in 2018; change the low bleed pneumatic device exemption to an intermittent bleed pneumatic device exemption starting in 2019; modify limited exemptions to entity compliance obligations to better reflect the most recent GHG emissions data reports; and add an exemption for CO_2 emissions resulting from food and beverage fermentation;

Requirement to list an offset project no later than one year after offset project commencement;

Clarifications that an offset project would terminate if reporting is not continuous, allow additional time to report in the first reporting period, require signed attestations with each document submittal, and expand interim data collection methods;

Modifications to the offset regulatory compliance requirement to limit the time period an offset project is ineligible to receive ARB offset credits and to more clearly define project-related activities;

Modifications to verification requirements for sequestration projects to simplify verifier rotation and to streamline timing of verification services, completion of verification services, and conflict of interest requirements;

Changes to the mechanism of ARB offset credit issuance, including allowing the Authorized Project Designee to request issuance to any party, more clearly limit ARB offset issuance to projects located in the United States, and the order of registry offset credit retirement;

Modifications to forestry offset project reversals and invalidations;

Elimination of all provisions of the early action offset program;

Modifications to reorganize and further clarify Compliance Instrument Tracking System Service account registration requirements;

Changes to corporate association disclosures to streamline requirements; and

Modifications to auction and reserve sale administration to provide clarity, consistency and efficiency.

WHEREAS, staff conducted eleven public workshops, including two public workshops on linkage, provided informal regulatory text, and also participated in numerous other meetings with various stakeholders to provide additional opportunities to participate in the regulatory development process;

WHEREAS, the Board has considered the community impacts of the proposed regulation, including environmental justice concerns as well as the social cost of carbon;

WHEREAS, the Board believes the success of California's Cap-and-Trade Program is predicated on GHG regulations that are clear, consistent, enforceable, and transparent;

WHEREAS, the Board is committed to ensuring that reductions in the percentage of allowances given to California manufacturing businesses do not discourage investments in upgrading existing facilities for production efficiency and growth and reductions in air pollutants, investment in new technologies and competitiveness;

WHEREAS, the Board believes decarbonizing the natural gas system is critical to meeting the State's long-term climate goals and is reinforced by the Short-Lived Climate Plan developed pursuant to SB 1383 (Lara, Chapter 395, Statutes of 2016);

WHEREAS, entities with legacy contracts that were entered into prior to AB 32 may not have an appropriate mechanism for recovery of GHG costs associated with the Cap-and-Trade Regulation;

WHEREAS, staff has prepared a document entitled "Staff Report: Initial Statement of Reasons—Public Hearing to Consider the Proposed Amendments to the California Cap on Greenhouse Gas Emissions and Market-Based Compliance Mechanisms" (ISOR), which presents the rationale and basis for the proposed regulation and identifies the data, reports, and information relied upon;

WHEREAS, the proposed regulatory language was made available to the public at least 45 days prior to the public hearing to consider the proposed regulation, with two subsequent comment periods of at least 15 days to add documents to the record and propose additional modifications to the regulatory text;

WHEREAS, Senate Bill 1018 (Government Code section 12894(f)) was enacted requiring State agencies to notify the Governor that the agency intends to take action to link with another GHG emissions trading program; and the Governor must make specified findings prior to the agency taking action to approve the linkage;

WHEREAS, on January 30, 2017, ARB sent a letter to the Governor requesting the Governor's consideration of the four findings that are necessary before ARB can adopt a regulation that would link the GHG emissions trading programs developed by California and the Canadian Province of Ontario;

WHEREAS, on March 16, 2017, the Governor provided ARB a letter stating that the four requirements of Government Code section 12894(f) have been satisfied and describing additional steps the Board will take prior to implementing linkage with the Ontario cap-and-trade program;

WHEREAS, in consideration of the ISOR, written comments, and public testimony it has received to date, the Board finds that:

Staff's proposed regulatory text meets the statutory requirements identified in section 38562 of the Health and Safety Code including equitable and cost effective distribution of allowances to maximize total benefits to California; minimizing leakage, and cost effectiveness;

Staff's proposed regulatory text meets the statutory requirements for a market-based mechanism identified in section 38570 of the Health and Safety Code, including consideration of the potential for direct; indirect, and cumulative emission impacts; prevention of increases in emissions of toxic air contaminants or criteria pollutants; and maximizing additional environmental and economic benefits for California;

Staff has considered the social cost of GHG emissions and prioritized emission reduction rules that result in direct emission reductions pursuant to section 38562.5 of the Health and Safety Code;

Staff's proposed regulatory text was developed in an open public process, in consultation with affected parties through public workshops, individual meetings, and other outreach efforts;

Ontario's program for GHG emission reductions is at least as stringent as California's program;

The scope of Ontario's cap-and-trade program is consistent with the scope of California's Cap-and-Trade Program;

Ontario's GHG reporting program is rigorous and will provide accurate GHG emissions data to support a cap-and-trade program;

Ontario's GHG reporting program verification requirements are consistent with California's requirements;

Ontario's cap-and-trade program is designed with mechanisms consistent with California's Cap-and-Trade Program to prevent the ability of entities to exert market power;

Ontario's auction mechanics are consistent with those in California's Cap-and-Trade Program and will enable the administration of joint auctions;

Ontario's entity verification requirements are consistent with those in the California Cap-and-Trade Program;

Ontario's compliance offset program design is consistent with California's Cap-and-Trade Program requirements;

Ontario's offset criteria are consistent with AB 32 and California's Cap-and-Trade Program;

Ontario's offset verification requirements are consistent with those recommended by WCI and included in California's Cap-and-Trade Program;

Ontario's process for approving offset protocols utilizes the same rigorous criteria and oversight as California's Cap-and-Trade Program;

Staff's proposed regulatory text is predicated on GHG regulations that are clear, consistent, enforceable, and transparent and helps meet the goals of AB 32 and SB 32; and

Staff's proposed regulatory text would provide for a linked Cap-and-Trade Program between California and Ontario, effective January 1, 2018, where allowances and compliance offsets issued by each jurisdiction would be fungible across both Programs.

WHEREAS, the WCI coordination process to have a linked cap-and-trade program between California and any of the WCI Partner jurisdictions as described in the ISOR does not set a precedent for other mechanisms for California to accept compliance instruments from other types of programs;

WHEREAS, ARB's regulatory program that involves the adoption, approval, amendment, or repeal of standards, rules, regulations, or plans has been certified by the Secretary of Natural Resources Agency under Public Resources Code section 21080.5 of the California Environmental Quality Act (CEQA; California Code of Regulations, title 14, section 15251(d)), and ARB conducts its CEQA review according to this certified program (California Code of Regulations, title 17, sections 60000-60007);

WHEREAS, ARB prepared an environmental analysis for the amended Regulation for purposes of the California Environmental Quality Act under its certified regulatory program (Public Resources Code section 21 080.5) in a document entitled *Draft*

Environmental Analysis prepared for the Proposed Amendments to the California Cap on Greenhouse Gas Emissions and Market-Based Compliance Mechanisms Regulation (Draft EA), included as Appendix B to the ISOR circulated for public review from August 5, 2016 through September 19, 2016 (the Draft EA was also circulated as Appendix J to the Proposed Compliance Plan for the federal Clean Power Plan);

WHEREAS, the Draft EA evaluated potential significant adverse and beneficial impacts from implementation of both the proposed amendments to the Cap-and-Trade regulation and the Proposed Compliance Plan for the federal Clean Power Plan, and stated that these actions could result in beneficial impacts to GHGs and energy demand; could result in less than significant or no impacts to aesthetics, agriculture and forest resources, geology, soils, and mineral resources (relating to the offset protocols), hazards and hazardous materials, hydrology and water quality, land use and planning, noise, population, employment, and housing, public services, recreation, transportation and traffic, and utilities and service systems; could result in potentially significant and unavoidable adverse impacts to aesthetics, agriculture and forest resources, air quality, biological resources, cultural resources, geology, soils, and mineral resources, hazards and hazardous materials, hydrology and water quality, land use and planning, noise, recreation, and transportation and traffic, primarily due to construction activities; and could also result in significant cumulative impacts in certain resource areas.

WHEREAS, staff reviewed written comments received on the Draft EA during the initial 45-day comment period and subsequent 15-day comment periods and prepared the *Final Environmental Analysis Prepared for the Proposed Amendments to the California Cap on Greenhouse Gas Emissions and Market-Based Compliance Mechanisms Regulation* (Final EA) and prepared written responses to those comments in a document entitled *Responses to Comments on the Draft Environmental Analysis Prepared for the Proposed Amendments to the California Cap on Greenhouse Gas Emissions and Market-Based Compliance Mechanisms Regulation and California's Compliance Plan for the Federal Clean Power Plan* (Responses to EA Comments);

WHEREAS, on July 17, 2017, staff posted on ARB's webpage the Final EA, which includes minor revisions to the Draft EA, and the Response to EA Comments;

WHEREAS, prior to the duly noticed public hearing held on July 27, 2017, staff provided the Final EA and the Response to EA Comments to the Board for consideration; and

WHEREAS, on July 17, 2017, the Legislature passed, and on July 25, 2017, the Governor signed into law, AB 398. AB 398 amends certain provisions of AB 32 to take effect starting January 1, 2021, and expressly supports ARB's authority to continue the Cap-and-Trade Program; and the Board recognizes that additional regulatory modifications to the Cap-and-Trade Program will be required through a new rulemaking process to implement the AB 398 requirements for the post-2020 Cap-and-Trade Program;

NOW, THEREFORE, BE IT RESOLVED that the Board certifies that the Final EA, as set forth in Attachment B to this resolution, was completed in compliance with ARB's

certified regulatory program to meet the requirements of CEQA, reflects the agency's independent judgment and analysis, and was presented to the Board, whose members reviewed and considered the information before taking action to adopt the amendments to the California Cap on Greenhouse Gas Emissions and Market-Based Compliance Mechanisms set forth in Attachment A to this Resolution.

BE IT FURTHER RESOLVED that the Board approves the Responses to EA Comments as set forth in Attachment C to this resolution.

BE IT FURTHER RESOLVED that in consideration of the Final EA and the Responses to EA Comments, the Board adopts the Findings and Statement of Overriding Considerations as set forth in Attachment D to this resolution.

BE IT FURTHER RESOLVED that the Board adopts the amendments to the California Cap on Greenhouse Gas Emissions and Market-Based Compliance Mechanisms set forth in Attachment A to this Resolution.

BE IT FURTHER RESOLVED that the Board directs the Executive Officer to finalize the Final Statement of Reasons and submit the rulemaking package to the Office of Administrative Law by August 4, 2017.

BE IT FURTHER RESOLVED that the Board directs the Executive Officer to report to the Board at least annually on the status of the linked Cap-and-Trade Program.

BE IT FURTHER RESOLVED that the Board directs the Executive Officer to work with any remaining entities with legacy contracts and their non-industrial counterparties to resolve the parties' issues related to recovery of greenhouse gas costs, or, as necessary, to propose regulatory amendments to be in place no later than the allocation of vintage 2021 allowances to ensure reasonable transition assistance for greenhouse gas costs throughout the term of the legacy contract.

BE IT FURTHER RESOLVED that the Board directs the Executive Officer to work with natural gas utilities to evaluate and propose, as necessary, post-2020 program regulatory amendments to ensure adequate rate payer protection as the State pursues strategies to decarbonize the natural gas system.

BE IT FURTHER RESOLVED that the Board directs the Executive Officer to work with the three existing waste-to-energy facilities that are covered by the Cap-and-Trade Program to provide transition assistance for a compliance obligation beginning in 2018 and ending when landfill diversion is required to achieve a 75 percent diversion rate by 2025.

BE IT FURTHER RESOLVED that the Board directs the Executive Officer to evaluate and propose, as necessary, post-2020 cap adjustment factors consistent with the methodology used in 2015-2017 allocation calculations for sectors that have been

determined to be highly trade exposed with highly emissions intensive products that have greater than 50 percent process emissions.

BE IT FURTHER RESOLVED that the Board directs the Executive Officer to propose subsequent regulatory amendments to provide a quantity of allocation, for the purposes of minimizing emissions leakage, to industrial entities for 2018 through 2020 by using the same assistance factors in place for 2013 through 2017.

BE IT FURTHER RESOLVED that the Board directs the Executive Officer to evaluate appropriate quantification methodologies for additional electrical distribution utility allocation that would provide ratepayer benefit for the Cap-and-Trade Program cost burden associated with transportation electrification load growth (in recognition of the requirements of SB 350).

BE IT FURTHER RESOLVED that the Board directs the Executive Officer to consider requiring all electrical distribution utilities to consign all allocated allowances to auction, and to use auction proceeds for specific purposes to further the goals of AB 32 and SB 32.

BE IT FURTHER RESOLVED that, at least six months prior to any of the following taking effect in a linked jurisdiction, the Executive Officer will provide a report to the Board that includes an assessment of environmental factors and will provide a recommendation for Board action if appropriate. The report to the Board will also include an opportunity for public review and input.

Changes to the stringency of the Program, including changes to the cap;

The adoption of a new compliance offset protocol or significant amendments to an existing compliance offset protocol;

Linkage to another cap-and-trade program; and

Any other change to a linked jurisdiction's Program which would significantly affect the stringency, integrity, enforceability or successful functioning of the combined Programs.

BE IT FURTHER RESOLVED that the Board directs the Executive Officer to work with Ontario to complete pre-linkage activities prior to the linkage effective date of January 1, 2018. These activities should include those steps needed to ensure implementation readiness, which may include, but are not limited to, testing of the auction platform to allow for a joint auction among California, Québec, and Ontario; testing of the tracking system to enable transfers across program participants; and, a review (and adjustments as needed) of processes, procedures, and systems of California's, Québec's and Ontario's programs to ensure consistency and compatibility.

BE IT FURTHER RESOLVED that the Board directs the Executive Officer to coordinate with the Government of Ontario to ensure that both jurisdictions maintain enforceable linked cap-and-trade programs, and that the implementation of the cap-and-trade programs in linked jurisdictions is as rigorous as California's implementation of its Cap-and-Trade Program. This coordination should include the reporting and verification of GHG emissions, reports on implementation of offset programs, market surveillance, and updates on investigations and enforcement actions.

BE IT FURTHER RESOLVED that the Board directs the Executive Officer to coordinate with the Government of Ontario to implement the linked cap-and-trade programs in an efficient and transparent manner, and directs the Executive Officer to document the coordination process in a written agreement with the Government of Ontario and provide it to the Board and make it available to the public.

BE IT FURTHER RESOLVED that the Board directs the Executive Officer to work with linked jurisdictions to ensure that information is shared between the jurisdictions to ensure robust surveillance, oversight, and enforcement, and that enforcement is applied in an equivalent manner in all linked jurisdictions.

BE IT FURTHER RESOLVED that the Board directs the Executive Officer to provide a linkage readiness report to the Secretary of California Environmental Protection Agency and the Governor's office by November 1, 2017, as directed in the Governor's March 16, 2017, letter to ARB.

BE IT FURTHER RESOLVED that the Board directs the Executive Officer to continue working with the non-linked WCI Partner jurisdictions to harmonize programs by developing appropriate regulatory amendments necessary to formally link GHG emissions reduction programs, and by developing appropriate policy and technical protocols necessary to effectively implement the linked jurisdictions' programs.

BE IT FURTHER RESOLVED that the Board directs the Executive Officer to continue collaboration with CAISO as a revised accounting algorithm for EIM is developed and implemented and to propose amendments to reflect accounting based on the revised EIM for GHG reporting, as appropriate.

BE IT FURTHER RESOLVED that the Board directs the Executive Officer to assess the impacts of the climate change program on disadvantaged communities, as required by AB 197, AB 32, and SB 32. As part of the annual report through the Joint Legislative Committee on Climate Change Policies, the Board will present information, to the extent it is available, on direct, indirect and cumulative emission impacts measures taken by local air districts and others to prevent increases in emissions of toxic air contaminants and criteria pollutants. Said report should include findings from the adaptive management plan and other studies such as those conducted by the Office of Environmental Health Hazard Assessment.

BE IT FURTHER RESOLVED that the Board directs the Executive Officer to initiate a new rulemaking process to implement the AB 398 requirements for the post-2020 Cap-and-Trade Program.

I hereby certify that the above is a true and correct copy of Resolution 17-21 as adopted by the Air Resources Board.

FILED
AUG 04 2017
Resources Agency of California

Rana McReynolds, Clerk of the Board

Resolution 17-21

July 27, 2017

Identification of Attachments to the Board Resolution

Attachment A: Final Regulation Order to the California Cap on Greenhouse Gas Emissions and Market-Based Compliance Mechanisms

Attachment B: Final EA Prepared for the Amendments to the California Cap on Greenhouse Gas Emissions and Market-Based Compliance Mechanisms, released to the public July 17, 2017.

Attachment C: Responses to EA Comments are found at: https://www.arb.ca.gov/regact/2016/capandtrade16/capandtrade16.htm released to the public July 17, 2017.

Attachment D: Findings and Statement of Overriding Considerations (Distributed at the July 27, 2017 Board Hearing).

Exhibit 10

REGULAR

STATE OF CALIFORNIA—OFFICE OF ADMINISTRATIVE LAW

NOTICE PUBLICATION/REGULATIONS SUBMISSION

(See instructions on reverse)

For use by Secretary of State only

STD. 400 (REV. 01-2013)

OAL FILE NUMBERS	NOTICE FILE NUMBER	REGULATORY ACTION NUMBER	EMERGENCY NUMBER
	Z-2016-0719-09	2017-0804-01S	

For use by Office of Administrative Law (OAL) only

2017 AUG -4 P 3:28

OFFICE OF ADMINISTRATIVE LAW

NOTICE | REGULATIONS

ENDORSED - FILED
in the office of the Secretary of State
of the State of California
SEP 18 2017
4:17 PM

AGENCY WITH RULEMAKING AUTHORITY: AIR RESOURCES BOARD

AGENCY FILE NUMBER (If any):

A. PUBLICATION OF NOTICE (Complete for publication in Notice Register)

1. SUBJECT OF NOTICE	TITLE(S)	FIRST SECTION AFFECTED	2. REQUESTED PUBLICATION DATE
Cap and Trade 2016	17	95802	August 5, 2016

3. NOTICE TYPE	4. AGENCY CONTACT PERSON	TELEPHONE NUMBER	FAX NUMBER (Optional)
☐ Notice re Proposed Regulatory Action ☐ Other	Trini Balcazar	916 445-9564	916 322-3928

OAL USE ONLY	ACTION ON PROPOSED NOTICE	NOTICE REGISTER NUMBER	PUBLICATION DATE
	☐ Approved as Submitted ☐ Approved as Modified ☐ Disapproved/ Withdrawn	2016, 32-Z	8-5-2016

B. SUBMISSION OF REGULATIONS (Complete when submitting regulations)

1a. SUBJECT OF REGULATION(S): Cap and Trade 2016

1b. ALL PREVIOUS RELATED OAL REGULATORY ACTION NUMBER(S):

2. SPECIFY CALIFORNIA CODE OF REGULATIONS TITLE(S) AND SECTION(S) (Including title 26, if toxics related)

SECTION(S) AFFECTED (List all section number(s) individually. Attach additional sheet if needed.)

ADOPT: 95803, 95835, 95859, 95871, 95944, 95945, appendix D, and E

AMEND: 95802, 95811, 95812, 95813, 95814, 95830, 95831, 95832, 95833, 95834, 95840, 95841, see attachment

TITLE(S): 17

REPEAL:

3. TYPE OF FILING

- ☒ Regular Rulemaking (Gov. Code §11346)
- ☐ Resubmittal of disapproved or withdrawn nonemergency filing (Gov. Code §§11349.3, 11349.4)
- ☐ Emergency (Gov. Code, §11346.1(b))
- ☐ Certificate of Compliance: The agency officer named below certifies that this agency complied with the provisions of Gov. Code §§11346.2-11347.3 either before the emergency regulation was adopted or within the time period required by statute.
- ☐ Resubmittal of disapproved or withdrawn emergency filing (Gov. Code, §11346.1)
- ☐ Emergency Readopt (Gov. Code, §11346.1(h))
- ☐ File & Print
- ☐ Other (Specify) _____
- ☐ Changes Without Regulatory Effect (Cal. Code Regs., title 1, §100)
- ☐ Print Only

4. ALL BEGINNING AND ENDING DATES OF AVAILABILITY OF MODIFIED REGULATIONS AND/OR MATERIAL ADDED TO THE RULEMAKING FILE (Cal. Code Regs. title 1, §44 and Gov. Code §11347.1)
December 21, 2016-January 20, 2017 April 13, 2017-April 28, 2017

5. EFFECTIVE DATE OF CHANGES (Gov. Code, §§ 11343.4, 11346.1(d); Cal. Code Regs., title 1, §100)
☐ Effective January 1, April 1, July 1, or October 1 (Gov. Code §11343.4(a)) per agency request 9/18/17 ☐ Effective on filing with Secretary of State ☐ §100 Changes Without Regulatory Effect ☒ Effective other (Specify) October 1, 2017 per agency request 9/18/17

6. CHECK IF THESE REGULATIONS REQUIRE NOTICE TO, OR REVIEW, CONSULTATION, APPROVAL OR CONCURRENCE BY, ANOTHER AGENCY OR ENTITY
☒ Department of Finance (Form STD. 399) (SAM §6660) ☐ Fair Political Practices Commission ☐ State Fire Marshal
☒ Other (Specify) per agency request 9/18/17 Consultation with California Public Utilities Commission.

7. CONTACT PERSON	TELEPHONE NUMBER	FAX NUMBER (Optional)	E-MAIL ADDRESS (Optional)
Trini Balcazar, Regulations Coordinator	916 445-9564	916 322-3928	trinidad.balcazar@arb.ca.gov

8. **I certify that the attached copy of the regulation(s) is a true and correct copy of the regulation(s) identified on this form, that the information specified on this form is true and correct, and that I am the head of the agency taking this action, or a designee of the head of the agency, and am authorized to make this certification.**

SIGNATURE OF AGENCY HEAD OR DESIGNEE: Richard Corey by Ally Pait — DATE: 8/4/2017

TYPED NAME AND TITLE OF SIGNATORY: Richard W. Corey, Executive Officer

For use by Office of Administrative Law (OAL) only

ENDORSED APPROVED

SEP 18 2017

Office of Administrative Law

Attachment to Form 400 for the Cap and Trade Regulation 2016

2. SPECIFY CALIFORNIA CODE OF REGULATIONS TITLE(S) AND SECTION(S) (Including title 26, if toxics related)	
SECTION(S) AFFECTED (List all section number(s) individually. Attach additional sheet if needed.)	ADOPT
	AMEND 95841.1, 95851, 95852, 95852.1, 95852.2, 95853, 95856, 95857, 95858, 95870, 95890, 95891, 95892, 95893, 95894, 95895, 95910, 95911, 95912, 95913, 95914, 95920, 95921, 95922, 95941, 95943, 95972, 95973, 95974, 95975, 95976, 95977, 95977.1, 95978, 95979, 95980, 95980.1, 95981, 95981.1, 95983, 95985, 95987, 95990, 96014, Appendix C
TITLE(S) 17	REPEAL

Exhibit 11

Ontario

NEWS

Office of the Premier-designate

Premier-Designate Doug Ford Announces an End to Ontario's Cap-and-Trade Carbon Tax

Incoming government will use every power available to challenge federal government's authority to impose a carbon tax on Ontario families, individuals and small businesses

June 15, 2018 10:40 A.M.

TORONTO — Premier-designate Doug Ford today announced that his cabinet's first act following the swearing-in of his government will be to cancel Ontario's current cap-and-trade scheme, and challenge the federal government's authority to impose a carbon tax on the people of Ontario.

"I made a promise to the people that we would take immediate action to scrap the cap-and-trade carbon tax and bring their gas prices down," said Ford. "Today, I want to confirm that as a first step to lowering taxes in Ontario, the carbon tax's days are numbered."

Ford also announced that Ontario would be serving notice of its withdrawal from the joint agreement linking Ontario, Quebec and California's cap-and-trade markets as well as the pro-carbon tax Western Climate Initiative. The Premier-designate confirmed that he has directed officials to immediately take steps to withdraw Ontario from future auctions for cap-and-trade credits. The government will provide clear rules for the orderly wind down of the cap-and-trade program.

Finally, Ford announced that he will be issuing specific directions to his incoming attorney general to use all available resources at the disposal of the government to challenge the federal government's authority to arbitrarily impose a carbon tax on Ontario families.

"Eliminating the carbon tax and cap-and-trade is the right thing to do and is a key component in our plan to bring your gas prices down by 10 cents per litre," said Ford. "It also sends a clear message that things are now different. No longer will Ontario's government answer to insiders, special interests and elites. Instead, we will now have a government for the people. Help is here."

Exhibit 12

WCI, Inc.
Western Climate Initiative, Inc.

Annual Report – 2018

Activities and Accomplishments

May 14, 2019

Table of Contents

2018 ACTIVITIES AND ACCOMPLISHMENTS

1. INTRODUCTION

The Western Climate Initiative (WCI) partnership[1] represents the largest carbon market in North America, and the only one developed and managed by governments from two different countries. At the end of 2018, the WCI carbon market was one of the world's largest existing carbon market. The WCI partnership covers a population of nearly 50 million people and about 3 trillion USD / 4 trillion CAD in gross domestic product (GDP).

Western Climate Initiative, Inc. (WCI, Inc.) is a non-profit corporation formed in 2011 to support the implementation of state and provincial greenhouse gas (GHG) emissions trading programs. At the end of 2018, California, Québec and Nova Scotia were participants in WCI, Inc., building on their common, continuous and collaborative efforts to tackle climate change and reduce GHG emissions from multiple sources in the most cost-effective way possible. The administrative support provided by WCI, Inc. can be expanded to support jurisdictions that join in the future. Each Participating Jurisdiction specifies its regulations and administrative requirements, and WCI, Inc. provides administrative support that meets these specifications in alignment with the various needs of the Partnership.

Most of the administrative support provided by WCI, Inc. is highly technical and has been developed through the use of specialized contractors:

- The development and administration of the Compliance Instrument Tracking System Service (CITSS), which serves as a single registry for all Participating Jurisdictions;
- The development and administration of the GHG allowance auction and reserve sale platform, used by jurisdictions to auction emission allowances under their Cap-and-Trade programs and to conduct reserve sales;
- Financial administrative services for auctions and reserve sales, which includes evaluation of bid guarantees and financial settlement of accounts (transferring the payments from the auction and reserve sale purchasers to the sellers); and
- The performance of analyses by an independent market monitor to support market oversight performed by each jurisdiction.

The activities and accomplishments of WCI, Inc. in 2018 are divided into three categories: Cap-and-Trade Services, Personnel and Direct Operations, and Governance.

[1] A collaboration among Western U.S. states and Canadian provinces to tackle climate change at a regional level. The partnership developed the 2008 Design Recommendations for the WCI Regional Cap and Trade Program and the 2010 Design for the WCI Regional Program. For more details, see the WCI website.

2. CAP-AND-TRADE SERVICES

In 2018, the membership in the WCI partnership changed with the addition of Nova Scotia and the departure of Ontario. In May 2018, Nova Scotia entered into a funding agreement with WCI, Inc. and subsequently named directors to the Board. During 2018, work was completed to enable Nova Scotia to be able to utilize CITSS and the services of the market monitor. Following Ontario's announcement in the summer 2018 to withdraw from the California-Québec-Ontario linked WCI carbon market, WCI, Inc. conducted the necessary activities to complete Ontario offboarding by November 30, 2018.

The collaborative and dedicated effort related to Cap-and-Trade services included the continuous improvement of the platforms and processes which support the execution of coordinated auctions of GHG emission allowances that conform to each jurisdiction's requirements.

2018 WCI AUCTIONS

During 2018, WCI, Inc. supported the execution of four joint auctions including two California-Québec-Ontario joint auctions and two California-Québec joint auctions.

The four auctions held in 2018 resulted in the sale of 380.5 million allowances and proceeds of 5.7 billion USD / 7.3 billion CAD delivered to its Participating Jurisdictions and California consigning entities.

The following provides a summary of the activities performed during 2018 for each WCI, Inc. service area, pursuant to its 4.65 million USD 2018 Annual Budget and supported by funding agreements with each Participating Jurisdiction using WCI, Inc. services.

2.1 CITSS

Since 2011, WCI, Inc. and the Participating Jurisdictions have worked with SRA International, Inc. (SRA), now known as General Dynamics Information Technology (GDIT), to develop and support CITSS[2].

During 2018, numerous application and software updates were made to CITSS, to:

- Onboard Nova Scotia and offboard Ontario;
- Continuously improve the system's security, stability and automation; and,
- Develop new functionalities to increase efficiency, to improve usability for Participating Jurisdiction staff and market participants, and to complete changes required due to regulatory updates.

[2] The latest Contract Amendment to the CITSS Agreement with SRA covers the period from January 1, 2019 to December 31, 2020 and includes one 1-year option to extend contract through December 31, 2021.

During the first quarter of 2018, Gelder, Gingras and Associates (GGA) completed an independent information technology (IT) assessment. The results of the assessment indicated that the current version of CITSS is reliable and secure, and responds adequately to the present needs of WCI, Inc., the Participating Jurisdictions, and market participants. The assessment also included recommendations regarding the ability of the CITSS application to scale and adapt successfully to future changes and expansions. WCI, Inc. strategy on how to implement GGA's recommendations for the future of CITSS were presented for WCI, Inc. Board consideration in May 2018. A series of corresponding activities have been undertaken toward the implementation of this strategy and will be ongoing in the coming years as part of the implementation of the WCI, Inc. 2018 – 2021 Strategic Plan (further described in section 3.3 of this report).

There was also a successful compliance event executed in CITSS. On November 1st, 2018, through a process completed in CITSS, all regulated emitters were able to surrender the necessary allowances to cover their greenhouse gas emissions for the second compliance period (2015-2017) in both California and Québec.

WHAT IS CITSS?

CITSS provides accounts for market participants to hold and retire compliance instruments and to record transactions of compliance instruments with other account holders, as well as apply to auctions and reserve sales. As of the end of 2018, there were approximately 850 entities registered in CITSS for California and Québec[2].

More specifically, CITSS is used to register market participants and track compliance instruments (e.g., emissions allowances and offsets) from the point of issuance by the WCI, Inc. Participating Jurisdictions to ownership, transfer by regulated GHG emitters and other voluntary or general market participants, and final compliance retirement by regulated entities.

CITSS is designed to simplify the participation in the Cap-and-Trade program for market participants, jurisdiction staff, and contractors involved in implementing Cap-and-Trade programs within Participating Jurisdictions. To accommodate the primary languages of each Participating Jurisdiction, CITSS is available in English for California and Nova Scotia, and in English and French for Québec participants.

2.2 Auction and Reserve Sale Services

WCI, Inc. supports Participating Jurisdictions in executing coordinated auctions and reserve sales of GHG emission allowances that conform to each jurisdictions' requirements. Since 2011, WCI, Inc. and the Participating Jurisdictions have worked with Markit Group Limited (Markit)[4] to develop and implement an auction and reserve sale platform, and to serve as the auction and reserve sale administrator.

Throughout 2018, WCI, Inc., Participating Jurisdictions and Markit worked on the improvement of the consolidated auction and reserve sale platform, to finalize the implementation of a series of

[3] WCI, Inc. compilation as of January 24, 2019, based on data published by California and Québec (French).
[4] The term of the current Auction and Reserve Sale Administrator Services Agreement with Markit is from June 15, 2016 to January 31, 2021.

enhancements for administrative users and market participants, and to maintain the security and the stability of the platform.

During 2018, the auction platform supported the execution of four joint auctions, including two California–Québec–Ontario joint auctions in the first half of 2018, and two California–Québec joint auctions in the second half of 2018, following Ontario's decision to withdraw from WCI, Inc. In addition, four California reserve sales and one Québec reserve sale were scheduled and opened for registration as required but were ultimately not held due to lack of applicants.

The four auctions held in 2018 resulted in the sale of 380.5 million allowances and proceeds of 5.7 billion USD / 7.3 billion CAD delivered to its Participating Jurisdictions and California consigning entities. Throughout 2018, the settlement price for 2018-vintage allowances sold fluctuated from 14.61 USD / 18.44 CAD in the first California–Québec–Ontario joint auction held in February 2018, to 15.31 USD / 20.27 CAD in the California–Québec joint auction held in November 2018, for a 2018 average price of 14.91 USD / 18.98 CAD (not weighted by volume of allowances sold in each auction). An average total of 124 qualified bidders[5] — 64 in California, 20 in Québec and 40 in Ontario — were approved to participate in the two WCI auctions held in the first half of 2018, and an average total of 86 qualified bidders — 67 in California and 19 in Québec — were approved to participate in the two WCI auctions held in the second half of 2018. As in years past, the auction and reserve sale platform (in conjunction with other WCI, Inc. services) has demonstrated that it is a reliable and secure source of providing

THE AUCTION AND RESERVE SALE PLATFORM

This secure platform allows market participants who have completed the application process to post bids during the open bidding window for each auction and reserve sale, and to review results once each event is certified.

The platform algorithm automatically applies the currency exchange rate and different bidding limitations — i.e., auction minimum price, bid guarantee limits, purchase limits and holding limits — to accept, reject and sorts bids submitted by qualified bidders, and then determine settlement price and allowance awards, before completing reporting for auction and reserve sale events. The platform also generates reports to support auction monitoring and implementation, and to inform auction participants.

Following completion of financial settlement and distribution of auction proceeds by the financial service administrator (refer to section 2.3) to the jurisdictions and consigning entities (in California only), allowances are transferred to successful bidders in CITSS.

[5] A "qualified bidder" is an entity that completed an auction application, submitted a bid guarantee that was accepted by the Financial Services Administrator, and was approved by the Participating Jurisdiction where it is registered to participate in the auction. Qualified bidders may or may not have participated in the auction. The term "bid guarantee" refers to "bid guarantee" as described in the California Regulation, "financial guarantee" as defined in the Québec Regulation, and "financial assurance" as described in the Ontario Regulation (revoked July 3, 2018).

allowances for the numerous market participants in each Participating Jurisdiction's Cap-and-Trade program.[6]

2.3 Financial Administrative Services

Since 2013, WCI, Inc. has contracted with Deutsche Bank North American Trust Company (DBNTC) to provide financial administrative services of auctions and reserve sales[7]. This includes the evaluation and management of financial bid guarantees from auction applicants and qualified bidders through the provision of escrow services for the financial settlement and distribution of proceeds to Participating Jurisdictions and California consigning entities.

With the support of DBNTC, WCI, Inc. supported four joint auctions in 2018.

In December 2018, WCI, Inc. also posted a request for proposal for Canadian Financial Services. The proposer ultimately awarded the contract under this solicitation will be expected to be able to coordinate efforts and cooperate with DBNTC, or provide contingency services for United States-based financial services, as needed.

2.4 Market Monitor

WCI, Inc. supports the Participating Jurisdictions by contracting for analyses that support independent market monitoring. Monitoring Analytics has served as this contractor since 2012[8]. These analyses include review and evaluation of auctions and reserve sales to identify any inappropriate market activity or deviations from the requirements of each Participating Jurisdiction's program. The analyses also include ongoing examination of participant corporate structures (ownership and affiliates), and of allowance and offset holdings and transfer activity in CITSS. The analyses also review secondary, derivative and related market activity (e.g., energy) to identify any potentially inappropriate market activity. The results of the analyses are provided to the Participating Jurisdictions, each of which retains its own market monitoring responsibilities and authorities.

During 2018, Monitoring Analytics continued to support multi-jurisdictional monitoring for California and Québec joint auctions and linked markets, which were also linked with Ontario in the first half of 2018. In addition, Monitoring Analytics prepared for the launch of Nova Scotia's Cap-and-Trade program on January 1, 2019. At the time of this report, Nova Scotia does not allow trading of greenhouse gas emission allowances with other jurisdictions.

[6] All auction data included in this paragraph are based on WCI, Inc. compilation from Auction Results published by California, Québec and Ontario.
[7] The term of the current Financial Services Administrator Agreement with DBNTC is from October 19, 2016 to January 31, 2020 and includes one 1-year option to extend contract through January 31, 2021.
[8] The term of the current Market Monitoring Services Agreement with Monitoring Analytics is from December 1, 2015 to January 31, 2020 and includes one 2-year option to extend contract through January 31, 2022.

3. PERSONNEL AND DIRECT OPERATIONS

WCI, Inc. personnel carry out the responsibilities for WCI, Inc. as directed by the Board and are responsible for day-to-day operation of the organization and for oversight and management of the contractors hired to provide Cap-and-Trade services as described above.

3.1 Personnel

At the end of 2018, the WCI, Inc. team included five staff positions located in the United States and one staff position located in Canada:

- an Executive Director;
- an Assistant Executive Director (located in Canada);
- an Operations Manager;
- two Information Technology (IT) Project Managers; and
- an IT Business Analyst.

3.2 Administrative and Professional Services

In addition, WCI, Inc. has retained administrative and professional services necessary to carry out its mission to support the Cap-and-Trade programs of its Participating Jurisdictions in the U.S. and Canada, including:

- legal counsel;
- accountants to administer the accounting systems, advise on accounting procedures, and to report on the financial activities of the corporation;
- an auditor to provide audit and tax services;
- payroll services that also support all payroll tax filings and the management of several human resources activities, including employee benefits;
- IT technical support, communication, interpretation and translation services.

3.3 Strategic Planning

The first strategic plan developed by WCI, Inc. was approved by the Board in October 2018. This plan represents an extensive effort from WCI, Inc. and Participating Jurisdictions staff to operationalize the mission, vision and values endorsed by its Board in 2016.

The Plan describes how the organization can meet the future needs of the Participating Jurisdictions and **position WCI, Inc. as a globally recognized model for how jurisdictions can work together to operate a cost-efficient, joint carbon market.** The vision for success of the Plan is that by 2022, WCI, Inc. is an agile

and responsive organization with people, processes, and technologies operating at peak performance and efficiency to deliver enhanced services to our Participating Jurisdictions.

The Plan has four major goals:

1. Strengthen the Partnership through enhanced collaboration, communication and decision-making;
2. Consistently meet or exceed expectations by delivering high-quality, efficient and responsive services;
3. Build and effectively manage a highly skilled and engaged workforce; and
4. Establish WCI, Inc. as a recognized leader and reference within the carbon market space.

The purpose of this Plan is to build on the success of this strong partnership to help everyone work even better together, keeping in mind the potential broadening of the Partnership in the upcoming years. In addition, the 2019 budget and 2020 – 2021 projections include funding to support the implementation of the Plan. WCI, Inc. staff have prioritized the activities and adjusted the timeline necessary to complete the Plan. WCI, Inc. will provide regular updates to the Board at Board meetings and through future annual reports.

4. GOVERNANCE

WCI, Inc. is governed by a Board of Directors according to its By-Laws and the Policies adopted by the WCI, Inc. Board of Directors.

4.1 Board Members

From October 12, 2017, to the WCI, Inc. Annual Board meeting in October 11, 2018, the acting Board Members were:

- Matthew Rodriquez (Chair)
  Secretary for Environmental Protection, California Environmental Protection Agency
- Jim Whitestone (Vice Chair, resigned September 28, 2018)
  Assistant Deputy Minister, Environmental Programs Division, Ontario Ministry of the Environment and Climate Change
- Jean-Yves Benoit (Treasurer)
  Director of Carbon Market, Québec Ministry of Environment and Fight Against Climate Change
- Mary Nichols (Secretary)
  Chair, California Air Resources Board
- Tim Lesiuk (resigned January 12, 2018)
  Executive Director, Business Development and Chief Negotiator, British Columbia Climate Action Secretariat
- Alex Wood (resigned September 28, 2018)
  Executive Director, Climate Change Directorate, Ontario Ministry of the Environment and Climate Change
- Éric Théroux (appointed January 25, 2018)
  Assistant Deputy Minister, Fight Against Climate Change, Québec Ministry of Environment and Fight Against Climate Change
- Lilani Kumaranayake (appointed August 2, 2018)
  Executive Director, Fiscal Policy, Economics and Budgetary Planning with the Nova Scotia Department of Finance and Treasury Board
- Jason Hollett (appointed August 2, 2018)
  Executive Director, Climate Change Unit, Nova Scotia Environment

During that period, non-voting Board Members were:

- Richard Bloom, Assembly Member appointed by the Speaker of the California Assembly
- Kip Lipper, appointed by the California Senate Rules Committee

Starting from October 11, 2018 through the end of 2018 the acting Board Members were:

- Éric Théroux (Chair)
- Mary Nichols (Vice Chair)
- Jean-Yves Benoit (Treasurer)
- Jason Hollett (Secretary)
- Matthew Rodriquez
- Lilani Kumaranayake

During that period, non-voting Board Members were:

- Richard Bloom
- Kip Lipper

4.2 Board Meeting Actions

The following provides an overview of actions taken by the Board during the six meetings held in 2018:

- February 9, 2018
  - Actions taken by the Board during the open session included:
    - Approval of the October 12, 2017, Board Meeting Minutes;
    - Nomination of the newly appointed Director, Mr. Théroux, to the Audit Committee;
    - Approval of California and Ontario 2018 – 2019 Funding Agreements.

- March 27, 2018
  - Actions taken by the Board during the open session included:
    - Approval of the February 9, 2018, Board Meeting Minutes;
    - Approval of Québec 2018 – 2019 Funding Agreement;
    - Reception of the Executive Director's Report.
  - Actions taken by the Board during the executive (closed) session included:
    - Approval of the October 12, 2017, Executive Session Meeting Minutes;
    - Executive Director performance review.

- May 11, 2018
  - Actions taken by the Board during the open session included:
    - Approval of the March 27, 2018, Meeting Minutes;
    - Acceptance of the 2017 Audit Report and Year End Financial Statement;
    - Approval of the 2017 U.S. Federal and State tax forms and the 2017 Canadian Sales Tax forms;
    - Reception of the status update on the Grant to Support the Pacific Coast Collaborative Carbon Pricing Technical Working Group;

        - Approval of the amendment to the WCI, Inc. By-laws to include Nova Scotia as a Participating jurisdiction and specify how Nova Scotia names their directors to the WCI, Inc. Board;
        - Approval of the Nova Scotia 2018-2019 Funding Agreement;
        - Approval of the 2017 Annual Report;
    - Action taken by the Board during the executive (closed) session was:
        - Approval of the March 27, 2018, Executive Session Meeting Minutes.

- October 11, 2018
    - Actions taken by the Board during the executive (closed) session included:
        - Approval of the May 11, 2018, Executive Session Meeting Minutes;
        - Approval of the Amendment 2012-01-006 of the SRA CITSS Agreement;
        - Approval of the Enterprise Architect Agreement.
    - Actions taken by the Board during the open session included:
        - Approval of the May 11, 2018, Meeting Minutes;
        - Review of corporate policies (Ethical Guidelines and Conflict of Interest Policy);
        - Election of officers and appointment of standing committee members for 2019;
        - Approval of the Amendment to the WCI, Inc. By-laws to remove Ontario as a Participating Jurisdiction;
        - Approval of the WCI, Inc. 2018-2021 Strategic Plan;
        - Reception of the 2018 Treasurer's Report and approval of the 2019 Budget and Projected Expenses for 2020 and 2021;
        - Approval of the Agreement to Support the Development of an Impact Assessment;
        - Heard an update from the Executive Director on Grant to Support Carbon Pricing Discussions.

- November 14, 2018
    - Actions taken by the Board during the open session included:
        - Approval of the October 11, 2018, Meeting Minutes;
        - Approval of Amendment No. 2 to the Ontario Funding Agreement.
    - Actions taken by the Board during the executive (closed) session included:
        - Approval of the October 11, 2018, Executive Session Meeting Minutes;
        - Heard an update on WCI, Inc. Corporate Insurance.

- December 17, 2018
    - Actions taken by the Board during the executive (closed) session included:
        - Approval of the November 14, 2018, Executive Session Meeting Minutes;
        - Executive Director performance review.

5. WCI, INC. KEY NUMBERS IN 2018

1
WCI partnership is the largest carbon market in North America and one of the largest in the world

3
Participating Jurisdictions using WCI, Inc. services at the end of 2018
(while Ontario participated until November)

4
Joint Auctions supported, of which 2 California–Québec Only Joint Auctions, and 2 events including Ontario

18
Main contractors retained for administrative and professional services necessary to carry out WCI, Inc. mission

34
Actions taken by the WCI, Inc. Board

84-127
Range of Qualified bidders approved to participate in each WCI Quarterly Joint Auction (of which an average of 66 in California, 19 in Québec and 40 in Ontario*)
*For the first 2 auctions of 2018 only.

850
Entities registered into CITSS or potential WCI carbon market participants in California and Québec

380.5 M
Allowances sold by Participating Jurisdictions and California consigning entities through the Auction Platform (including current and future vintages)

$4.65 M
2018 Annual Budget supported by funding agreements with each Participating Jurisdiction using WCI, Inc. services

5.7 billion USD / 7.3 billion CAD
Total Estimated Auction Proceeds delivered in 2018 to Participating Jurisdictions' GHG Reduction Funds and California Consigning Entities

Exhibit 13

Memorandum

This memorandum sets forth Department of State comments on the January 25, 2001 Memorandum of Understanding between the State of Missouri and the Province of Manitoba ("MOU") in light of relevant provisions of the U.S. Constitution.

In the MOU, Missouri and Manitoba agree "to work cooperatively to the fullest extent possible consistent with law and existing treaties . . . in their efforts to oppose water transfers" between the Missouri River watershed (Missouri's water supply) and the Hudson Bay watershed (Manitoba's water supply).[1] The MOU includes commitments to exchange information; to mutually support opposition to inter-basin transfers, including related incremental works; and to communicate concerns about such transfers to their respective national governments.

There appear to be three constitutional doctrines implicated by the MOU: (a) the Compact Clause; (b) the Supremacy Clause by which federal law may preempt state action; and (c) the Foreign Affairs Power generally.

The MOU and the Compact Clause

The question has been raised whether the MOU, given that it has not been approved by Congress, is consistent with the Compact Clause of the Constitution. Article 1, Section 10, Clause 3 of the Constitution provides that "[n]o State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State, or with a foreign Power. . . ." The Constitution does not specifically assign responsibility for interpretation or enforcement of this clause to the Executive branch of the federal government. In practice, however, it is not uncommon for states

[1] We understand that the parties are concerned about the environmental and/or economic impact such transfers might have. *See, e.g.*, Terry Ganey, *Holden, Canadian Oppose Transfers of Missouri River Water; Officials Sign Deal Aimed at Protecting Supply, Environment, St. Louis Post-Dispatch*, January 31, 2001 at A7 (citing Canadian concern over environmental damage to Hudson Bay watershed from inter-basin transfers and Missouri interest in protecting its supply of water for drinking and recreational purposes).

of the United States to consult with the Department of State when they are considering entering into an arrangement with a foreign power for advice as to the consistency of that arrangement with the Compact Clause. In the first instance, responsibility for fidelity to the requirements of the Compact Clause lies with the states themselves, pursuant to the Supremacy Clause of the Constitution. Should they submit a proposed compact to the Congress, it is the prerogative of the Congress to approve or disapprove the compact, or to require modifications. Ultimately, issues concerning the Compact Clause or a particular arrangement by a state with a foreign power may need to be resolved in the courts, either state or federal.

The Department of State has not been consulted by the state authorities of either North Dakota or Missouri concerning the MOU at issue here, and thus is not aware of whether there is an intention to bring the MOU before the Congress or the courts. However, in accordance with the Department's normal practice, this memorandum identifies the kinds of considerations that the Department would raise about an MOU like this.

The Scope of the Compact Clause

The Department ordinarily looks to *Virginia v. Tennessee*, 148 U.S. 503 (1893), in assessing whether an agreement involving a U.S. state would constitute a "Compact . . . with a foreign Power," although that case did not involve a compact with a foreign power.[2] The only Supreme Court case actually to review a potential state compact with a foreign power, *Holmes v. Jennison*, resulted in a divided court.[3] The case involved the question of whether the Governor of Vermont had entered into an agreement

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[2] There is, in fact, little historical evidence of the intended scope of the Compact Clause. *See* Felix Frankfurter and James M. Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments* 34 YALE L.J. 685, 694 (1925) (finding a lack of attention to the Compact Clause in the records of the Constitutional Convention and the Federalist Papers); *see also* Abraham C. Weinfeld, "What did the Framers of the Federal Constitution Mean by 'Agreements or Compacts'" 3 U. CHI. L. REV. 453 (1936).

[3] *See* 39 U.S. 540, 560 (1840)

with Canadian authorities to extradite a fugitive back to Canada. Chief Justice Taney, speaking for three other justices, took the view that "every agreement, written or verbal, formal or informal, positive or implied, by the mutual understanding of the parties" falls within the Compact Clause's ambit.[4] Taney was particularly concerned about the ability of a U.S. state to extradite fugitives to a country when it was the policy of the federal government not to extradite persons.[5] In Taney's view, the only permissible way for Vermont to make such a hand-over would be if Congress consented, since that would make the agreement subject to federal supervision.[6] In contrast, the other justices found either that the Supreme Court had no jurisdiction to hear the case or that no agreement could be inferred.[7]

In general, the notion articulated by Chief Justice Taney that all U.S. state agreements constitute compacts that require congressional consent has not been widely supported. In *Virginia v. Tennessee*, the Supreme Court, in reviewing an interstate compact delineating a boundary line, concluded that despite the Constitution's general language, its prohibition on compacts without congressional consent was not absolute.[8] Specifically, the Court reasoned the Clause should only extend to those compacts

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[4] *Id.* at 572

[5] *Id.* at 574. At the time, the United States was renegotiating its extradition treaty with Great Britain, which was responsible for Canada's foreign relations, and had a policy of refusing to surrender persons. *Id.* at 561–62.

[6] *Id.* at 578–79.

[7] *See, e.g., Holmes v. Jennison*, 39 U.S. at 579–86 (opinion of Justice Thompson concluding the Court lacked jurisdiction under § 25 of the Judiciary Act); id. at 594–598 (opinion of Justice Catron noting, in course of finding no jurisdiction under § 25 of the Judiciary Act, alarm over reading the intent to surrender Holmes to Canadian officials as an "agreement").

[8] 148 U.S. at 519. The case involved a request by Virginia to set aside as unconstitutional a boundary line compact it had concluded in 1803 since it was entered into without congressional consent. *Id.* at 517. Although the Court stated that the constitutional term "compact" could not apply to every possible compact between one U.S. state and another for the purposes of requiring congressional consent, such consent in the case of the 1803 compact could be "fairly implied" in light of subsequent legislation and proceedings relating to judicial, revenue and federal elections law issues. *Id.* at 521–22.

that involved "the formation of any combination tending to the increase of political power in the states, which may encroach upon or interfere with the just supremacy of the United States."[9] Subsequent Supreme Court case law has affirmed that, at least with respect to interstate compacts, only compacts that would increase the political power of the states in such a way as to interfere with the supremacy of the federal government require congressional consent.[10]

Although it is not a settled question that the *Virginia* standard applies to state compacts with foreign powers, at least one state court, the Department of State and numerous scholars have assumed that it does.[11] In *McHenry County v. Brady*, the Supreme Court of North Dakota declined to enjoin construction and maintenance of a drain from North Dakota into Canada called for by a contract between U.S. and Canadian municipal entities as a violation of the Compact Clause.[12] In so ruling, the court declined to adopt the "sweeping language" of *Jennison* since the subject matter of that case (extradition) involved a national power, and instead relied on *Virginia* and its progeny in light of the local context in which the contract was concluded.[13] In a similar 1981 case regarding a proposed international water district involving areas of both Vermont and Quebec, the Department of State took the view that such an arrangement did not implicate the Compact

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[9] *Id.* at 519.

[10] *See, e.g., Northeast Bancorp, Inc. v. Board of Governors of the Federal Reserve System*, 472 U.S. 159 (1985) (finding no compact nor any impact on U.S. federal structure where New England state banking deregulation statutes complied with a federal banking statute, the Douglas Amendment); *United States Steel Corporation v. Multistate Tax Commission*, 434 U.S. 452 (1978) (reasoning that since the compact did not authorize member states to exercise powers that they could not exercise in the absence of the compact, there was no enhancement of state power in relation to the federal government).

[11] *See, e.g.*, Louis Henkin, *Foreign Affairs and the U.S. Constitution* 155 (2d. ed. 1996); Raymond Rodgers, *The Capacity of States of the Union to Conclude International Agreements: The Background and Some Recent Developments*, 61 Am. J. Int'l L. 1021, 1023 (1967).

[12] 37 N.D. 59 (1917).

[13] *Id.* at 78. The Court went on to conclude that the drainage construction was consistent with the relevant provisions of the 1909 U.S.-Canada Boundary Waters Treaty. *Id.* at 80.

Clause because federal permitting procedures would still apply and the district's activities would be limited to traditionally local functions (e.g., water service) rather than political functions.[14]

In practice, Congress has been asked to consent to only a few foreign compacts involving U.S. states, leaving uncertain Congress' view of the scope of the Compact Clause. However, we are aware of no compacts approved by the Congress that involved local interference with national policy. Among the most well-known examples of congressionally-approved compacts are a 1956 New York-Canada agreement to establish a port authority for a bridge across the Niagara river; a 1958 Minnesota-Manitoba highway agreement; 1949 and 1952 Northeastern Interstate Forest Fire Protection Compacts; and various compacts authorized under the 1972 International Bridge Act.[15] In one case involving water rights, Congress consented in 1968 to a Great Lakes Basin Compact.[16] Originally intended to include all U.S. states and Canadian provinces bordering the Great Lakes, the compact was to establish a Commission with the goal of promoting the use, development and conservation of the water resources of the Great Lakes. In giving its consent, however, Congress refused to approve certain compact provisions, including those that allowed Canadian provinces to join as members, in light of Department of State concerns about such participation and the potential overlap between the compact and the mechanisms established under the 1909 U.S.-Canadian Boundary Waters Treaty.[17]

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[14] In a later case, involving a June 23, 1990 *Preliminary Agreement to Develop and Implement a Trade Development Initiative between Indiana's Department of Commerce and the All-Union Academy of Agricultural Sciences and the Ukrainian Association of Consumer Goods Exporters*, the Legal Adviser's office took a similar stance, making no objection to the Preliminary Agreement where it focused on facilitating the traditionally local function of enhancing trade and commercial opportunity for state industry abroad without undertaking functions of a political nature.

[15] 33 U.S.C. § 535a. For more details about the other examples, *see* Kevin J. Heron, *The Interstate Compact in Transition: From Cooperative State Action to Congressionally Coerced Agreements*, 60 ST. J. L. REV. 1 (1985). *See also* Peter R. Jennetten, *State Environmental Agreements with Foreign Powers: The Compact Clause and the Foreign Affairs Power of the States*, 8 GEO. INT'L ENV. L. REV. 141 (1995).

[16] *See* P.L. 90–419, 82 Stat. 414 (July 24, 1968).

[17] *Id.; see also Treaty between the United States and Great Britain*

At the same time, the Department of State is aware that U.S. states often conclude various arrangements with foreign powers without congressional consent. It appears that such arrangements principally involve matters of common local interest, e.g., coordination on roads, police cooperation, border control, local trade cooperation initiatives, education exchanges, local conservation measures, and similar matters. When they are called to the Department's attention, such arrangements have generally been analyzed under the *Virginia* standard, with particular attention to whether such texts would interfere with the President's foreign relations responsibilities.

The MOU and the Compact Clause

Turning to the MOU, it appears that two questions need to be asked to determine whether it triggers the Compact Clause's requirement for congressional approval. First, is the MOU a "compact or agreement" for constitutional purposes? Second, if so, does it belong to that class of agreements that the Supreme Court has determined require congressional consent?

As for the first question, to qualify as a "compact or agreement" the Department traditionally has looked to whether the text in question is intended to be legally binding.[18] The form and

Relating to Boundary Waters Between the United States and Canada, done at Washington January 11, 1909, TS 548 ("Boundary Waters Treaty"). In a recent development, in December 2000, Congress amended the U.S. Water Redevelopment Act of 1986, 42 U.S.C. § 1926d-20, to "encourage the Great Lakes States, in consultation with the Provinces of Ontario and Quebec, to develop and implement a mechanism that provides a common conservation standard embodying the principles of water conservation and resource improvement for making decisions concerning the withdrawal and use of water from the Great Lakes Basin." In doing so, however, Congress indicated that it was not approving in advance any agreement reached by the Great Lakes States with Ontario and Quebec. *See* 105 Cong. Rec. S11406 (Oct. 31, 2000) (expressing views of Senators Baucus, Levin and Smith that 42 U.S.C. § 1962d-20(b)(2) should not "be interpreted as granting preapproval to standards which have not yet been developed and which Congress has not reviewed").

[18] This approach is derived from the treatment generally accorded to interstate compacts. In *Northeast Bancorp*, the Supreme Court concluded

the content of this MOU suggest that Missouri and Manitoba likely intended to conclude such a legal agreement. The MOU is structured as an agreement with a title, preamble, specific commitments and a signature block. The terminology used (e.g., "agree" and "ensure") is consistent with a legally binding intent. A Missouri Department of Natural Resources Press Release calls the MOU an "historic agreement" that "commits both jurisdictions to working together to oppose water transfers between major watersheds."[19] Upon signing, Manitoba Premier Doer indicated that "today's signing of this MOU commits both of our jurisdictions to work together to oppose any efforts that may result in the transfer of water between watersheds."[20] The two sides have also convened an inaugural meeting under the MOU to discuss their concerns over potential inter-basin water transfers.[21]

The fact that the two parties condition their cooperation on existing law and treaties does not preclude a finding that the MOU is intended to be legally binding. The United States has concluded

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that the state statutes in question did not constitute a compact in part because "each State is free to modify or repeal its law unilaterally." 472 U.S. at 175; *see also Multistate Taxation Commission*, 434 U.S. at 473 (discussing how states are not bound by Commission rules and regulations or to participate in the Commission for any length of time); 4B U.S. Op. Off. Legal Counsel 828 (1980) (OLC opinion reviewing federal-state and state-state arrangements under the Water Resources Planning Act and finding that congressional "[c]onsent is required only when two or more states agree among themselves to impose some legal obligation or disability on state or federal governments or private parties."). There does not, however, appear to be an established position on whether state compacts with foreign powers need to be legally binding. The Department has not ruled out the possibility that a political arrangement touching on matters of important national interest would also constitute a compact for constitutional purposes.

[19] Missouri Department of Natural Resources, News Release No. 185, Feb. 2, 2001.

[20] Manitoba Government News Release, January 25, 2001; *see also Doer's Anti-Diversion Efforts Irk Dorgan*, *The Canadian Press*, February 24, 2001 (quoting Premier Doer's response to Senator Dorgan's hostility to the MOU: "This shows how important this Missouri agreement is . . . [t]he Missouri Agreement gives us some heft in the United States to deal with these diversion projects, as opposed to being off on our own in Canada").

[21] *See* Missouri Department of Natural Resources News Release No. 215, March 9, 2001.

a number of treaties and other international agreements in which a particular provision or the agreement as a whole is subject to the parties' laws or international commitments.[22] In such circumstances, although the parties can avoid their obligations based on an existing law or treaty, they may not avoid such obligations simply because, from a policy perspective, they no longer desire to comply with them.

Ultimately, however, the legal status of an instrument such as the MOU may not itself be determinative of whether the document qualifies as a compact. As the Supreme Court reasoned in *U.S. Steel Corp*. "the mere form of the interstate agreement cannot be dispositive."[23] In other words, even in the absence of a legally binding agreement, the Compact Clause may be implicated. In *Northeast Bancorp., Inc.*, for example, the Court undertook a Compact Clause analysis of reciprocal state banking legislation even where there was no evidence of a legal agreement between the states to enact such legislation. Instead, the Court looked for "several of the classic indicia" of a Compact: e.g., establishment of a joint organization or a body; some restriction on the state's ability to withdraw from the arrangement by repealing or modifying its law unilaterally; or a requirement that limi-

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[22] *See, e.g., Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, done at Paris, December 17, 1997 (Art. 9) (Parties agree "to the fullest extent possible under its laws and relevant treaties" to "provide prompt and effective legal assistance to another Party"); *Inter-American Convention Against Corruption*, March 29, 1996 (Article XIV) ("In accordance with their domestic laws and applicable treaties, the States Parties shall afford one another the widest measure of mutual assistance. . ."); *see also Agreement between the United States of America and the Government of Japan Regarding Mutual Assistance Between Customs Administrations*, done at Washington, June 17, 1997 (Art. 2(2)); *Agreement between the United States of America and the Government of Canada regarding the Application of their Competition and Deceptive Marketing Practices Laws*, done at Washington and Ottawa August 1 and 3, 1995 (Article XI).

[23] 434 U.S. at 470 (citing with approval *Holmes v. Jennison*, 39 U.S. at 573 ("Can it be supposed that the constitutionality of the act depends on the mere form of the agreement? We think not. The Constitution looked to the essence and substance of things, and not to mere form. It would be but an evasion of the Constitution to place the question upon the formality with which the agreement is made.")).

tations on state action are reciprocal.[24] Although these factors seem particularly relevant where a court has to determine if independent state statutes constitute a compact, the Court has not to our knowledge addressed whether such indicia are also required where in fact a legal agreement exists. At a minimum, however, assuming that the same indicia applicable to interstate compacts apply to state compacts with foreign powers, these indicia are useful in evaluating the MOU.

Whether the "indicia" cited in *Northeast Bancorp, Inc.* are present in the MOU is not immediately apparent.[25] Missouri and Manitoba have had at least one meeting "under" the MOU, but it is not clear if such meetings would constitute the "joint organization" referred to by the Supreme Court. Another question is whether Manitoba could argue that Missouri had violated the MOU if Missouri announced that it supported inter-basin water transfers (à la a repeal in legislation). Similarly, *Northeast Bancorp, Inc.* would ask whether the obligation of Missouri to cooperate in opposing inter-basin water-transfers is contingent on Manitoba's performance of similar obligations.[26] Firm answers to such questions would require further factual development of what actions the parties understood as being required by their agreement "to work cooperatively to the fullest possible extent consistent with law and existing treaties . . . to oppose [inter-basin] water transfers."

Assuming for purposes of analysis that the MOU constitutes a "compact or agreement," the next question is whether it is the sort of compact or agreement for which congressional consent is required. As stated above, the Department traditionally applies

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[24] 472 U.S. at 175 (finding no evidence of the classic indicia in the state banking statutes under consideration).

[25] The reasoning of the *Northeast Bancorp, Inc.* Court only discusses "several of the classic indicia of a compact" that were missing from the banking statutes in question; the Court, therefore, did not include an exhaustive list of such indicia. *See id.* Presumably, therefore, there are additional criteria that may be used in assessing whether a compact exists.

[26] In appropriate cases, it may also be desirable to consult with the national authorities of the foreign entity concluding an arrangement with a state of the United States. Just as there may be constitutional limitations here, a foreign subnational entity—including provincial governments in Canada—may not have competence to enter into an international arrangement without approval from their national government.

the standard laid out in *Virginia*—i.e., whether a compact is "directed to the formation of any combination tending to the increase of political power in the states, which may encroach upon or interfere with the just supremacy of the United States." Evidence of an actual impact on the federal government's supremacy has traditionally not been required; it is the potential impact of the compact that has led the Department to point out the need for congressional consent.[27]

Examining the MOU in light of *Virginia* and its progeny, the Department would look to whether the MOU (a) impacts other U.S. states; (b) interferes with the federal government's interests in inter-basin water transfers; (c) deals solely with local matters; or (d) involves activities that could be carried out by Missouri even in the absence of the MOU. The following discussion briefly reviews each of these factors.

First, with respect to effects on other states, the water in the Missouri and Hudson Bay watersheds that is the subject of the MOU borders or supplies water for numerous states. Missouri and Manitoba are therefore not the only parties interested in how those watersheds are treated. Missouri's alliance with Manitoba to support each other's effort to oppose inter-basin water transfers could affect the interests of other states both as to the outcome and the process leading to decisions on how these waters are managed.

Second, in terms of the federal government's role, Congress has indicated an express interest in the inter-basin transfers at issue in the MOU. Two statutes—the Dakota Waters Resources Act of 2000 ("DWRA"),[28] which amended the Garrison Diversion Reformulation Act of 1986 ("Garrison Act")[29] and the Garrison Act itself—address inter-basin water transfers directly. Pursuant to authorities in the Garrison Act, as amended, the Department

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[27] *See Multistate Tax Commission*, 434 U.S. at 452 (agreeing that the "pertinent inquiry is one of potential rather than actual, impact upon federal supremacy").

[28] *See* P.L. 106–554 (2000).

[29] *See* P.L. 99–294 (1986). Although no mention is made of the Garrison Act, the MOU's preamble does refer to the DWRA: "Whereas, the Dakota Water Resources Act contains language that contemplates the possible large-scale diversion of water from the Missouri to the Hudson Bay watershed. . . ."

of Interior, in consultation with the Department of State, recently approved construction of a relatively small-scale endeavor, the Northwest Area Water Supply ("NAWS") project, which will result in transfers of water from the Missouri River watershed to the Hudson Bay watershed. In addition, the DWRA contemplates a potential future authorization of transfers between these watersheds on a larger scale. The DWRA provides a comprehensive set of procedures for the Secretary of the Interior to follow in order to study and possibly construct projects involving inter-basin transfers in the Red River Valley (part of the Hudson Bay watershed), with both federal and state involvement in the review process.[30] Ultimately, the DWRA reserves to Congress the final decision on whether a transfer will be authorized,[31] but any such transfers are limited to those that the Executive branch determines comport with the 1909 U.S.-Canada Boundary Waters Treaty's restrictions on activities that might pollute or otherwise affect the level or flow of boundary waters.[32]

Given such federal interest, application of the *Virginia* standard would require an analysis of whether the MOU encroaches on the political power of the federal government to address inter-basin water-transfers.[33] It is not enough to show simply that the

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[30] DWRA § 608(b) (amending Garrison Act § 8(c)). The DWRA requires the Secretary of the Interior to prepare a report for Congress studying the Red River Valley's water needs. In conducting the study, the Secretary is required to solicit the input of gubernatorial designees from states that may be affected by various possible options and the effect of an out-of-basin option (i.e., inter-basin water transfers) on such states. In addition, within 1 year of the DWRA's enactment (or later, in which case the reason for delay must be given), the Secretary of the Interior and the state of North Dakota are required to jointly prepare a draft environmental impact statement concerning all feasible options for meeting the comprehensive water quality and quantity needs of the Red River Valley, *including* the delivery of Missouri River water to the Red River Valley. *Id.*

[31] *Id.* (amending Garrison Act § 8(a)). If, however, the selected project involves only in-basin sources of water to meet the water needs of the Red River Valley, the Secretary is authorized to proceed with the project using the appropriated funds (approximately $40.5 million) without further Act of Congress. *Id.*

[32] *Id.* (amending Garrison Act § 8(a)).

[33] *See Multistate Tax Commission*, 434 U.S. at 473 ("the test is whether the Compact enhances state power *quoad* the National Government.").

federal government has competence over these matters. Rather, one must ask whether Missouri's enlistment of Manitoba's support in the MOU to oppose particular transfers potentially operates to the legal detriment of the federal government by interfering with the decision-making scheme set out in the federal legislation or, where decisions have been made, in their effective implementation. A secondary question is whether the MOU could interfere with administration of the Boundary Waters Treaty. That Treaty affords the United States and Canada, not Missouri or Manitoba, the rights to interpret and apply the Treaty as well as to refer matters to the International Joint Commission.[34]

As indicated above, a third factor the Department would customarily examine is the question of whether the MOU deals only with matters of local policy. Some state arrangements with foreign powers dealing with water use issues have been deemed to be solely of local interest for Compact Clause purposes. This was true of the drainage basin at issue in *McHenry County* and the Vermont-Quebec International Water District, which had "no political function." The MOU in this case, in contrast, addresses cooperation between a U.S. state and a Canadian province to work together to oppose the possibility of inter-basin water transfers that could affect other states of the United States and which are to be considered pursuant to federal statute.

Fourth, the Department would assess the implications of the Supreme Court's decision in *Multistate Tax Commission*, which highlighted that congressional consent to an interstate compact is not required so long as the state is free to undertake the contemplated activities in the absence of the MOU, on a proposed arrangement.[35] Thus, if one could show in this case that activities contemplated under the MOU—i.e., sharing information on

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[34] When U.S. states and Canadian provinces sought a more direct role in treaty negotiations involving the Great Lakes Water Basin, Congress rejected such a role. With respect to NAWS, the Secretary of the Interior, in consultation with the Secretary of State, made a finding in January 2001 that the proposed inter-basin water transfers were consistent with the Boundary Waters Treaty.

[35] *See Multistate Tax Commission*, 434 U.S. at 473 (concluding that the Commission Compact did not require congressional consent where "[t]his pact does not purport to authorize member States to exercise any powers they could not exercise in its absence")

actions contemplated under the DWRA, opposing inter-basin water transfers and communicating concerns about such transfers to the federal government—are actions that Missouri has the authority to carry out irrespective of an MOU, it would argue against applying the Compact Clause.

A key inquiry for this purpose is the extent to which the MOU calls for "mutually supportive" cooperation which might be understood as cooperation that cannot occur without another party. This would pose two issues: first, the extent to which such activities are possible even in the absence of the MOU, and secondly, whether this kind of activity impinges upon the "exclusive foreign relations power expressly reserved to the federal government," and therefore falls outside the *Multistate Tax Commission* authorization for interstate compacts to be concluded without Congressional approval.[36]

Finally, in addition to these four factors, evidence of agreement on concrete actions by the parties undertaken pursuant to the MOU could assist in ascertaining whether the MOU impacts our federal structure. The MOU, however, is not so specific as to require either party to cooperate in ways that must physically manifest themselves (i.e., constructing a facility, etc.) nor does it appear to require them to enact any reciprocal obligations into law. This is presumably because the object and purpose of the MOU seems to be to commit Missouri and Manitoba to oppose the actions of others; i.e., to oppose what the federal government is studying, and in some cases, doing, with respect to inter-basin water transfers. Thus, any interference that the MOU might cause to the federal government's supremacy would likely be procedural rather than substantive in nature. For example, if the MOU requires Missouri to operate not only on its own behalf, but also on Manitoba's behalf, in attempting to influence federal water management policy, would that interfere with the federal gov-

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[36] *Id.* at 465, n. 15 ("Mr. Chief Justice Taney's opinion in *Jennison* is not inconsistent with the rule of *Virginia v. Tennessee*. At some length, Taney emphasized that the State was exercising power to extradite persons sought for crimes in other countries, which was part of the exclusive foreign relations power expressly reserved to the federal government. He concluded therefore that the State's agreement would be constitutional only if made under the supervision of the United States.").

ernment's ability to implement the DWRA, the Garrison Act and the 1909 Boundary Waters Treaty? As discussed, below, in the event Missouri sought to undertake concrete actions with respect to such water management issues, a strong argument can be made that such actions would be pre-empted by the DWRA, the Garrison Act, and the 1909 Boundary Waters Treaty.[37]

Because of the expressions of federal policy, in addition to Compact Clause considerations, the MOU also potentially implicates the more general constitutional issues of federal preemption and the foreign affairs powers of the federal government. This memorandum therefore provides some additional background on these separate constitutional issues.

The MOU, the Supremacy Clause and the Foreign Affairs Power

The Supreme Court decision in *Crosby v. National Foreign Trade Council* illustrates the Court's most recent views on federal preemption in a foreign affairs context.[38] In *Crosby*, the Court held unanimously that a Massachusetts law imposing sanctions on Burma was invalid under the Supremacy Clause of the Constitution "owing to its threat of frustrating federal statutory objectives."[39] In so holding, the Court concluded that a state law must yield to a congressional Act if Congress intends to occupy the field, even if the federal statute does not contain an express preemption provision. The Court did not base its holding on the federal government's exclusive constitutional responsibility for foreign affairs, but it did reason that preemption was appropriate in part based on the state law's disruption of the federal government's ability to speak with one voice to foreign nations.

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[37] *See Northeast Bancorp, Inc.*, 472 U.S. at 176 ("[t]o the extent that the state statutes might conflict in a particular situation with other federal statutes . . . they would be preempted by those statutes, and therefore any Compact Clause argument would be academic").

[38] 530 U.S. 363 (2000).

[39] *Id.* at 366. Under Article VI of the Constitution, the laws of the United States are "the supreme law of the Land ... any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. Art. VI, cl. 2.

The Massachusetts law that was the subject of *Crosby* was enacted three months prior to a federal statute imposing mandatory and conditional sanctions on Burma. The Court found that the federal statute and the state law at issue had a common goal (economic sanctions against Burma based on its human rights record) and evidence was presented that it would not necessarily have been impossible for companies to comply with both the federal and state laws. But the Court found that the means employed by the Commonwealth of Massachusetts were in conflict with those in the federal Act insofar as they were different and distinct from those prescribed by the federal statute, and that the common end did not neutralize the conflicting means. According to the Court, the fact that companies might have been able to comply with both sets of sanctions did not mean that the state Act was compatible with the federal Act, which gave maximum discretion to the President to calibrate the appropriate level of U.S. sanctions.[40]

In examining the issue, the Court emphasized that "[i]t is simply implausible that Congress would have gone to such lengths to empower the President had it been willing to compromise the effectiveness by deference to every provision of state statute or local ordinance that might, if enforced, blunt the consequences of discretionary Presidential action."[41] Referring to the foreign affairs context of the statute,[42] the Court also stressed that Massachusetts' independent actions threatened the ability of the United States to speak effectively with one voice on the international plane, noting that "the President's maximum power to persuade rests on his capacity to bargain for the benefits of access to the entire national economy without exception for enclaves fenced off willy-nilly by inconsistent political tactics."[43]

As far as the Department is aware the courts have not had occasion to consider the applicability of these principles to a state agreement with a foreign power, rather than a state statute. It

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[40] *Id.* at 379 (citations omitted).

[41] *Id.* at 376.

[42] *Cf. Allen-Bradley Local No. 1111 v. Wisconsin Employment Relations Bd.*, 315 U.S. 740, 749 (1942); *Boyle v. United Techs. Corp.*, 487 U.S. 500, 507 (1988).

[43] *Crosby*, 530 U.S. at 381.

would seem, however, that the logic of *Crosby* would prohibit states from accomplishing, via agreement with foreign states, what they are not able to accomplish by their own statutes. Therefore, it would appear relevant to assess the MOU's operation in light of federal preemption principles.

The central issue would be the MOU's compatibility with the federal statutory scheme for addressing the inter-basin water issues covered by the MOU. The NAWS project, for example, will involve such a transfer and has already been approved by the federal government in accordance with the terms of the Garrison Act. As for the DWRA, it is as comprehensive, if not more so, than the federal sanctions at issue in *Crosby*. Under the DWRA, the Secretary of Interior is charged with preparing a comprehensive report for Congress studying the Red River Valley's water needs and options for fulfilling them. The Secretary is required to solicit input from states that may be impacted by possible options. Environmental impact assessments of all feasible options are mandated by the statute. Within this statutory scheme, the Secretary of Interior is given some responsibility for selecting among potential projects, with the notable exception that any project that would require transfer of water from the Missouri River or its tributaries must be submitted to Congress for specific approval by an Act of Congress.

Given this comprehensive scheme, it is plain that Congress intended, in enacting the DWRA, to ensure that the decision making process about water allocation to the Red River Valley be centrally coordinated at the federal level. State input is recognized by the DWRA as an important piece of the process, but it is clearly subsumed into a federal decision-making process that reserves all final decision-making authority to the federal government. Indeed it seems that one of Congress' objectives was to reserve certain decisions not only to the federal government but to Congress' power alone. In general, even where it does not reserve exclusive decision-making power for Congress, it is clear that the DWRA makes the issue of supply to the Red River Valley one of federal concern. The statutory scheme represents not merely a solution for a subset of issues related to the water needs of the Red River Valley, or a plan for addressing some specific geographic area representing part of the Red River Valley, but rather a complete plan

for a federal approach to the total problem. As such, the statute appears to be designed to "occupy the field" when it comes to major decisions impacting certain water resources across several states.

Analogizing to the logic in *Crosby*, it is difficult to believe that Congress would have enacted the DWRA "had it been willing to compromise the effectiveness by deference to every provision of state statute or local ordinance" that might, if enforced, interfere with the overall purpose of the scheme.[44] Any concrete actions by Missouri to oppose inter-basin water transfers outside of this scheme would likely be preempted in that they would interfere with federal policies and programs. On the other hand, Missouri is not precluded from expressing its own viewpoint on the resolution of federal water management issues; to the contrary, the DWRA explicitly allows Missouri such a role. Thus, the question under *Crosby* is whether through the MOU Missouri is seeking to afford a surrogate voice for Manitoba in the federal government's decision-making and implementation processes that would interfere with the scheme envisioned by Congress.[45]

Besides such principles of federal preemption, the courts have also confirmed the exclusive assignment of foreign affairs responsibilities to the federal government under the U.S. Constitution. Although the Court in *Crosby* did not reach the question of whether the Massachusetts statute unconstitutionally interfered in foreign affairs, both the district court and the appeals court held that it did, based on the decision by the Supreme Court in *Zschernig v. Miller*.[46] The appellate court opined that "*Zschernig*

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[44] *See id.* at 376.

[45] The Court has also said that when a state legislates in an area "that touch[es] international relations," the Court should be "more ready to conclude that a federal Act . . . supersede[s] state regulation." *Allen-Bradley Local No. 1111*, 315 U.S. at 749. This raises the question of whether Missouri's cooperation and information sharing with Manitoba under the MOU constitutes a line of communication with a foreign power separate from that maintained by the United States, potentially impairing the ability of the United States and Canada to deal with each other diplomatically about comprehensive approaches to these issues.

[46] *Zschernig v. Miller*, 389 U.S. 429 (1968). *Zschernig* involved a state probate law that prevented the distribution of an estate to a foreign heir if the proceeds of the estate were subject to confiscation by the decedent's government. *Id.* at 435. The Court overturned the law on the ground

stands for the principle that there is a threshold level of involvement in and impact on foreign affairs which the states may not exceed."[47] The court held that while the boundaries of *Zschernig* were unclear, the Massachusetts law was clearly inconsistent with the principle in *Zschernig*. The court rejected arguments by Massachusetts to the effect that courts must balance the interests in a unified foreign policy against the particular interests of an individual state. Rather, quoting from *Zschernig*, the court reiterated that "[state] regulations must give way if they impair the effective exercise of the nation's foreign policy."[48] A similar ruling was recently issued by the U.S. District Court for the Northern District of California.[49] In that case, the Court found *Zschernig* applicable where a state was conducting its own foreign policy.[50]

Thus, depending on the extent of its actual interference with U.S. foreign policy efforts in managing the water resources of the Hudson Bay watershed shared with Canada, the Missouri-Manitoba MOU would need to be evaluated for whether it constitutes an unconstitutional disruption of the federal government's foreign affairs power.

Conclusion

In light of the DWRA, the Garrison Act, the Boundary Waters Treaty and relevant practice, the Missouri-Manitoba MOU poten-

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that such statutes had "a great potential for disruption or embarrassment" of the United States in the international arena in that they called for state officials to inquire into the status of foreign law and the credibility of foreign officials. *See id.* at 435.

47 *National Foreign Trade Council v. Natsios*, 181 F.3d 38, 52 (1st Cir. 1999).

48 *Id.*; *Zschernig v. Miller*, 389 US at 440–41.

49 *See In Re World War II Era Japanese Forced Labor Litigation*, No. MDL-1347 (N.D. Cal., September 17, 2001) (citing *Zschernig* for the proposition that the Constitution prohibits state action that unduly interferes with the federal government's authority over foreign affairs).

50 *See id.* at 22–23 (examining whether a California statute affording individuals from any country a right to recover compensation for their forced labor by the Japanese government or Japanese companies during World War II embraces a "foreign policy purpose" with the intent of influencing foreign affairs directly).

tially implicates several constitutional doctrines. First, if the MOU is intended to be an instrument that could interfere with the just supremacy of the federal government, issues are raised as to the necessity for congressional consent under the Compact Clause. Given Congress's occupation of the field of inter-basin water transfers by statute (e.g., the DWRA), there are further issues under *Crosby* which set out the standards for determining when a state statute is preempted under the Supremacy Clause. Finally, to the extent the MOU may potentially interfere with the foreign affairs power more generally it would need to be evaluated for its consistency with principles set out in *Zschernig*.

b. Proposed annex to Great Lakes Charter

On June 15, 2001, Robert E. Dalton, Assistant Legal Adviser for Treaty Affairs, U.S. Department of State, provided comments on a proposed Great Lakes Charter Annex forwarded for his review by the Great Lakes Council of Governors. The letter raised two concerns, as set forth in the excerpts below.

The full text of the letter is available at *www.state.gov/s/l*.

Thank you for forwarding a copy of the proposed Great Lakes Charter Annex 2001, which I understand is intended to supplement the Great Lakes Charter of 1985. The Department of State shares your view of the importance of conservation of Great Lakes water and supports coordinated efforts in this area. As the Great Lakes States and Canadian Provinces move forward to develop and implement a resource-based conservation standard for new water withdrawal proposals from the Great Lakes Basin, the Department would expect such efforts to be within the competence of States and Provinces within their respective federal systems, and consistent with the treaty commitments of the United States and Canada, including the Boundary Waters Treaty of 1909, as well as State, Provincial and Federal laws. In keeping with this expectation, I wish to raise with you two concerns, one with respect to the proposed Annex itself and the other with respect to the future binding agreements contemplated by the Annex.

Exhibit 14

FACT SHEETS

President Donald J. Trump's United States-Mexico-Canada Agreement Delivers a Historic Win for American Workers

ECONOMY & JOBS

Issued on: **January 29, 2020**

★ ★ ★

> **The USMCA is the largest, most significant, modern, and balanced trade agreement in history. All of our countries will benefit greatly.**
>
> ***President Donald J. Trump***

DELIVERING ON HIS PROMISE: President Donald J. Trump is replacing the outdated North American Free Trade Agreement (NAFTA) with the United States-Mexico-Canada Agreement (USMCA).

- Today, President Trump is signing his historic USMCA deal, making good on his promise to deliver fairer and more reciprocal trade for the American people.
- USMCA will replace the terrible NAFTA agreement that resulted in the loss of millions of American jobs and devastated communities across our country.
- The deal marks a tremendous victory for American workers, farmers, manufacturers, and businesses alike.

STANDING UP FOR AMERICAN WORKERS: USMCA will deliver more jobs and better labor protections that benefit American workers, while fostering more growth for American businesses.

- While NAFTA was a disaster for American workers, USMCA will deliver new jobs and better protections for hardworking Americans across the country.
- USMCA has the potential to create nearly 600,000 jobs and generate up to $235 billion in economic activity.
- This deal includes the strongest, most advanced, and most comprehensive labor chapter of any American trade agreement in history.
- Workers in all sectors of the economy are expected to benefit from this landmark agreement.
- USMCA is the first United States trade agreement to ever include a chapter supporting small and medium sized businesses.

SUPPORTING AMERICAN FARMERS: USMCA includes tremendous breakthroughs for American agriculture.

- USMCA is a monumental win for American farmers and ranchers, improving access to Canadian and Mexican markets to export their goods.
- As a result of President Trump’s efforts to secure a better deal for our farmers, American agricultural exports are expected to increase by $2.2 billion under USMCA.
- Under the agreement, Canada has agreed to expand market access for American dairy, egg, and poultry producers.
    - The agreement is expected to grow annual dairy exports by nearly $315 million.
- American wheat growers will have access to a more level playing field.
    - Thanks to this deal, Canada will finally give fair treatment to American-grown wheat.

DRIVING NEW GROWTH FOR THE AUTO INDUSTRY: USMCA will provide a massive boost to American manufacturers, particularly our vital auto industry.

- USMCA will achieve fairer, more reciprocal trade that supports high-paying American manufacturing jobs and grows the economy.
- USMCA includes innovative provisions to incentivize new investments in the American auto industry and support high-paying jobs for American auto workers.
    - New wage and rules of origin requirements included in the agreement will put American autoworkers on a level playing field with workers from other countries.
- USMCA is expected to create up to 76,000 new auto jobs, spur $34 billion in new investment in the auto industry, and add $23 billion in auto parts purchases annually.

MODERNIZING REGIONAL TRADE: USMCA will bring our trade relationship with Canada and Mexico into the 21st century.

- USMCA is a modern trade deal that will completely transform our trade relationship with Canada and Mexico and end the outdated NAFTA.
- USMCA contains new protections for American intellectual property, ensuring strong, effective protection for American innovators and creators.
- Included in USMCA is a first-of-its-kind chapter on digital trade, which the decades-old NAFTA was never updated to address.
    - The digital trade provisions included in this agreement will foster economic growth and innovation for years to come.
- USMCA includes first-of-its-kind provisions to prohibit unfair currency practices and reinforce exchange rate stability.
- The agreement includes the strongest environmental standards of any trade agreement in our history.
    - These standards are fully enforceable and will help prevent companies from moving out of the United States—and taking jobs with them—to avoid environmental rules.

Exhibit 15

Foreign Affairs Federalism

The Myth of National Exclusivity

MICHAEL J. GLENNON

ROBERT D. SLOANE

OXFORD
UNIVERSITY PRESS

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Note to Readers

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(Based on the Declaration of Principles jointly adopted by a Committee of the American Bar Association and a Committee of Publishers and Associations.)

Their greater international presence typically reflects that interest. Size supplies motive.

Third, greater and richer resources enable larger nations and states to engage more effectively in foreign affairs. Diplomacy is expensive, and yet even small countries maintain embassies and consulates, run by highly trained diplomats, worldwide. Larger states, like larger nations, exercise greater influence in foreign affairs. Size supplies capacity. State and local government employee pension funds now hold about $2.9 trillion in assets,[101] enough to exert substantial influence on the deliberations of a company seeking investors and considering doing business in a place such as South Africa or Burma.

Accordingly, the several states increasingly decline to stand idly by while global issues threaten their interests or offer new opportunities. They have both the motive and capacity to act. And they do.

IV. State Activities in the International Realm

As noted earlier, the record belies the shibboleth that the federal government alone conducts foreign policy. An overview of comparatively recent international activities by states and cities reveals that federal exclusivity is a fiction.[102]

A. Compacts and Agreements with Foreign Countries

In recent decades, state and local governments have entered into thousands of compacts and agreements with national and subnational governments around the world.[103] More than four hundred agreements exist between the states and Canadian provinces, with some 46 states parties.[104] For example, Alaska, Idaho, Oregon, Montana, and Washington joined several Canadian provinces to coordinate provincial and state policies throughout the region, enhance competitiveness

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101. U.S. Census Bureau, Statistical Abstract of the United States: 2012, Assets of Private and Public Pension Funds by Type: 1990–2010 (2012), https://www.census.gov/library/publications/2011/compendia/statab/131ed/banking-finance-insurance.html.

102. Few of these initiatives have been subjected to judicial challenge. It should be noted, however, that among those that have been contested, a number have been struck down. By reviewing these activities, we do not address their constitutionality. The point is descriptive: contrary to common assumptions, states and cities engage in many and diverse activities in foreign affairs. Sometimes, these activities, or forms of expression, may be in tension or inconsistent with federal foreign policy. But often they will not be.

103. Earl H. Fry, The Expanding Role of State and Local Governments in U.S. Foreign Affairs 5 (1998).

104. *Id.* at 73.

of the region in international and domestic markets, and maintain the region's natural resources, among other goals.[105] On the opposite end of the United States, New England governors and Eastern Canadian premiers came together in 1997 to work together on projects pertaining to acid rain deposition and impacts and reduce mercury in the northeast.[106] Later plans have included efforts to address climate change generally and transportation and air quality.[107] For the past seventeen years, Maine has done well for itself developing international trade relations with a number of foreign nations, including South Korea, Chile, and Brazil, and now the United Kingdom and Iceland.[108] What makes Maine's initiative unique, perhaps, is the extent to which the state and federal agencies work together to encourage and "smooth the way" for such economic partnerships.[109]

Not all of these foreign agreements conform to federal policy, and some affirmatively contravene it. Residents of the United States seldom receive economic assistance from developing countries, for example, but some Massachusetts residents can now claim that distinction by virtue of a deal with Venezuela's state-owned oil company, Petróleos de Venezuela S.A. (PDVSA). Under its terms, PDVSA agreed to supply oil to low-income Massachusetts families.[110] At the time of the agreement's negotiation by U.S. representative Bill Delahunt, Hugo Chavez, a close ally of Cuba and boisterous critic of U.S. foreign policy, was president of Venezuela. Boulder, Colorado made a name for itself when it created a

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105. *Background and History*, PNWER.ORG (July 21, 2015), http://www.pnwer.org/about-us.html.

106. *Action Plans, Policy Reports, and Other Publications*, NEW ENGLAND GOVERNORS' CONFERENCE, INC. (June 26, 2007), http://www.mercvt.org/PDF/Addendum%20File%20for%20CD%20ROM.pdf.

107. *Id.*

108. Douglas Brooks, *Are Maine's Overseas Trade Missions Worth the Time and Money?*, MAINEBIZ, May 5, 2014, http://www.mainebiz.biz/article/20140505/CURRENT-EDITION/305019999/are-maine's-overseas-trade-missions-worth-the-time-and-money.

109. *Id.*

110. During the winter of 2005–2006, CITGO provided oil for heating to the residents of Maine, Massachusetts, New York, and Rhode Island at approximately 40 percent below market rates. The Venezuelan government said that it would provide 12 million gallons of fuel to Massachusetts and approximately 8 million gallons to the Bronx, New York. Participating households would receive a discount of 60 to 80 cents per gallon, totaling $10 to $14 million in savings for the whole winter. OFFICE OF LEGIS. RESEARCH, 2006-R-0079, VENEZUELAN SUBSIDIZED HEATING OIL PROGRAM (2006), http://www.cga.ct.gov/2006/rpt/2006-R-0079.htm; *see also Venezuela Gives US Cheap Oil Deal*, BBC, Nov. 3, 2005, http://news.bbc.co.uk/2/hi/americas/4461946.stm (last visited July 21, 2015). For a discussion on the subsequent political questions raised by the agreement, see Kate Phillips, *Kennedy Connection to Chavez and Citgo*, Sept. 6, 2009, N.Y. TIMES BLOG, http://thecaucus.blogs.nytimes.com/2009/09/06/kennedy-connection-to-chavez-and-citgo/?_php=true&_type=blogs&_r=0.

Exhibit 16

THE COMMERCIAL PRIVILEGES OF THE TREATY OF 1803

In view of the interest taken in the constitutional questions arising out of the purchase of Louisiana because of their bearing upon our recent acquisitions of territory, it is rather surprising that no one has called attention to the fact that when Louisiana was admitted as a state into the Union, no regard was taken of the conflict of certain provisions of the treaty of 1803 with that clause of the Federal Constitution which specifies that "No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another."[1]

The treaty with France which ceded Louisiana to the United States contained the following agreement:

> "That the French ships coming directly from France or any of her colonies, loaded only with the produce and manufactures of France or her said colonies; and the ships of Spain coming directly from Spain or any of her colonies, loaded only with the produce or manufactures of Spain or her colonies, shall be admitted during the space of twelve years in the port of New Orleans, and in all other legal ports of entry within the ceded territory, in the same manner as the ships of the United States coming directly from France or Spain, or any of their colonies, without being subject to any other or greater duty on merchandise, or other or greater tonnage than that paid by the citizens of the United States."[2]

By the tonnage act of 1790, a duty of only six cents per ton was laid upon ships of the United States, but thirty cents a ton was charged upon vessels built within the United States since 1789, which belonged wholly or in part to subjects of foreign powers, and fifty cents per ton upon all other ships or vessels.[3] An additional duty of ten per cent. was levied by the tariff acts upon all goods imported in ships or vessels not of the United States.[4] It was from these "discriminating duties," as they were called, that the French and Spanish ships were exempted by the treaty for twelve years in the ports of Louisiana.[5]

[1] Article I., Section 9.

[2] Article VII.

[3] Act of July 20, 1790, Chap. 30. *U. S. Stat. at Large*, I. p. 135.

[4] Cf., *e. g.*, Acts of July 4, 1789, Chap. 2; Jan. 29, 1795, Chap. 17, and March 3, 1797, Chap. 10. *U. S. Stat. at Large*, I. pp. 24, 411 and 503.

[5] At different times there were various temporary acts laying additional duties, but the duties noted were practically permanent and are the ones that were always cited in the diplomatic negotiations, of which they were the frequent subject.

The twelve years, during which these privileges were granted, were to "commence three months after the exchange of ratifications, if it shall take place in France, or three months after it shall have been notified at Paris to the French Government, if it shall take place in the United States."[1] The ratifications of the treaty were exchanged in Washington on October 21, 1803, and this fact was announced in *Le Moniteur* of December 21 of the same year. Even if this be not the exact date of the formal notification to France, it is evident that by the terms of the treaty these privileges were granted from some day early in the year 1804 to a corresponding date in 1816, and Louisiana was formally admitted as a state into the Union on April 30, 1812. For nearly four years, therefore, if the provisions of the treaty of 1803 remained in force, the ports of Louisiana enjoyed privileges in commerce with France and Spain that were not granted to the ports of any other state.

When the treaty of 1803 was before Congress, objections were made to the commercial privileges granted by the seventh article on the specific ground that these privileges were contrary to the clause of the Constitution already cited. Other interpretations were offered, but the explanation most frequently given, and apparently most acceptable, was to the effect that this clause of the Constitution referred only to the states, and as Louisiana was not a state, but a territory, that clause was not applicable in this instance.[2]

It seems scarcely possible, therefore, that, when the bill for the admission of Louisiana into the Union was before Congress in 1811, this point of conflict of the treaty with the Constitution was not raised, and yet such appears to have been the case. It is true that the debate over the admission of Louisiana was not a long one[3] and that it was several times interrupted by matters of more pressing importance, such as the re-charter of the national bank, the commercial and other complications with England, so soon to culminate in war. Yet the opposition to the admission of Louisiana was very bitter. Objections of all sorts were raised, but no one seems to have noticed the fact that by the admission of Louisiana as a state the commercial privileges of the treaty came into direct conflict with the provisions of the Federal Constitution. When one remembers the keenness with which every point in the treaty was discussed in 1803,

[1] Article VII.

[2] Cf., *e. g.*, statements by Nicholson, of Maryland; Rodney, of Delaware; Mitchill, of New York, and Elliot, of Vermont. *Annals of Cong.*, 8th Cong., 1st Sess., 471, 475, 482 and 450.

[3] In the Senate practically no debate at all is recorded and in the House the bill was only briefly debated on seven days in the course of two weeks. *Annals of Cong.*, 11th Cong., 3rd Sess., pp. 97–127, 482–579.

and the acuteness of New Englanders on all constitutional questions, and remembers also that the New Englanders were especially strong in their opposition to the admission of Louisiana, this oversight seems the more remarkable.

As careful a study of the records as time and opportunity have permitted establishes the belief that this conflict escaped the notice of every one at the time. And this belief is confirmed by the statement of John Quincy Adams in 1821, that "No question appears to have arisen at the time of the admission of the State upon the application of this article, and the privilege of French and Spanish vessels was never, in fact, denied them during the term for which they were entitled by the article to claim it."[1]

It was several years after the admission of Louisiana as a state and not until after the term of these commercial privileges had expired that our government became aware of the manner in which the Constitution had been disregarded in permitting these commercial privileges to continue. It is quite possible that these privileges were never of much moment either financially or commercially, and it is probable that the non-observance of the constitutional prohibition was due to inadvertence in time of war. But inasmuch as the Constitution was plainly disregarded, it is interesting to learn the way by which the attention of our government was called to this omission.

Shortly after the War of 1812 the United States adopted a plan of reciprocity. The discriminating tonnage duties on foreign vessels were repealed "in favour of any foreign nation, whenever the President of the United States shall be satisfied that the discriminating or countervailing duties of such foreign nation, so far as they operate to the disadvantage of the United States, have been abolished."[2] England promptly availed herself of this offer,[3] and a little later the Netherlands, Sweden, Prussia and certain of the Hanseatic cities did the same,[4] but France declined or neglected to take advantage of this opportunity.[5]

It was not long before the masters of French merchant ships began to protest both to their own government and to the United States local authorities that discriminations were made against

[1] Adams to de Neuville, June 15, 1821. *Amer. State Papers, For. Rel.*, V., p. 182.
[2] *U. S. Stat. at Large*, Mar. 3, 1815, Chap. 77.
[3] *Amer. State Papers, For. Rel.*, Vol. IV., p. 7.
[4] President's Message at first Session of 17th Congress. *Ibid.*, p. 738.
[5] There were additional acts passed laying heavier tonnage duties in certain instances. These were evidently retaliatory and culminated in the Act of May 15, 1820, Chap. 126, which imposed a tonnage duty of $18 per ton on all French vessels entered in the United States.

French vessels and that they were no longer treated in the ports of Louisiana upon the footing of the most favored nation. Acting under instructions from his government, the French minister to the United States, Baron de Neuville, looked into the matter and then in 1817 lodged a formal complaint with our Secretary of State. He protested against the advantages that were granted to Great Britain in all the ports of the United States, and insisted that similar privileges should be accorded to France in the ports of Louisiana, in accordance with the eighth article of the treaty of 1803 which stipulated that "in future and forever after the expiration of the twelve years, the ships of France shall be treated upon the footing of the most favored nations in the ports above mentioned."[1] In answer to this complaint, the Secretary of State, John Quincy Adams, replied that French vessels were treated upon the footing of the most favored nation; that the English vessels enjoyed this advantage only for a full equivalent; and that it would be possible for France to obtain "every advantage enjoyed by the vessels of Great Britain upon the fair and just equivalent of reciprocity," not only in the ports of Louisiana but in those of all the United States. He further insisted that to admit French vessels into the ports of Louisiana upon the payment of the same duties as vessels of the United States would be contrary to the provision of the Constitution which declares "that no preference shall be given to the ports of one state over those of another."[2]

It was in response to this that de Neuville called attention to the fact that such privileges had been enjoyed in 1815 in spite of apparent constitutional difficulties, and asked why, if this were done in 1815, it could not be repeated now.[3]

If one were to judge simply by outward appearances, it would seem as if the dilemma were one from which our Secretary of State saw no way of escape. For although communications were frequently exchanged between the representatives of the two governments, no attempt was made to answer the questions that the French minister had propounded. It was not until two years later, after a special request from de Neuville for a reply to his letter of June 16, 1818, that Adams took up this matter. He then stated that whether the commercial privileges of the treaty of 1803 were compatible with the Constitution of the United States was a question for the Senate to decide; but that whether the claim advanced by France was reconcilable with the Constitution of the United

[1] De Neuville to Adams, December 15, 1817. *Amer. State Papers, For Rel.* Vol. V., p. 152.

[2] Adams to de Neuville, December 23, 1817. *Ibid.*, pp. 152–153.

[3] De Neuville to Adams, June 16, 1818. *Ibid.*, pp. 154–155.

States was not a question of construction or of implication. It was directly contrary to the constitutional provision that the regulations of commerce and revenue in the ports of all *states* of the Union should be the same. He further said:

"The admission of the State of Louisiana, in the year 1812, *on an equal footing with the original States* in all respects whatever, does not impair the force of this reasoning, although the admission of French and Spanish vessels into their ports for a short remnant of time upon different regulations of commerce and revenue from those prescribed in the ports of all the other States in the Union, gave them a preference not sanctioned by the Constitution, and upon which the other States might, had they thought fit, have delayed the act of admission until the expiration of the twelve years; yet as this was a condition of which the other States might waive the benefit for the sake of admitting Louisiana, sooner even than rigorous application would have required, to the full enjoyment of all the rights of American citizens, this consent of the only interested party to anticipate the maturity of the adopted child of the Union can be considered in no other light than a friendly grant in advance of that which, in the lapse of three short years, might have been claimed as of undeniable right."[1]

A few weeks later Adams added:

"Whatever transient and inadvertent departure, in favor of the inhabitants of Louisiana, from the principles of the Constitution, may have occurred, is a question of internal administration in this Government, from which France has received no wrong and of which, therefore, she can have no motive to complain."[2]

After one more retort from the French minister, this question was dropped in the negotiations for the convention which was consummated in 1822.

The whole matter is not of vital importance. France had nothing of which to complain. It might even be decided that the Constitution was not infringed. The Constitution provides that no preference shall be given by any *regulation of commerce or revenue* to the ports of one state over those of another. The act for the admission of a state can hardly be regarded as a regulation of commerce or revenue, unless it be interpreted as such because commerce is thereby affected. Or possibly Madison's explanation might be accepted: that this privilege was not the result of ordinary legislative power in Congress; that this privilege was "in the deed of cession, carved by the foreign owner out of the title conveyed to the purchaser," and that the United States never possessed entire power over that territory as over the original territory of the United States.[3] But in view of the stress that has always been laid upon

[1] Adams to de Neuville, March 29, 1821. *Ibid.*, pp. 164–165.

[2] Adams to de Neuville, June 15, 1821. *Ibid.*, p. 182.

[3] Letter to Robert Walsh, November 27, 1819. Madison's *Writings*, Vol. III. pp. 153–154.

The date of the letter renders it probable that Madison's attention was called to this difficulty by the administration after France had raised the question.

the fact that such commercial privileges in the case of Louisiana, the Floridas, and the Philippines were not granted in the ports of a *state*, and in view of Adams's frank admission that, under the circumstances, there had been a virtual suspension of a provision of the Constitution, one cannot avoid the feeling that, had the circumstances been generally known, public opinion would have regarded the continuance of the commercial privileges after Louisiana became a state as a breach of the Constitution, no matter how the difficulty might have been avoided by technical interpretation.[1] At any rate the point is of historical interest both for itself and because it apparently escaped the notice of those of the time, to whose distinct advantage it would have been to call attention to it, and also because it came up at a later date to embarrass our negotiations with France.

MAX FARRAND.

[1] It would seem as if Attorney-General Griggs must have been aware of this difficulty, and thought it best not to refer to it, for in his "Argument" in the recent "Insular Cases" before the Supreme Court he cited passages from Adams's letter to de Neuville of June 15, 1821, and only a few lines farther on this constitutional objection is stated in unmistakable terms. *The Insular Cases*, Government Printing Office, Washington, 1901, pp. 339–340.

Exhibit 17

COMMENTARIES

ON THE

CONSTITUTION OF THE UNITED STATES;

WITH

A PRELIMINARY REVIEW

OF

THE CONSTITUTIONAL HISTORY OF THE COLONIES AND STATES,

BEFORE THE ADOPTION OF THE CONSTITUTION.

By JOSEPH STORY, LL. D.,

DANE PROFESSOR OF LAW IN HARVARD UNIVERSITY.

IN THREE VOLUMES.

"Magistratibus igitur opus est; sine quorum prudentiâ ac diligentiâ esse civitas non potest; quorumque descriptione omnis Reipublicæ moderatio continetur."
CICERO DE LEG. lib. 3. cap. 2.

"Government is a contrivance of human wisdom to provide for human wants."
BURKE.

VOLUME III.

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1833.

CHAPTER XXXIII.

PROHIBITIONS ON THE STATES.

§ 1347. THE tenth section of the first article (to which we are now to proceed) contains the prohibitions and restrictions upon the authority of the states. Some of these, and especially those, which regard the power of taxation, and the regulation of commerce, have already passed under consideration; and will, therefore, be here omitted. The others will be examined in the order of the text of the constitution.

§ 1348. The first clause is, "No state shall enter "into any treaty, alliance, or confederation; grant "letters of marque or reprisal; coin money; emit bills "of credit; make any thing but gold and silver coin a "tender in payment of debts; pass any bill of attainder, "*ex post facto* law, or law impairing the obligation of "contracts, or grant any title of nobility."[1]

§ 1349. The prohibition against treaties, alliances, and confederations, constituted a part of the articles of confederation,[2] and was from thence transferred in substance into the constitution. The sound policy,

[1] In the original draft of the constitution, some of these prohibitory clauses were not inserted; and, particularly, the last clause, prohibiting a state to pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts. The former part was inserted by a vote of seven states against three. The latter was inserted in the revised draft of the constitution, and adopted at the close of the convention, whether with, or without opposition, does not appear.* It was probably suggested by the clause in the ordinance of 1787, (Art. 2,) which declared, "that no law ought to be made, &c., that shall interfere with, or affect private contracts, or engagements, *bonâ fide*, and without fraud, previously formed."

[2] Art. 6.

* Journal of Convention, p. 227, 302, 359, 377, 379.

nay, the necessity of it, for the preservation of any national government, is so obvious, as to strike the most careless mind. If every state were at liberty to enter into any treaties, alliances, or confederacies, with any foreign state, it would become utterly subversive of the power confided to the national government on the same subject. Engagements might be entered into by different states, utterly hostile to the interests of neighbouring or distant states; and thus the internal peace and harmony of the Union might be destroyed, or put in jeopardy. A foundation might thus be laid for preferences, and retaliatory systems, which would render the power of taxation, and the regulation of commerce, by the national government, utterly futile. Besides; the intimate dangers to the Union ought not to be overlooked, by thus nourishing within its own bosom a perpetual source of foreign corrupt influence, which, in times of political excitement and war, might be wielded to the destruction of the independence of the country. This, indeed, was deemed, by the authors of the Federalist, too clear to require any illustration.[1] The corresponding clauses in the confederation were still more strong, direct, and exact, in their language and import.

§ 1350. The prohibition to grant letters of marque and reprisal stands upon the same general ground; for otherwise it would be in the power of a single state to involve the whole Union in war at its pleasure. It is true, that the granting of letters of marque and reprisal is not always a preliminary to war, or necessarily designed to provoke it. But in its essence, it is a hostile measure for unredressed grievances, real or supposed;

[1] The Federalist, No. 44.

and therefore is most generally the precursor of an appeal to arms by general hostilities. The security (as has been justly observed) of the whole Union ought not to be suffered to depend upon the petulance or precipitation of a single state.[1] Under the confederation there was a like prohibition in a more limited form. According to that instrument, no state could grant letters of marque and reprisal, until after a declaration of war by the congress of the United States.[2] In times of peace the power was exclusively confided to the general government. The constitution has wisely, both in peace and war, confided the whole subject to the general government. Uniformity is thus secured in all operations, which relate to foreign powers; and an immediate responsibility to the nation on the part of those, for whose conduct the nation is itself responsible.[3]

§ 1351. The next prohibition is to coin money. We have already seen, that the power to coin money, and regulate the value thereof, is confided to the general government. Under the confederation a concurrent power was left in the states, with a restriction, that congress should have the exclusive power to regulate the alloy and value of the coin struck by the states.[4] In this, as in many other cases, the constitution has made a great improvement upon the existing system. Whilst the alloy and value depended on the general government, a right of coinage in the several states could have no other effect, than to multiply expensive mints, and diversify the forms and weights of the circulating coins. The latter inconvenience would defeat one

[1] 1 Tucker's Black. Comm. App. 310, 311.
[2] Article 6.
[3] The Federalist, No. 44; Rawle on Constitution, ch. 10, p. 136.
[4] Article 9.

CHAPTER XXXV.

PROHIBITIONS ON THE STATES.

§ 1395. THE next clause of the constitution is, "No state shall, without the consent of congress, lay "any duty on tonnage; keep troops, or ships of war "in time of peace; enter into any agreement or com- "pact with another state, or with a foreign power, or "engage in war, unless actually invaded, or in such "imminent danger as will not admit of delay."

§ 1396. The first part of this clause, respecting laying a duty on tonnage, has been already considered. The remaining clauses have their origin in the same general policy and reasoning, which forbid any state from entering into any treaty, alliance, or confederation; and from granting letters of marque and reprisal. In regard to treaties, alliances, and confederations, they are wholly prohibited. But a state may, *with the consent of congress*, enter into an agreement, or compact with another state, or with a foreign power. What precise distinction is here intended to be taken between *treaties*, and *agreements*, and *compacts* is nowhere explained; and has never as yet been subjected to any exact judicial, or other examination. A learned commentator, however, supposes, that the former ordinarily relate to subjects of great national magnitude and importance, and are often perpetual, or for a great length of time; but that the latter relate to transitory, or local concerns, or such, as cannot possibly affect any other interests, but those of the parties.[1] But this

[1] 1 Tucker's Black. Comm. App. 310.

is at best a very loose, and unsatisfactory exposition, leaving the whole matter open to the most latitudinarian construction. What are subjects of great national magnitude and importance? Why may not a compact, or agreement between states, be perpetual? If it may not, what shall be its duration? Are not treaties often made for short periods, and upon questions of local interest, and for temporary objects.?[1]

§ 1397. Perhaps the language of the former clause may be more plausibly interpreted from the terms used, "treaty, alliance, or confederation," and upon the ground, that the sense of each is best known by its association (*noscitur a sociis*) to apply to treaties of a political character; such as treaties of alliance for purposes of peace and war; and treaties of confederation, in which the parties are leagued for mutual government, political co-operation, and the exercise of political sovereignty; and treaties of cession of sovereignty, or conferring internal political jurisdiction, or external political dependence, or general commercial privileges.[2] The latter clause, "compacts and agreements," might then very properly apply to such, as regarded what might

[1] The corresponding article of the confederation did not present exactly the same embarrassments in its construction. One clause was, "No state, without the consent of the United States, in congress assembled, shall enter into any conference, agreement, alliance, or treaty with any king, prince, or state"; and "No two or more states shall enter into any treaty, confederation, or alliance whatever between them, without the consent of the United States, &c.; specifying accurately the purposes, for which the same is to be entered into, and how long it shall continue." Taking both clauses, it is manifest, that the former refers exclusively to foreign states, or nations; and the latter to the states of the Union.

[2] In this view, one might be almost tempted to conjecture, that the original reading was "treaties of alliance, or confederation;" if the corresponding article of the confederation (art. 6) did not repel it.

be deemed mere private rights of sovereignty; such as questions of boundary; interests in land, situate in the territory of each other; and other internal regulations for the mutual comfort, and convenience of states, bordering on each other. Such compacts have been made since the adoption of the constitution. The compact between Virginia and Kentucky, already alluded to, is of this number. Compacts, settling the boundaries between states, are, or may be, of the same character. In such cases, the consent of congress may be properly required, in order to check any infringement of the rights of the national government; and at the same time a total prohibition, to enter into any compact or agreement, might be attended with permanent inconvenience, or public mischief.

§ 1398. The other prohibitions in the clause respect the power of making war, which is appropriately confided to the national government.[1] The setting on foot of an army, or navy, by a state in times of peace, might be a cause of jealousy between neighbouring states, and provoke the hostilities of foreign bordering nations. In other cases, as the protection of the whole Union is confided to the national arm, and the national power, it is not fit, that any state should possess military means to overawe the Union, or to endanger the general safety. Still, a state may be so situated, that it may become indispensable to possess military forces, to resist an expected inva-

1 There were corresponding prohibitions in the confederation, (art. 6,) which differ more in form, than in substance, from those in the constitution. No state was at liberty, in time of peace, to keep up vessels of war, or land forces, without the consent of congress. Nor was any state at liberty to engage in war without the consent of congress, unless invaded, or in imminent danger thereof.

also included in it; and may in the last resort be exercised by the executive, although it is in many cases by our laws confided to the treasury department.[1] No law can abridge the constitutional powers of the executive department, or interrupt its right to interpose by pardon in such cases.[2]

§ 1499. The next clause is: "He (the president) "shall have power, by and with the advice and consent "of the senate, to make treaties, provided two thirds of "the senators present concur. And he shall nominate, "and, by and with the advice and consent of the senate, "shall appoint ambassadors, other public ministers, "and consuls, judges of the Supreme Court, and all "other officers of the United States, whose appoint- "ments are not herein otherwise provided for, and "which shall be established by law. But the congress "may by law vest the appointment of such inferior offi- "cers, as they think proper, in the president alone, in "the courts of law, or in the heads of departments."

§ 1500. The first power, "to make treaties," was not in the original draft of the constitution; but was afterwards reported by a committee; and after some ineffectual attempts to amend, it was adopted, in substance, as it now stands, except, that in the report the advice and consent of two thirds of the senators was not required to a treaty of peace. This exception was struck out by a vote of eight states against three. The principal struggle was, to require two thirds of the

1 Act of 3d of March, 1797, ch. 67; Act of 11th of Feb. 1800, ch. 6.

2 Instances of the exercise of this power by the president, in remitting fines and penalties in cases, not within the scope of the laws giving authority to the treasury department, have repeatedly occurred; and their obligatory force has never been questioned.

whole number of members of the senate, instead of two thirds of those present.[1]

§ 1501. Under the confederation congress possessed the sole and exclusive power of "entering into treaties and alliances, provided, that no treaty of commerce shall be made, whereby the legislative power of the respective states shall be restrained from imposing such imposts and duties on foreigners, as their own people were subjected to; or from prohibiting the exportation or importation of any species of goods or commodities whatsoever." But no treaty or alliance could be entered into, unless by the assent of nine of the states.[2] These limitations upon the power were found very inconvenient in practice; and indeed, in conjunction with other defects, contributed to the prostration, and utter imbecility of the confederation.[3]

§ 1502. The power "to make treaties" is by the constitution general; and of course it embraces all sorts of treaties, for peace or war; for commerce or territory; for alliance or succours; for indemnity for injuries or payment of debts; for the recognition and enforcement of principles of public law; and for any other purposes, which the policy or interests of independent sovereigns may dictate in their intercourse with each other.[4] But though the power is thus general and unrestricted, it is not to be so construed, as to destroy the fundamental laws of the state. A power given by the constitution cannot be construed to authorize a destruction of other powers given in the same instrument. It must be con-

1 Journal of Convention, p. 225, 326, 339, 341, 342, 343, 362; The Federalist, No. 75.

2 Confederation, Art. 9.

3 The Federalist, No. 42.

4 See 5 Marshall's Life of Washington, ch. 8, p. 650 to 659.

strued, therefore, in subordination to it; and cannot supersede, or interfere with any other of its fundamental provisions.[1] Each is equally obligatory, and of paramount authority within its scope; and no one embraces a right to annihilate any other. A treaty to change the organization of the government, or annihilate its sovereignty, to overturn its republican form, or to deprive it of its constitutional powers, would be void; because it would destroy, what it was designed merely to fulfil, the will of the people. Whether there are any other restrictions, necessarily growing out of the structure of the government, will remain to be considered, whenever the exigency shall arise.[2]

§ 1503. The power of making treaties is indispensable to the due exercise of national sovereignty, and very important, especially as it relates to war, peace, and commerce. That it should belong to the national government would seem to be irresistibly established by every argument deduced from experience, from public policy, and a close survey of the objects of government. It is difficult to circumscribe the power within any definite limits, applicable to all times and exigencies, without impairing its efficacy, or defeating its purposes. The constitution has, therefore, made it general and unqualified. This very circumstance, however, renders it highly important, that it should be delegated in such

[1] See Woodeson's Elem. of Jurisp. p. 51.

[2] See 1 Tuck. Black. Comm. App. 332, 333; Rawle on Const. ch. 7, p. 63 to 76; 2 Elliot's Deb. 368, 369 to 379; Journal of Convention, p. 342; 4 Jefferson's Corresp. 2, 3. — Mr. Jefferson seems at one time to have thought, that the constitution only meant to authorize the president and senate to carry into effect, by way of treaty, *any power they might constitutionally exercise*. At the same time, he admits, that he was sensible of the weak points of this position. 4 Jefferson's Corresp. 498. What are such powers given to the president and senate? Could they make appointments by treaty?

a mode, and with such precautions, as will afford the highest security, that it will be exercised by men the best qualified for the purpose, and in the manner most conducive to the public good.[1] With such views, the question was naturally presented in the convention, to what body shall it be delegated? It might be delegated to congress generally, as it was under the confederation, exclusive of the president, or in conjunction with him. It might be delegated to either branch of the legislature, exclusive of, or in conjunction with him. Or it might be exclusively delegated to the president.

§ 1504. In the formation of treaties, secrecy and immediate despatch are generally requisite, and sometimes absolutely indispensable. Intelligence may often be obtained, and measures matured in secrecy, which could never be done, unless in the faith and confidence of profound secrecy. No man at all acquainted with diplomacy, but must have felt, that the success of negotiations as often depends upon their being unknown by the public, as upon their justice or their policy. Men will assume responsibility in private, and communicate information, and express opinions, which they would feel the greatest repugnance publicly to avow; and measures may be defeated by the intrigues and management of foreign powers, if they suspect them to be in progress, and understand their precise nature and extent. In this view the executive department is a far better depositary of the power, than congress would be. The delays incident to a large assembly; the differences of opinion; the time consumed in debate; and the utter impossibility of secrecy, all combine to render them unfitted for the purposes of diplomacy. And our

[1] The Federalist, No. 64.

own experience during the confederation abundantly demonstrated all the evils, which the theory would lead us to expect.[1] Besides; there are tides in national affairs, as well as in the affairs of private life. To discern and profit by them is the part of true political wisdom; and the loss of a week, or even of a day, may sometimes change the whole aspect of affairs, and render negotiations wholly nugatory, or indecisive. The loss of a battle, the death of a prince, the removal of a minister, the pressure or removal of fiscal embarrassments at the moment, and other circumstances, may change the whole posture of affairs, and ensure success, or defeat the best concerted project.[2] The executive, having a constant eye upon foreign affairs, can promptly meet, and even anticipate such emergencies, and avail himself of all the advantages accruing from them; while a large assembly would be coldly deliberating on the chances of success, and the policy of opening negotiations. It is manifest, then, that congress would not be a suitable depositary of the power.

§ 1505. The same difficulties would occur from confiding it exclusively to either branch of congress. Each is too numerous for prompt and immediate action, and secrecy. The matters in negotiations, which usually require these qualities in the highest degree, are the preparatory and auxiliary measures; and which are to be seized upon, as it were, in an instant. The president could easily arrange them. But the house, or the senate, if in session, could not act, until after great delays; and in the recess could not act all. To have entrusted the power to either would have been to relinquish the benefits of the constitutional agency of the

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[1] The Federalist, No. 64.

[2] Id. No. 64.

president in the conduct of foreign negotiations. It is true, that the branch so entrusted might have the option to employ the president in that capacity; but they would also have the option of refraining from it; and it cannot be disguised, that pique, or cabal, or personal or political hostility, might induce them to keep their pursuits at a distance from his inspection and participation. Nor could it be expected, that the president, as a mere ministerial agent of such branch, would enjoy the confidence and respect of foreign powers to the same extent, as he would, as the constitutional representative of the nation itself; and his interposition would of course have less efficacy and weight.[1]

§ 1506. On the other hand, considering the delicacy and extent of the power, it is too much to expect, that a free people would confide to a single magistrate, however respectable, the sole authority to act conclusively, as well as exclusively, upon the subject of treaties. In England, the power to make treaties is exclusively vested in the crown.[2] But however proper it may be in a monarchy, there is no American statesman, but must feel, that such a prerogative in an American president would be inexpedient and dangerous.[3] It would be inconsistent with that wholesome jealousy, which all republics ought to cherish of all depositaries of power; and which, experience teaches us, is the best security against the abuse of it.[4] The check, which acts upon the mind from the consideration, that what is done is but preliminary, and requires the assent of other independent minds to give it a legal conclusiveness, is a restraint, which awakens caution, and compels to deliberation.

1 The Federalist, No. 75.
2 1 Black. Comm. 257; The Federalist, No. 69.
3 The Federalist, No. 75.
4 Id. No. 75.

§ 1507. The plan of the constitution is happily adapted to attain all just objects in relation to foreign negotiations. While it confides the power to the executive department, it guards it from serious abuse by placing it under the ultimate superintendence of a select body of high character and high responsibility. It is indeed clear to a demonstration, that this joint possession of the power affords a greater security for its just exercise, than the separate possession of it by either.[1] The president is the immediate author and finisher of all treaties; and all the advantages, which can be derived from talents, information, integrity, and deliberate investigation on the one hand, and from secrecy and despatch on the other, are thus combined in the system.[2] But no treaty, so formed, becomes binding upon the country, unless it receives the deliberate assent of two thirds of the senate. In that body all the states are equally represented; and, from the nature of the appointment and duration of the office, it may fairly be presumed at all times to contain a very large portion of talents, experience, political wisdom, and sincere patriotism, a spirit of liberality, and a deep devotion to all the substantial interests of the country. The constitutional check of requiring two thirds to confirm a treaty is, of itself, a sufficient guaranty against any wanton sacrifice of private rights, or any betrayal of public privileges. To suppose otherwise would be to suppose, that a representative republican government was a mere phantom; that the state legislatures were incapable, or unwilling to choose senators possessing due qualifications; and that the people would voluntarily confide power to those, who were ready to promote

[1] The Federalist, No. 75. [2] Id. No. 64.

their ruin, and endanger, or destroy their liberties. Without supposing a case of utter indifference, or utter corruption in the people, it would be impossible, that the senate should be so constituted at any time, as that the honour and interests of the country would not be safe in their hands. When such an indifference, or corruption shall have arrived, it will be in vain to prescribe any remedy; for the constitution will have crumbled into ruins, or have become a mere shadow, about which it would be absurd to disquiet ourselves.[1]

§ 1508. Although the propriety of this delegation of the power seems, upon sound reasoning, to be incontestible; yet few parts of the constitution were assailed with more vehemence.[2] One ground of objection was, the trite topic of an intermixture of the executive and legislative powers; some contending, that the president ought alone to possess the prerogative of making treaties; and others, that it ought to be exclusively deposited in the senate. Another objection was, the smallness of the number of the persons, to whom the power was confided; some being of opinion, that the house of representatives ought to be associated in its exercise; and others, that two thirds of all the members of the senate, and not two thirds of all the members present, should be required to ratify a treaty.[3]

§ 1509. In relation to the objection, that the power ought to have been confided exclusively to the president, it may be suggested in addition to the preceding remarks, that, however safe it may be in governments, where the executive magistrate is an hereditary monarch, to commit to him the entire power of making

[1] The Federalist, No. 64.
[2] See 2 Elliot's Debates, 367 to 379.
[3] The Federalist, No. 75.

treaties, it would be utterly unsafe and improper to entrust that power to an executive magistrate chosen for four years. It has been remarked, and is unquestionably true, that an hereditary monarch, though often the oppressor of his people, has personally too much at stake in the government to be in any material danger of corruption by foreign powers, so as to surrender any important rights or interests. But a man, raised from a private station to the rank of chief magistrate for a short period, having but a slender or moderate fortune, and no very deep stake in the society, might sometimes be under temptations to sacrifice duty to interest, which it would require great virtue to withstand. If ambitious, he might be tempted to seek his own aggrandizement by the aid of a foreign power, and use the field of negotiations for this purpose. If avaricious, he might make his treachery to his constituents a vendible article at an enormous price. Although such occurrences are not ordinarily to be expected; yet the history of human conduct does not warrant that exalted opinion of human nature, which would make it wise in a nation to commit its most delicate interests and momentous concerns to the unrestrained disposal of a single magistrate.[1] It is far more wise to interpose checks upon the actual exercise of the power, than remedies to redress, or punish an abuse of it.

§ 1510. The impropriety of delegating the power exclusively to the senate has been already sufficiently considered. And, in addition to what has been already urged against the participation of the house of representatives in it, it may be remarked, that the house of representatives is for other reasons far less fit, than the

[1] The Federalist, No. 75.

senate, to be the exclusive depositary of the power, or to hold it in conjunction with the executive. In the first place, it is a popular assembly, chosen immediately from the people, and representing, in a good measure, their feelings and local interests; and it will on this account be more likely to be swayed by such feelings and interests, than the senate, chosen by the states through the voice of the state legislatures. In the next place, the house of representatives are chosen for two years only; and the internal composition of the body is constantly changing so, as to admit of less certainty in their opinions, and their measures, than would naturally belong to a body of longer duration. In the next place, the house of representatives is far more numerous, than the senate, and will be constantly increasing in numbers so, that it will be more slow in its movements, and more fluctuating in its councils. In the next place, the senate will naturally be composed of persons of more experience, weight of character, and talents, than the members of the house. Accurate knowledge of foreign politics, a steady and systematic adherence to the same views, nice and uniform sensibility to national character, as well as secrecy, decision, and despatch, are required for a due execution of the power to make treaties. And, if these are not utterly incompatible with the genius of a numerous and variable body, it must be admitted, that they will be more rarely found there, than in a more select body, having a longer duration in office, and representing, not the interests of private constituents alone, but the sovereignty of states.

§ 1511. Besides; the very habits of business, and the uniformity and regularity of system, acquired by a long possession of office, are of great concern in all

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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

THE UNITED STATES OF AMERICA,

Plaintiff,

v.

THE STATE OF CALIFORNIA; GAVIN C. NEWSOM, in his official capacity as Governor of the State of California; THE CALIFORNIA AIR RESOURCES BOARD; MARY D. NICHOLS, in her official capacity as Chair of the California Air Resources Board and as Vice Chair and a board member of the Western Climate Initiative, Inc.; WESTERN CLIMATE INITIATIVE, INC.; JARED BLUMENFELD, in his official capacity as Secretary for Environmental Protection and as a board member of the Western Climate Initiative, Inc.; KIP LIPPER, in his official capacity as a board member of the Western Climate Initiative, Inc., and RICHARD BLOOM, in his official capacity as a board member of the Western Climate Initiative, Inc.,

Defendants.

Case No. 2:19-cv-02142-WBS-EFB

STATEMENT OF UNDISPUTED FACTS IN SUPPORT OF STATE DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT AND THEIR OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Date: March 9, 2020
Time: 1:30 PM
Courtroom: 5
Judge: Honorable William B. Shubb
Trial Date: Not Set

Action Filed: 10/23/2019

[1] The State Defendants are State of California; Gavin C. Newsom, in his official capacity as Governor of the State of California; the California Air Resources Board; Mary D. Nichols, in her official capacity as Chair of the California Air Resources Board; and Jared Blumenfeld, in his official capacity as Secretary for Environmental Protection.

Pursuant to Local Rule 260(a), State Defendants respectfully submit this Statement of Undisputed Facts in support of their cross-motion for summary judgment and their opposition to Plaintiff's motion for summary judgment.

UNDISPUTED FACTS

Facts	Supporting Evidence
1. In enacting Assembly Bill 32, the Global Warming Solutions Act, the California Legislature found that climate change posed "a serious threat" to the economic well-being, public health, natural resources, and the environment of California, and anticipated serious impacts to California's largest industries.	Cal. Health & Safety Code, § 38501(a), (b).
2. The Global Warming Solutions Act mandated that the State of California reduce its greenhouse gas emissions to 1990 levels by 2020, and, a later act mandated reductions to at least 40 percent below 1990 levels by the end of 2030.	Cal. Health & Safety Code, §§ 38550, 38566.
3. The Global Warming Solutions Act required and authorized the California Air Resources Board (CARB) to develop a plan and promulgate regulations to achieve the mandated statewide reductions of greenhouse gas emissions.	Cal. Health & Safety Code, §§ 38561, 38560.
4. The California Legislature authorized CARB to design and adopt a system of market-based declining annual aggregate emission limits for sources or categories of sources that emit greenhouse gases.	Cal. Health & Safety Code, § 38562(c)(2).
5. In 2008, CARB concluded that achieving statewide emissions limits could "best be accomplished through a cap-and-trade program along with a mix of complementary strategies that combine market-based regulatory approaches, other regulations, voluntary measures, fees, policies, and programs."	Dorsi Decl., Exh. 2 at E-2, E-3; Declaration of Rajinder Sahota, ¶ 7.
6. In 2011, CARB adopted cap-and-trade regulations (Cap-and-Trade Regulation).	Dorsi Decl., Exh. 4; Declaration of Rajinder Sahota, ¶ 20.

Facts	Supporting Evidence
7. The Cap-and-Trade Regulation became effective on January 1, 2012.	Declaration of Rajinder Sahota, ¶ 20.
8. The compliance obligations established by the Cap-and-Trade Regulation began on January 1, 2013.	Cal. Code Regs., tit. 17, § 95840(a); Declaration of Rajinder Sahota, ¶ 20.
9. The Cap-and-Trade Regulation establish "yearly caps" for total greenhouse gas emissions of all regulated sources (i.e., covered entities).	Cal. Code Regs., tit. 17, §§ 95841, 95802(a) (defining "Annual Allowance Budget"); Declaration of Rajinder Sahota, ¶ 21.
10. Pursuant to the Cap-and-Trade Regulation, CARB issues allowances in quantities equal to the emissions budget for a given year.	Declaration of Rajinder Sahota, ¶ 22; Cal. Code Regs., tit. 17, §§ 95802(a), 95820(a)(1).
11. Pursuant to the Cap-and-Trade Regulation, "covered entities" may trade allowances, and are required to acquire and surrender eligible compliance instruments equivalent to their emissions.	Declaration of Rajinder Sahota, ¶ 22; Cal. Code Regs., tit. 17, §§ 95850(b), 95856(a).
12. The Cap-and-Trade Regulation authorized CARB to link California's cap-and-trade program to cap-and-trade programs in other jurisdictions via a rulemaking proceeding and after certain findings are made.	Cal. Code Regs., tit. 17, § 95940.
13. Under the Cap-and-Trade Regulation, when CARB completes a rulemaking to link to another program, CARB will (1) accept the allowances (or other compliance instruments) issued by the linked jurisdiction as essentially equivalent to CARB-issued instruments and (2) conduct coordinated allowance auctions with the other jurisdiction. Linkage does not alter the caps (or emissions budgets) of California's cap-and-trade program, or any other requirement in the Cap-and-Trade Regulations.	Cal Code Regs., tit. 17, §§ 95940, 95942(a), (e), 95911(a)(5); Declaration of Rajinder Sahota, ¶ 25.
14. CARB found that linking cap-and-trade programs would expand the market(s) for compliance instruments for covered entities and thereby give them access to more cost-reduction opportunities.	Declaration of Rajinder Sahota, ¶ 25.
15. Multiple business interests, including parties that would be regulated under California's cap-and-trade program, supported	Declaration of Rajinder Sahota, ¶ 27; Dorsi Decl., Exh. 5.

Facts	Supporting Evidence
CARB including the ability to link its program to those in other jurisdictions.	
16. Before CARB can link California's cap-and-trade program to a cap-and-trade program from another jurisdiction, it must give the Governor notice of the proposed linkage arrangement, and the Governor must make four findings.	Cal. Gov. Code § 12894(f).
17. If the Governor makes those four findings, CARB can only link California's cap-and-trade program with a cap-and-trade program in another jurisdiction through an amendment to the Cap-and-Trade Regulation.	Cal. Gov. Code § 12894(f); Declaration of Rajinder Sahota, ¶¶ 26, 38.
18. The California cap-and-trade program and the Quebec cap-and-trade program are not identical.	Declaration of Rajinder Sahota, ¶¶ 35, 81.
19. The California cap-and-trade program and the Quebec cap-and-trade program differ in that Quebec's overall, province-wide greenhouse gas emissions target for 2020 is 20 percent below 1990 levels, whereas California's target is to at least achieve 1990 levels of emissions by 2020.	Declaration of Rajinder Sahota, ¶ 35.
20. The California cap-and-trade program and the Quebec cap-and-trade program differ in that while Quebec's cap-and-trade program includes sources of high global warming potential gases, those gases are not included in CARB's program.	Declaration of Rajinder Sahota, ¶ 35.
21. The California cap-and-trade program and the Quebec cap-and-trade program differ in that Quebec chose not to accredit its own third-party verifiers of greenhouse gas emission reports submitted by entities subject to its program and instead relies on existing accreditation systems, while CARB established an accreditation program for individuals to audit any greenhouse gas reports submitted to CARB.	Declaration of Rajinder Sahota, ¶ 35.
22. The California cap-and-trade program and the Quebec cap-and-trade program differ in that California and Quebec utilize different tools to maintain environmental integrity in the event an offset credit is invalidated at a later time.	Declaration of Rajinder Sahota, ¶ 35.

Facts	Supporting Evidence
23. The California cap-and-trade program and the Quebec cap-and-trade program differ in that Quebec and California chose different methodologies to allocate allowances to covered industries to minimize for emission leakage.	Declaration of Rajinder Sahota, ¶ 35.
24. The California cap-and-trade program and the Quebec cap-and-trade program differ in that the California program freely provides allowances to utility companies which are then consigned at auction, and the allowance value generated by the auction is provided back to California energy rate-payers as a climate credit, but this feature is not included in the Quebec program.	Declaration of Rajinder Sahota, ¶ 35.
25. The California cap-and-trade program and the Quebec cap-and-trade program differ in that California created the price ceiling and lower offset usage limit in its program, while Quebec has no price ceiling and has different offset usage limits.	Declaration of Rajinder Sahota, ¶ 81.
26. Over several months in 2012 through 2013, CARB staff and staff from the Quebec government held weekly meetings regarding potentially linking their respective cap-and-trade programs.	Declaration of Rajinder Sahota, ¶ 36.
27. On April 19, 2013, CARB adopted regulatory amendments to link to Quebec's cap-and-trade program.	Declaration of Rajinder Sahota, ¶ 36; Cal. Code Regs., tit. 17, § 95943(a)(1).
28. In September 2013, CARB and California's Governor signed an agreement with Quebec.	Declaration of Rajinder Sahota, ¶ 44.
29. The 2013 agreement was signed after CARB amended its regulations to link its cap-and-trade program with Quebec's program.	Declaration of Rajinder Sahota, ¶ 44.
30. CARB recognized that the 2013 agreement was not enforceable.	Declaration of Rajinder Sahota, ¶ 47.
31. CARB's intention in signing the agreement was to memorialize the parties' intention to continue to coordinate as to how each jurisdiction managed its respective program.	Declaration of Rajinder Sahota, ¶ 47.

Facts	Supporting Evidence
32. The 2013 agreement between California and Quebec did not modify any parties' existing laws or regulations.	Declaration of Rajinder Sahota, ¶ 49; Dorsi Decl., Exh. 8 (Articles 6, 7, 8).
33. The 2013 agreement did not link California's cap-and-trade program to Quebec's cap-and-trade program.	Declaration of Rajinder Sahota, ¶ 46.
34. On July 27, 2017, CARB adopted regulatory amendments to link its cap-and-trade program with Ontario's cap-and-trade program.	Cal. Code Regs., tit. 17, § 95943(a)(2); Declaration of Rajinder Sahota, ¶ 64.
35. In September 2017, California, Quebec, and Ontario signed an agreement to continue consulting and collaborating on their respective cap-and-trade programs.	Declaration of Rajinder Sahota, ¶ 65.
36. The 2017 agreement acknowledged that the parties had already "developed constructive working relationships among their respective staff and officials," the parties expressed their intentions to "facilitate continued consultation, using and building on existing working relationships."	Am. Compl., Attachment B (ECF No. 7-2) at 2.
37. The 2017 agreement did not link California's cap-and-trade program to Quebec's or Ontario's cap-and-trade programs.	Declaration of Rajinder Sahota, ¶ 66.
38. The 2017 agreement did not modify California's, Ontario's, or Quebec's existing laws or regulations.	Am. Compl., Attachment B (ECF No. 7-2), Article 14; Declaration of Rajinder Sahota, ¶ 68.
39. Nothing in the 2017 agreement altered California's, Ontario's, or Quebec's authority or ability to modify, amend, or even repeal its own program.	Declaration of Rajinder Sahota, ¶ 68.
40. The provision relating to withdrawal from the 2017 agreement does not, and was not intended to, prevent any party to the agreement from withdrawing unilaterally or without providing 12-months notice.	Declaration of Rajinder Sahota, ¶ 70.
41. The "Consultation Committee," mentioned in the 2017 agreement, has never been formed or met.	Declaration of Rajinder Sahota, ¶ 69.

Facts	Supporting Evidence
42. The Western Climate Initiative, Inc. (WCI, Inc.) provides "technical and administrative support services related to the parties' respective cap-and-trade programs."	Declaration of Rajinder Sahota, ¶¶50-51; Amended Complaint, Exh. C (ECF No. 7-3); Dorsi Decl., Exh. 12.
43. WCI, Inc. has no policy-making, regulatory, or enforcement authority over California's cap-and-trade program.	Declaration of Rajinder Sahota, ¶ 57.
44. In 2018, Ontario's government announced its intention to cancel its cap-and-trade program, and the Legislative Assembly voted to repeal its cap-and trade regulations.	Declaration of Rajinder Sahota, ¶¶ 73-75.
45. At no point in 2018 did Ontario officials consult with CARB during these revocation or cancellation proceedings.	Declaration of Rajinder Sahota, ¶ 76.
46. No Ontario official provided notice of withdrawal from the 2017 agreement it had signed with California and Quebec.	Declaration of Rajinder Sahota, ¶ 76.
47. Despite Ontario's repeal of its cap-and-trade program, California continues to accept Ontario-issued compliance instruments that were held by participants in the still-linked California and Quebec programs as of June 15, 2018.	Declaration of Rajinder Sahota, ¶ 77.

Dated: February 10, 2020

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

THE UNITED STATES OF AMERICA, Plaintiff, v. THE STATE OF CALIFORNIA; GAVIN C. NEWSOM, in his official capacity as Governor of the State of California; THE CALIFORNIA AIR RESOURCES BOARD; MARY D. NICHOLS, in her official capacity as Chair of the California Air Resources Board and as Vice Chair and a board member of the Western Climate Initiative, Inc.; WESTERN CLIMATE INITIATIVE, INC.; JARED BLUMENFELD, in his official capacity as Secretary for Environmental Protection and as a board member of the Western Climate Initiative, Inc.; KIP LIPPER, in his official capacity as a board member of the Western Climate Initiative, Inc., and RICHARD BLOOM, in his official capacity as a board member of the Western Climate Initiative, Inc., Defendants.	2:19-cv-02142-WBS-EFB **DEFENDANTS' RESPONSE TO PLAINTIFF'S STATEMENT OF UNDISPUTED FACTS IN SUPPORT PLAINTIFF'S SUMMARY JUDGMENT MOTION** Date: March 9, 2020 Time: 1:30 PM Courtroom: 5 Judge: Honorable William B. Shubb Trial Date: Not Set Action Filed: 10/23/2019

[1] The State Defendants are State of California; Gavin C. Newsom, in his official capacity as Governor of the State of California; the California Air Resources Board; Mary D. Nichols, in her official capacity as Chair of the California Air Resources Board; and Jared Blumenfeld, in his official capacity as Secretary for Environmental Protection.

The State Defendants hereby submit the information in the table below in Response to Plaintiff's Statement of Undisputed Facts. State Defendants further incorporate by reference all of the information contained in the Statement Of Undisputed Facts in Support of State Defendants' Cross-Motion for Summary Judgment and Their Opposition to Plaintiff's Motion for Summary Judgment, filed concurrently herewith, as additional undisputed material facts requiring the denial of Plaintiff's motion.

Plaintiff's Statement of Undisputed Facts and Supporting Evidence	**Undisputed or Disputed**	**Explanation**
1. The United States is a party to the United Nations Framework Convention on Climate Change of 1992 ("UNFCCC"). Declaration of Rachel E. Iacangelo, Exh. 1—United Nations Framework Convention on Climate Change.	Undisputed	
2. The UNFCCC was ratified by the President with the advice and consent of the Senate. Iacangelo Decl., Exh. 2—Senate Daily Digest Regarding Treaty Doc. 102-38: "United Nations Framework Convention on Climate Change" at D1316.	Undisputed	
3. The "ultimate objective [of the UNFCCC is]. . . stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system." Iacangelo Decl., Exh. 1—United Nations Framework Convention on Climate Change at 4 (Art. 2).	Undisputed	
4. Under the UNFCCC, "[a]ll Parties," including the United States, are obliged to "(b) [f]ormulate, implement, publish and regularly update national and, where appropriate, regional programmes containing	Undisputed	

measures to mitigate climate change by addressing anthropogenic emissions by sources and removals by sinks of all greenhouse gases not controlled by the Montreal Protocol, and measures to facilitate adequate adaptation to climate change [and] (c) [p]romote and cooperate in the development, application and diffusion, including transfer, of technologies, practices and processes that control, reduce or prevent anthropogenic emissions of greenhouse gases not controlled by the Montreal Protocol in all relevant sectors . . . ." *Id.* at 5 (Art. 4).		
5. In 2015, various Parties to the UNFCCC agreement entered into the Paris Agreement of 2015 ("Paris Accord"). Iacangelo Decl., Exh. 3—Paris Agreement of 2015 at 3.	Disputed	The cited document does not indicate that Parties to the UNFCCC entered into the Paris Agreement in 2015. Parties to the UNFCCC signed the Paris Agreement in 2016.
6. Under the Paris Accord, signatories are to announce "nationally determined contributions" of emissions associated with climate change and periodically report on progress. *Id.* at 4-5 (Art. 4).	Disputed as Phrased	Defendants do not dispute that the Paris Agreement exists, and do not dispute that the copy attached to the Iacangelo Declaration is a fair and accurate representation of the Agreement, which speaks for itself.
7. On March 28, 2017, in Executive Order 13,783, President Trump announced that, "[e]ffective immediately, when monetizing the value of changes in greenhouse gas emissions resulting from regulations, including with respect to the consideration of domestic versus international impacts and the consideration of appropriate discount rates, agencies shall ensure, to the extent permitted by law, that any such estimates are consistent with the guidance contained in OMB Circular A-4 of September 17, 2003	Undisputed/ Objection	Defendants understand this fact to refer only to the existence of the statement, not the truth of content within the statement, and do not dispute the statement's existence or the accuracy of Plaintiff's quotation. If offered for the truth of the matter asserted, the purported evidence would be inadmissible hearsay not subject to any exception in the Federal Rules of Evidence. Fed. R. Evid. 801, 802.

(Regulatory Analysis), which was issued after peer review and public comment and has been widely accepted for more than a decade as embodying the best practices for conducting regulatory cost-benefit analysis." Iacangelo Decl., Exh. 4—Executive Order 13,783: Promoting Energy Independence and Economic Growth (Section 5(c)).		
8. On June 1, 2017, President Trump concluded that the Paris Accord relating to the emission of greenhouse gases ("GHG") "disadvantages the United States to the exclusive benefit of other countries, leaving American workers — who I love — and taxpayers to absorb the cost in terms of lost jobs, lower wages, shuttered factories, and vastly diminished economic production." Iacangelo Decl., Exh. 5—Statement by President Trump on the Paris Climate Accord on June 1, 2017 at 2.	Undisputed/ Objection	Defendants understand this fact to refer only to the existence of the statement, not the truth of content within the statement, and do not dispute the statement's existence or the accuracy of Plaintiff's quotation. If offered for the truth of the matter asserted, the purported evidence would be inadmissible hearsay not subject to any exception in the Federal Rules of Evidence. Fed. R. Evid. 801, 802.
9. In the same statement, President Trump explained that the Paris Accord "could cost America as much as 2.7 million lost jobs by 2025, . . . punishes the United States . . . while imposing no meaningful obligations on the world's leading polluters, . . . [allows] China . . . to increase these emissions by a staggering number of years — 13, . . . [and] makes [India's] participation contingent on receiving billions and billions and billions of dollars in foreign aid from developed countries[.]" *Id.* at 2-3.	Undisputed/ Objection	Defendants understand this fact to refer only to the existence of the statement, not the truth of content within the statement, and do not dispute the statement's existence or the accuracy of Plaintiff's quotation. If offered for the truth of the matter asserted, the purported evidence would be inadmissible hearsay not subject to any exception in the Federal Rules of Evidence. Fed. R. Evid. 801, 802.
10. President Trump stated that his Administration would "begin negotiations to reenter either the Paris Accord or a really entirely	Disputed as Phrased	This quotation combines sentences that are three pages apart in the original statement. The second phrase does not follow directly from the first. In context, the second phrase

new transaction on terms that are fair to the United States, its businesses, its workers, its people, its taxpayers. . . . to negotiate a new deal that protects our country and its taxpayers." *Id.*		contains two alternative possibilities, not only the one quoted. It says: "I'm willing to immediately work with Democratic leaders to either negotiate our way back into Paris, under the terms that are fair to the United States and its workers, or to negotiate a new deal that protects our country and its taxpayers." *Id.*
11. On November 4, 2019, the United States submitted formal notification of its withdrawal from the Paris Accord. Iacangelo Decl., Exh. 6—Notice of United States' Notification of Withdrawal from the Paris Agreement of 2015.	Disputed as Phrased	The cited document indicates that the United States submitted notification of its intent to begin withdrawal from the Paris Accord on November 4, 2019, giving notice that it will complete withdrawal by November 4, 2020. *Id.*
12. On November 4, 2019, Secretary of State Pompeo stated that "The U.S. approach incorporates the reality of the global energy mix and uses all energy sources and technologies cleanly and efficiently . . . . In international climate discussions, we will continue to offer a realistic and pragmatic model – backed by a record of real world results – showing innovation and open markets lead to greater prosperity, fewer emissions, and more secure sources of energy. We will continue to work with our global partners to enhance resilience to the impacts of climate change and prepare for and respond to natural disasters. Just as we have in the past, the United States will continue to research, innovate, and grow our economy while reducing emissions and extending a helping hand to our friends and partners around the globe." Iacangelo Decl., Exh. 7—Statement by Secretary of State Michael Pompeo on the U.S. Withdrawal from the Paris Agreement.	Undisputed/ Objection	Defendants understand this undisputed fact to refer only to the existence of the statement, not the truth of content within the statement. If offered for the truth of the matter asserted, the purported evidence would be inadmissible hearsay not subject to any exception in the Federal Rules of Evidence. Fed. R. Evid. 801, 802.

13. On June 1, 2017—the same day as President Trump's announcement of the United States' intent to withdraw from the Paris Accord—in what California and other signatory states called a direct response to the United States' intent to withdraw from the Paris Accord, California entered into the United States Climate Alliance, committing to reducing GHG emissions in a manner consistent with the goals of the Paris Accord. Iacangelo Decl., Exh. 8—Combined California Bilateral and Multilateral Climate Agreements at 12.	Undisputed	
14. Just days later, on June 6, 2017, Edmund Brown Jr., then-Governor of California, met in Beijing with China's President Xi Jinping to discuss environmental issues and climate change. Iacangelo Decl., Exh. 9—Xi Jinping and Jerry Brown of California Meet to Discuss Climate Change at 1.	Objection/ Disputed	Defendants object that this statement is based on inadmissible hearsay not subject to any exception in the Federal Rules of Evidence. Fed. R. Evid. 801, 802. Defendants do not dispute that Plaintiff has accurately described the contents of a newspaper article, but dispute that the contents of the article are material to the resolution of the Treaty Clause and Compact Clause claims.
15. The current Governor of California, Gavin Newsom, described then-Governor Brown's discussion with President Xi Jinping before the World Economic Forum in September 2019 with the following words: "Just a few years ago, Governor Brown, just five days after President Trump announced his intention to pull out of the Paris Accord, Governor Brown pulled out of his driveway, made his way to the airport, flew to Beijing, sat down in the presidential palace with President Xi — not as a head of state, but a head of a state, the State of California — and doubled down on the Paris Accord. That's California's leadership. The fifth largest	Undisputed	

economy in the world, a state that's not just sitting back pointing fingers. We're not bystanders, we have agency and we can shape this debate, like all of us, we can shape the future." Iacangelo Decl., Exh. 10—Governor Gavin Newsom Delivers Opening Remarks at Climate Week NYC at 2.		
16. California is a party to at least seventy-two active bilateral and multilateral "agreements" with national and subnational foreign and domestic governments relating "to strengthen the global response to the threat of climate change and to promote a healthy and prosperous future for all citizens." Iacangelo Decl., Exh. 8—Combined California Bilateral and Multilateral Climate Agreements at 1-15.	Disputed in Part	Defendants do not dispute that the cited document identifies that the agreements identified in the supporting document exist. However, the quotation offered to characterize those agreements is not part of the exhibit cited for this proposition. The burden to provide such evidence falls on the moving party. *See S. California Gas Co. v. City of Santa Ana*, 336 F.3d 885, 888 (9th Cir. 2003).
17. In 1956, the Department of State testified against including Ontario and Quebec in a proposed Great Lakes Basin Compact: "As a matter of principle, the Department would oppose any interstate compact which affects foreign relations unless there is a showing of a specific local situation appropriate for handling by the local authorities. Here there is no such local situation. The matter is of national interest, and clearly involves foreign relations . . . . The proposal is for an international compact, not for an interstate compact. This is not the sort of activity which was intended to be covered by the compact provision of the Constitution. Matters of international negotiation and agreement should be under national control as the Constitution contemplates and requires."	Objection / Disputed	Defendants object to this evidence as inadmissible hearsay not subject to any exception in the Federal Rules of Evidence. Fed. R. Evid. 801, 802. Additionally, although the quotation is accurate, the use of ellipsis is deceptive and misleading in that the quotation before the ellipsis is three pages before the quotation after the ellipses. Defendants also contend that the underlying statement, as presented here, is incorrect as a matter of law and therefore immaterial. International compacts are clearly permitted under Article I, Section 10, Clause 3 of the United States Constitution, which concerns a "Compact with another State, or with a <u>foreign Power</u> . . . ." (emphasis added).

Iacangelo Decl., Exh. 11—Testimony of Willard B. Cowles, Deputy Legal Adviser, Department of State at 14, 17.		
18. In his 2017 State-of-the-State address, then-Governor Brown, said "[w]e can do much on our own and we can join with others – other states and provinces and even countries, to stop the dangerous rise in climate pollution. And we will." Iacangelo Decl., Exh. 12—Governor Brown Delivers 2017 State of the State Address at 3.	Undisputed	
19. In 2006, with British Prime Minister Tony Blair at his side, then-Governor Arnold Schwarzenegger declared that California was a "nation-state" with its own foreign policy. Iacangelo Decl., Exh. 13—Like a Nation State at 1622.	Objection/ Disputed	Defendants object that this statement is based on inadmissible hearsay not subject to any exception in the Federal Rules of Evidence. Fed. R. Evid. 801, 802. Defendants do not dispute that Plaintiff has accurately quoted the law journal article but dispute that the contents of the journal article are material to the resolution of the Treaty Clause and Compact Clause claims.
20. In 2007, then-Governor Schwarzenegger stated that California is "the modern equivalent of the ancient city-states of Athens and Sparta. California has the ideas of Athens and the power of Sparta . . . . Not only can we lead California into the future . . . we can show the nation and the world how to get there. We can do this because we have the economic strength, the population, the technological force of a nation-state." Iacangelo Decl., Exh. 14—Schwarzenegger: California is 'Nation State' Leading World at 1.	Objection/ Disputed	Statements by reporters published in a newspaper, when offered for the truth of the matter they assert, are inadmissible hearsay. Fed. R. Evid. 802. Plaintiff's quotation does not distinguish which ellipses are original and which were added by Plaintiff. Further, the source material is inadmissible. Defendants also dispute that the contents of the newspaper article are material to the resolution of the Treaty Clause and Compact Clause claims.
21. Similarly, on July 25, 2017, during the signing ceremony for AB 398, a bill extending and modifying the California "cap-and-trade" program, then-Governor Brown stated that "[w]e are a nation-state in a	Disputed in Part	Defendants do not dispute that then-Governor Brown made the quoted statement at the AB 398 signing ceremony on July 25, 2017. Defendants dispute Plaintiff's characterization of AB 398. The text of the bill speaks for itself, and California's cap-and-trade program is a

globalizing world and we're having an impact and you're here witnessing one of the key milestones in turning around this carbonized world into a decarbonized, sustainable future." Iacangelo Decl., Exh. 15—Governor Brown Signs Landmark Climate Bill to Extend California's Cap-and-Trade Program at 1.		regulation that CARB modifies by rulemakings. *See* Cal. Code Regs., tit. 17, §§ 95801-96022. In any event, Plaintiff's characterization of the bill is not material to the resolution of the Treaty Clause and Compact Clause claims.
22. In response, Kevin De León, the California Senate President pro Tempore, said "the world is looking to California. . . . Today's extension of our landmark cap-and-trade program, coupled with our effective clean energy policies, will move us forward into the future and we plan to take the rest of the world with us[][.]" *Id.* at 2.	Objection/ Merits Clarification	Defendants understand this fact to refer only to the existence of the statement, not the truth of content within the statement. If offered for the truth of the matter asserted, the purported evidence would be inadmissible hearsay not subject to any exception in the Federal Rules of Evidence. Fed. R. Evid. 801, 802. Defendants do not dispute that Plaintiff has accurately quoted the former State Senate leader—Kevin de León ceased his position as California State Senate President Pro Tempore on March 21, 2018—but dispute that the contents of Senator de León's statement are material to the resolution of the Treaty Clause and Compact Clause claims.
23. The California "cap-and-trade" program is authorized under the 2006 California Global Warming Solutions Act (AB 32), which requires the California Air Resources Board ("CARB") to "facilitate the development of integrated . . . regional, national, and international greenhouse gas reduction programs." CAL. HEALTH & SAFETY CODE § 38564.	Disputed in Part	Defendants do not dispute that AB 32 authorized CARB to adopt a cap-and-trade program. Defendants dispute that AB 32 requires CARB to facilitate the development Plaintiff states. The entirety of California Health and Safety Code Section 38564 states: "The state board *shall consult* with other states, and the federal government, and other nations to identify the most effective strategies and methods to reduce greenhouse gases, manage greenhouse gas control programs, and *to facilitate* the development of integrated and cost-effective regional, national, and international greenhouse gas reduction programs." (emphasis added)
24. In the most recent AB 32 Scoping Plan, CARB stated that "[c]limate change is a global problem. GHGs are global pollutants, unlike criteria air	Disputed in Part	Defendants do not dispute that the Final Environmental Analysis for CARB's most recent Scoping Plan contains the quoted statement, though Plaintiff takes it out of

pollutants and toxic air contaminants, which are pollutants of regional and local concern." Iacangelo Decl., Exh. 16—Final Environmental Analysis for the Strategy for Achieving California's 2030 Greenhouse Gas Target, Attachment A: Environmental and Regulatory Setting at 24.		context. Defendants dispute that this statement appears in the Scoping Plan itself.
25. In this same document, CARB stated that "GHGs have long atmospheric lifetimes (one to several thousand years). GHGs persist in the atmosphere for long enough time periods to be dispersed around the globe. . . ." *Id.*	Disputed in Part, Merits Clarification	Plaintiff's reference to "this same document" is ambiguous because Item 24 purports to identify the document as the 2017 Scoping Plan, but the cited evidence is the Final Environmental Analysis for the 2017 Scoping Plan. These are different documents. Defendants do not dispute that the Final Environmental Analysis for CARB's most recent Scoping Plan contains the quoted statement, though Plaintiff takes it out of context. Defendants dispute that this statement appears in the Scoping Plan itself.
26. In this same document, CARB stated that "[t]he quantity of GHGs in the atmosphere that ultimately result in climate change is not precisely known, but is enormous; no single project alone would measurably contribute to an incremental change in the global average temperature, or to global, local, or micro climates." *Id.* at 25.	Disputed in Part, Merits Clarification	Plaintiff's reference to "this same document" is ambiguous because Item 24 purports to identify the document as the 2017 Scoping Plan, but the cited evidence is the Final Environmental Analysis for the 2017 Scoping Plan. These are different documents. Defendants do not dispute that the Final Environmental Analysis for CARB's most recent Scoping Plan contains the quoted statement, though Plaintiff takes it out of context. Defendants dispute that this statement appears in the Scoping Plan itself.
27. Similarly, on October 23, 2019, Governor Newsom, stated that "[c]arbon pollution knows no borders[.]" Iacangelo Decl., Exh. 17—Governor Newsom Statement on Trump Administration's Attack on California's Landmark Cap-and-Trade Program at 1.	Disputed in Part	The word "Similarly" is not a fact, and Defendants dispute the conclusion implied by that word. Defendants do not dispute that Governor Newsom made the statement on October 23, 2019.
28. After the passage of AB 32, beginning in February 2007, the governors of several states,	Disputed in Part	Defendants do not dispute that AB 32 passed before February 2007, nor that the governors of several states, including

including California, along with the premiers of several provinces, including Quebec, formed or joined the Western Climate Initiative, the parent of Defendant Western Climate Initiative, Inc., to establish a North American market to regulate GHGs. Iacangelo Decl., Exh. 18—Design Recommendations for the WCI Regional Cap-and-Trade Program at 3 (introductory letter from "The WCI Partners").		California, and the premiers of several Canadian provinces, joined the partnership titled "Western Climate Initiative." Defendants dispute that the Western Climate Initiative is the "parent" of Defendant Western Climate Initiative, Inc. The cited document offers no evidence in support of that allegation. WCI, Inc. is a separate legal entity and has no parent that owns 10% or more of its stock. *See* Defendant Western Climate Initiative, Inc.'s Corporate Disclosure Statement, ECF Doc. 20. Many of the participants in the Western Climate Initiative partnership do not use the services provided by WCI, Inc. *See* WCI, Inc., Annual Report – 2018, p. 1 (ECF Doc. 26-1, p. 116). Plaintiff offers no evidence to the contrary. The burden to provide such evidence falls on the moving party. *See S. California Gas Co. v. City of Santa Ana*, 336 F.3d 885, 888 (9th Cir. 2003).
29. In 2008, Western Climate Initiative released its design recommendations, and, in 2010, an actual design for a regional program. Iacangelo Decl., Exh. 19—Design for the WCI Regional Program at 2.	Objection / Undisputed, Merits Clarification	The phrase "actual design" is vague and ambiguous and does not appear in the cited document. The document refers to its content as a "Program Design." Defendants contend that the document speaks for itself and the Court should not rely on Plaintiff's description. Additionally, the Western Climate Initiative partnership should not be confused with WCI, Inc., a separate legal entity. Many of the participants in the Western Climate Initiative partnership do not use the services provided by WCI, Inc. *See* WCI, Inc., Annual Report – 2018, p. 1 (ECF Doc. 26-1, p. 116).
30. The 2010 design promoted a "cap-and-trade" framework that would impose an aggregate cap on the emission of GHGs. Id. at 5-6.	Objection/ Undisputed, Merits Clarification	The statement is vague and ambiguous in that it is unclear from this purported fact whether Plaintiff is asserting that the 2010 Program Design would impose a single aggregate cap or if each jurisdiction would impose an aggregate cap. The former is incorrect; the latter is correct. The 2010 design promoted linkage "composed of the individual jurisdictions' cap-and-trade programs implemented through state and provincial regulations. Each WCI Partner jurisdiction implementing the cap-and-trade program design will issue 'emission allowances' to

		meet its jurisdiction-specific emissions goal. *Id.* at 6. The 2010 design's linkage recommendations directly contradict an aggregate cap design (over all linked jurisdictions) by recommending that each jurisdiction evaluate whether another jurisdiction has an internal aggregate cap before establishing linkage. *See id.* at DD-44 (§9.1.1).
31. The 2010 design called for linkage of markets across jurisdictions to, among other things, increase liquidity and create economies of scale. *Id.* at 22, DD-44.	Disputed in Part	Defendants do not dispute that the 2010 Program Design called for linkage to increase liquidity. Defendants dispute that the 2010 Program Design document discusses economies of scale. The burden to provide such evidence falls on the moving party. *See S. California Gas Co. v. City of Santa Ana*, 336 F.3d 885, 888 (9th Cir. 2003).
32. The 2010 design contemplated that smaller jurisdictions, like Quebec, would be able to link to larger ones, like California, in order to stabilize the smaller states' own systems and, in some cases, make them viable. *Id.*	Disputed	Defendants dispute that the 2010 Program Design document discusses linkage as support for viability of smaller jurisdictions' programs. The burden to provide such evidence falls on the moving party. *See S. California Gas Co. v. City of Santa Ana*, 336 F.3d 885, 888 (9th Cir. 2003).
33. In October 2011, pursuant to AB 32, CARB adopted regulations to establish a cap-and-trade program based on the 2010 design that imposes an aggregate cap on the emission of GHGs in the State of California. 17 Cal. Code Regs. ("CCR") §§ 95801-96022	Disputed in Part	Defendants do not dispute that CARB adopted regulations to establish a cap-and-trade program that imposed an aggregate cap on covered California emissions. Defendants dispute that CARB "based" this program on the 2010 Western Climate Initiative partnership design because Defendants are not sure what Plaintiff means by that term. CARB commenced the rulemaking process before the Western Climate Initiative released the 2010 Program Design. Still, "CARB drew heavily on [the Western Climate Initiative's] recommendations while concurrently developing its own Cap-and-Trade Regulation." Sahota Decl., ¶15. Among other materials, CARB also "reviewed the design of the federal nitrogen oxide (NOx) and sulfur oxide (SOx) trading programs, the Regional Greenhouse Gas Initiative, the European Union Emissions Trading Program, Sweden's NOx Program, and the Regional Clean Air Incentives Market." *Id.* at ¶17; *see also id.* at ¶¶6–24.

34. Through the cap-and-trade program, California sells or grants "allowances," which are regulatory compliance instruments that entitle holders thereof to emit a specified quantity of GHGs in the State of California. *Id.* § 95820(c)	Disputed in Part	Defendants do not dispute that CARB distributes allowances under its Cap-and-Trade Program by auctioning some and by giving some away for free. Defendants do not dispute that cap-and-trade allowances permit covered California sources to emit a specified quantity of GHGs. Defendants do not understand the rest of this statement to be factual, including Plaintiff's characterization of compliance instruments as "regulatory" and dispute the remaining portions of this statement on that basis.
35. For each metric ton of CO2 or CO2 equivalent that a covered entity emits into the air, it must "surrender" a "compliance instrument," *e.g.*, an allowance. *Id.*	Undisputed, Merits Clarification	Defendants understand this statement to concern CARB's cap-and-trade regulation, although the statement does not say so explicitly.
36. There are two types of compliance instruments: allowances and "offset credits." *Id.* § 95820.	Undisputed Merits Clarification	Defendants understand this statement to concern CARB's cap-and-trade regulation, although the statement does not say so explicitly.
37. Covered entities may obtain additional allowances by buying them at periodic auctions or from other authorized parties. *Id.* §§ 95910-95915.	Undisputed Merits Clarification	Defendants understand this statement to concern CARB's cap-and-trade regulation, although the statement does not say so explicitly.
38. As of September 2019, California reported that it had received almost twelve billion dollars in proceeds from the sale of allowances since 2012. (The specific figure was $11,796,013,586.66.). Iacangelo Decl., Exh. 20—California Cap-and-Trade Program: Summary of Proceeds to California and Consigning Entities at 1.	Undisputed	
39. Covered entities can obtain offset credits by undertaking projects (such as forestry projects) designed to remove CO2 from the atmosphere. 17 CCR § 95970(a)(1)	Disputed	Offset credits are generated by Offset Project Operators or Authorized Project Designees, not by covered entities. Offset credits are issued for emission reductions *outside the cap*. *See* Sahota Decl., ¶24, Cal. Code Regs., tit. 17, § 95973. Further, the regulation requires more than Plaintiff indicates. Specifically, "A registry offset credit must: (1) Represent a GHG emission reduction or GHG removal enhancement that is real, additional, quantifiable,

		permanent, verifiable, and enforceable; (2) Result from the use of a Compliance Offset Protocol that meets the requirements of section 95972 and is adopted by the Board pursuant to section 95971; (3) Result from an offset project that meets the requirements specified in section 95973; (4) Result from an offset project that is listed pursuant to section 95975; (5) Result from an offset project that follows the monitoring, reporting and record retention requirements pursuant to section 95976; (6) Result from an offset project that is verified pursuant to sections 95977 through 95978; and (7) Be issued pursuant to section 95980.1 by an Offset Project Registry approved pursuant to section 95986." Cal. Code Regs. tit. 17, § 95970(a).
40. Covered entities are permitted to "bank" instruments, although California restricts the total number an entity may hold at one time. *Id.* § 95922; *see also* Iacangelo Decl., Exh. 21—Facts About Holding Limit for Linked Cap-and-Trade Programs at 1.	Undisputed, Merits Clarification	Defendants understand this statement to concern CARB's cap-and-trade regulation, although the statement does not say so explicitly.
41. Covered entities may bank compliance instruments through 2030. Iacangelo Decl., Exh. 21—Facts About Holding Limit for Linked Cap-and-Trade Programs at 1.	Undisputed Merits Clarification	Defendants understand this statement to concern CARB's cap-and-trade regulation, although the statement does not say so explicitly.
42. The California cap-and-trade program allows holders of allowances to buy, sell, and make other financial commitments related to allowances in a secondary market. 17 CCR §§ 95920-95923	Undisputed	
43. CARB regulations provide for linkage with other cap-and-trade programs: "compliance instrument[s] issued by an external greenhouse gas emissions trading system . . . may be used to meet" the state's regulatory requirements, provided the external system satisfies certain criteria.	Undisputed	

Id. § 95940.		
44. CARB also contemplates links between California's program and initiatives in developing countries to protect tropical forests. *Id.* § 95993; Iacangelo Decl., Exh. 22—California Tropical Forest Standard: Criteria for Assessing Jurisdiction-Scale Programs that Reduce Emissions from Tropical Deforestation at 3-4.	Disputed	CARB is not currently "contemplate[ing]" any links between its cap-and-trade program and its standard for tropical forests, Plaintiff points to no source indicating that CARB does so.
45. In December 2011, Quebec also adopted regulations to establish its own cap-and-trade program that imposes an aggregate cap on the emission of GHGs in the Province of Quebec based on the 2010 design. Iacangelo Decl., Exh. 23—Regulation respecting a cap-and-trade system for greenhouse gas emission allowances.	Disputed in Part	Defendants do not dispute that Quebec also adopted regulations to establish its own cap-and-trade program in 2011. Defendants lack sufficient information and belief to confirm whether Quebec based its regulation on the 2010 design recommendation. The evidence offered by Plaintiff at Exhibit 23 to the Iacangelo Declaration (the Quebec Regulation) does not state or otherwise indicate that Quebec's design is based on the 2010 design recommendation. The burden to provide such evidence falls on the moving party. *See S. California Gas Co. v. City of Santa Ana*, 336 F.3d 885, 888 (9th Cir. 2003).
46. In November 2011, between these events, Western Climate Initiative formed Defendant Western Climate Initiative, Inc. ("WCI") to facilitate linkage of the California and Quebec cap-and-trade programs. Iacangelo Decl., Exh. 24—Western Climate Initiative Jurisdictions Establish Non-Profit Corporation to Support Greenhouse Gas Emissions Trading Programs at 1.	Disputed in Part	Defendants do not dispute the chronology that CARB adopted its cap-and-trade regulation before the formation of WCI, Inc., and Quebec did so after. Defendants do not dispute that the then-participants in Western Climate Initiative partnership formed Defendant Western Climate Initiative, Inc., although the cited document announces the existence of WCI, Inc., not that the Western Climate Initiative partnership formed WCI, Inc. Defendants dispute that WCI, Inc. was "formed … to facilitate linkage" because the "Western Climate Initiative, Inc. (WCI, Inc.), . . . [was] formed to provide administrative and technical services to support the implementation of state and provincial greenhouse gas emissions trading programs." *See id.* It is not clear what Plaintiff means by "facilitate linkage," and

		Defendants dispute any meaning that goes beyond what the evidence demonstrates. *Cf. S. California Gas Co. v. City of Santa Ana*, 336 F.3d 885, 888 (9th Cir. 2003
47. On March 16, 2017, Robert W. Byrne, Senior Assistant Attorney General of California, sent a letter to Peter Krause, Legal Affairs Secretary, stating that "[a]ny jurisdiction that wishes to link with the California Program . . . will need to be a member of WCI, Inc. and will use the California-developed infrastructure for the combined Programs." Iacangelo Decl., Exh. 25—Letter from Robert W. Byrne, Senior Assistant Attorney General, to Peter Krause, Legal Affairs Secretary at 9.	Undisputed, Merits Clarification	Defendants do not dispute that the letter exists or contains the quoted language. The quotation ends mid-paragraph, and may be misleading. The paragraph as a whole concerns liability and cybersecurity concerns. It states: "Any jurisdiction that wishes to link with the California Program, such as Ontario, will need to be a member of WCI, Inc. and will use the California-developed infrastructure for the combined Programs. The creation of a single-market infrastructure for any California-linked program is intended, in part, to remove the possibility of a jurisdictional weak-link in the cybersecurity of the linked program. WCI's administration of the linked market thus is designed to enhance the security of the market. (See ARB's Discussion of Findings, pp. 13-14.) Indeed, California's participation in WCI is more likely to shield the state from liability than subject it to liability. *(Id.)*"
48. In September 2013, California and Quebec signed an "Agreement between the Gouvernement du Québec and the California Air Resources Board concerning the harmonization of cap-and-trade programs for reducing greenhouse gas emissions," as renegotiated in 2017 and renamed an "Agreement on the Harmonization and Integration of Cap-and-Trade Programs for Reducing Greenhouse Gas Emissions" (the "Agreement"). Iacangelo Decl., Exh. 26—Agreement on the Harmonization and Integration of Cap-and-Trade Programs for Reducing Greenhouse Gas Emissions at 2-3.	Objection / Disputed in Part	Defendants understand this undisputed fact to refer only to the existence of the agreements and their titles and do not dispute those facts. A legal conclusion would be improper in a Statement of Undisputed Facts. *See* E.D. Cal. L.R. 260(a). To the extent that Plaintiff offers this to state a legal conclusion, a legal conclusion is not a fact that can be considered evidence. *See* Fed. R. Evid. 704. Further, Defendants do not understand the meaning of the term "renegotiated." Any claim concerning renegotiation is not supported by the cited evidence. The burden to provide such evidence falls on the moving party. *See S. California Gas Co. v. City of Santa Ana*, 336 F.3d 885, 888 (9th Cir. 2003).
49. The Agreement's purpose is to "harmonize" and "integrate" the California and Quebec cap-and-trade programs in order to reduce GHGs in the "fight	Disputed	The Agreement expressly states that "the harmonization and integration of [the Parties'] greenhouse gas emissions reporting programs and their cap-and-trade programs *are to be attained by means of*

against climate change." *Id.* at 1 (Art. 1).		*regulations adopted by each Party*." *Id.* (fourth Whereas Clause) (emphasis added). The cited document also states that the Agreement "is intended to facilitate continued consultation" among the Parties. *Id.* (sixth Whereas Clause). "The objective of this Agreement is for the Parties to work jointly and collaboratively toward the harmonization and integration of the Parties' greenhouse gas emissions reporting programs and cap-and-trade programs for reducing greenhouse gas emissions." *Id.* at Art. 1. Plaintiff's cited evidence does not support Plaintiff's statement that the purpose of the Agreement or harmonization is GHG reductions. The burden to provide such evidence falls on the moving party. *See S. California Gas Co. v. City of Santa Ana*, 336 F.3d 885, 888 (9th Cir. 2003). Plaintiff also appears to be stating a legal conclusion about the purpose of the agreement in the guise of a fact. Such a legal conclusion would be improper in a Statement of Undisputed Facts. *See* E.D. Cal. L.R. 260(a). To the extent that Plaintiff offers this to state a legal conclusion, a legal conclusion is not a fact that can be considered evidence. *See* Fed. R. Evid. 704.
50. The word "harmonize," or one of its cognates, appears thirty-seven times in the Agreement. *See id.* at 2-13.	Objection / Disputed	Defendants understand this undisputed fact to refer only to the existence of the statement, not the legal effect as a legal conclusion would be improper in a Statement of Undisputed Facts. *See* E.D. Cal. L.R. 260(a). To the extent that Plaintiff offers this to state a legal conclusion, a legal conclusion is not a fact that can be considered evidence. *See* Fed. R. Evid. 704. Defendants count 1 use in the title, 38 in the body, and 4 in the annexes.
51. The Agreement requires the parties to evaluate their programs on a continuous basis to "promote continued harmonization and integration." *Id.* at 4 (Art. 4).	Objection/ Disputed	Plaintiff is offering an improper legal conclusion about the meaning of an Article of the Agreement. *See* E.D. Cal. L.R. 260(a); Fed. R. Evid. 704. Defendants do not dispute the text of Article 4 which reads as follows: "The Parties shall continue to examine their respective regulations for the reporting of greenhouse gas emissions and for the cap-

		and-trade program in order to promote continued harmonization and integration of the Parties' programs. In the case where a difference between certain elements of the Parties' programs is identified, the Parties shall determine if such elements need to be harmonized for the proper functioning and integration of the programs. If so determined, the Parties shall consult each other regarding a harmonized approach. A Party may consider making changes to its respective programs, including changes or additions to its emissions reporting regulation, cap-and-trade program regulations, and program related operating procedures. To support the objective of harmonization and integration of the programs, any proposed changes or additions to those programs shall be discussed between the Parties. The Parties acknowledge that sufficient time is required to enable effective public review and comment prior to adoption. The Parties shall consult regarding changes that may affect the harmonization and integration process or have other impacts on any Parties. Each Party's public process for making program changes must be respected. In the event that program conditions arise that indicate a need for rapid or emergency program changes or other actions by one or all Parties, the Parties shall work to harmonize such changes to maintain harmonization and integration and to resolve the conditions." Defendants dispute any fact or legal conclusion by Plaintiff that extends beyond the plain text of the Article. A legal conclusion would be improper in a Statement of Undisputed Facts. *See* E.D. Cal. L.R. 260(a). To the extent that Plaintiff offers this to state a legal conclusion, a legal conclusion is not a fact that can be considered evidence. *See* Fed. R. Evid. 704.
52. The Agreement allows a party to "consider making changes to its . . . program," but provides that "any proposed changes or additions shall be discussed between the Parties." *Id.* at 5 (Art. 4).	Objection/ Disputed	Plaintiff is offering an improper legal conclusion about the meaning of an Article of the Agreement. *See* E.D. Cal. L.R. 260(a); Fed. R. Evid. 704. Defendants do not dispute the text of Article 4 which is quoted in response to item 51, *supra*.

53. The Agreement provides that, where differences arise between "elements" of the parties' programs, "the Parties shall determine if such elements need to be harmonized for the proper functioning and integration of the programs. *Id.* at 4 (Art. 4).	Objection/ Disputed	Plaintiff is offering an improper legal conclusion about the meaning of an Article of the Agreement. *See* E.D. Cal. L.R. 260(a); Fed. R. Evid. 704. Defendants do not dispute the text of Article 4 which is quoted in response to item 51, *supra*.
54. The Agreement states that the parties agree to consult with each other before making changes to the "offset components" of their programs. *Id.* at 5 (Art. 5).	Objection/ Disputed	Plaintiff is offering an improper legal conclusion about the meaning of an Article of the Agreement. *See* E.D. Cal. L.R. 260(a); Fed. R. Evid. 704. Defendants do not dispute the text of Article 5 which reads as follows: "In order to achieve harmonization and integration of the Parties' cap-and-trade programs, the offset protocols in each of the Parties' programs require that all offset emission reductions, avoidances, removals or removal enhancements achieve the essential qualities of being real, additional, quantifiable, permanent, verifiable, and enforceable. A Party may consider making changes to the offset components of its program, including by adding additional offset protocols, or changing procedures for issuing offset credits. To support the objective of maintaining the harmonization and integration of the programs, any proposed changes shall be discussed between the Parties. The Parties acknowledge that sufficient time is required to enable effective public review and comment prior to adoption of any changes. The Parties shall consult regarding changes that may affect the harmonization and integration process or that may have other impacts on any Party. Each Party's public process for making program changes must be respected."
55. The Agreement establishes a mechanism for the resolution of differences: "[i]f approaches for resolving differences . . . cannot be developed in a timely manner through staff workgroups, the Parties shall constructively engage through the Consultation Committee, and if needed with additional officials of the Parties,	Objection/ Disputed in Part/ Merits Clarification	Plaintiff is offering an improper legal conclusion about the meaning of an Article of the Agreement. *See* E.D. Cal. L.R. 260(a); Fed. R. Evid. 704. Defendants do not dispute that Plaintiff accurately quoted part of the text of Article 20 (though did not include any text from Article 13). The text of Articles 13 and 20 speak for themselves.

or their designees." *Id.* at 9, 12 (Arts. 13, 20).		
56. On technical issues, the parties agree to rely on Defendant Western Climate Initiative because it "was created to perform such services." *Id.* at 9 (Art. 12).	Disputed/ Objection	Plaintiff is offering an improper legal conclusion about the meaning of an Article of the Agreement. *See* E.D. Cal. L.R. 260(a); Fed. R. Evid. 704. The quotation lacks context and is misleading. The relevant paragraph does not refer to technical "issues," nor does it say that the Parties agree to "rely" on WCI, Inc. The relevant paragraph within Article 12 states: "The Parties shall continue coordinating administrative and technical support through the WCI, Inc., an entity which was created to perform such services, including for the Parties." *Id*. The full text of Article 12 speaks for itself.
57. The Agreement provides that "auctioning of compliance instruments by the Parties' respective programs shall occur jointly." *Id.* at 8 (Art. 9).	Disputed/ Objection	Plaintiff is offering an improper legal conclusion about the meaning of an Article of the Agreement. *See* E.D. Cal. L.R. 260(a); Fed. R. Evid. 704. The joint auction results from each jurisdiction's regulations, not the Agreement. The Agreement expressly states that "the harmonization and integration of [the Parties'] greenhouse gas emissions reporting programs and their cap-and-trade programs *are to be attained by means of regulations adopted by each Party*." *Id.* (fourth Whereas Clause) (emphasis added). The directive in Article 9, that joint auctions should occur "as provided for under their respective cap-and-trade programs" comports with this structure.
58. As of August 20, 2019, twenty such auctions had taken place under the Agreement and its predecessor. Iacangelo Decl., Exh. 27—Auction Notices and Reports at 1-6.	Disputed in part	Defendants do not dispute that twenty joint auctions had taken place as of August 20, 2019. Defendants dispute that these auctions were "under the Agreement and its predecessor" because joint auctions occur pursuant to California's and Quebec's respective regulations. See Art 9 of the agreement and Cal. Code Regs., tit. 17, § 95910 et seq. The cited document does not indicate otherwise. The burden to provide such evidence falls on the moving party. *See S. California Gas Co. v. City of Santa Ana*, 336 F.3d 885, 888 (9th Cir. 2003).

59. In joint auctions, allowances are sold in lots of 1000, divided to reflect California's and Quebec's relative contribution. Iacangelo Decl., Exh. 28—Detailed Auction Requirements and Instructions at pt. IX, p. 43 (see Table of Contents).	Undisputed	
60. In its guidance titled "Detailed Auction Requirements and Instructions," CARB states that, if a joint auction "included 60 percent California 2019 vintage allowances and 40 percent Québec 2019 vintage allowances, each bid lot . . . would include 600 California 2019 vintage allowances and 400 Québec 2019 vintage allowances." *Id.*	Undisputed	
61. Allowance buyers do not know the exact mix of the allowances that they purchase because "serial numbers are not available to account holders." Iacangelo Decl., Exh. 29—Chapter 5: How Do I Buy, Sell, and Trade Compliance Instruments? at 28.	Undisputed, Merits Clarification	It is unclear what Plaintiff means by "know the exact mix." Defendants admit that holders of allowances do not know the source (California or Quebec) of the allowances they hold.
62. Trades between allowance holders are facilitated through the Compliance Instrument Tracking System Service, which is operated by CARB and monitors accounts and compliance. Iacangelo Decl., Exh. 30—Welcome to WCI CITSS at 1.	Disputed in Part	Defendants dispute only the statement that CITSS is "operated by CARB." This is incorrect. As stated in the cited document, CITSS is "administered by the Western Climate Initiative, Inc." CARB has privileges in CITSS, which includes monitoring entity holdings and compliance with the cap-and-trade program.
63. Purchases in the joint auction are currently settled through Deutsche Bank. Iacangelo Decl., Exh. 31—California Cap-and-Trade Program, Cap-and-Trade Auctions and Reserve Sales Financial Services Administration at 1.	Undisputed	

64. Under the Agreement, covered entities in California are authorized to trade compliance instruments with covered entities in Quebec, and vice-versa, "as provided for under [the parties'] respective cap-and-trade program regulations." Iacangelo Decl., Exh. 26—Agreement on the Harmonization and Integration of Cap-and-Trade Programs for Reducing Greenhouse Gas Emissions at 7 (Art. 7).	Objection / Undisputed	Defendants understand this undisputed fact to refer only to the existence of the statement, not the legal effect as such a legal conclusion would be improper in a Statement of Undisputed Facts. *See* E.D. Cal. L.R. 260(a). To the extent that Plaintiff offers this to state a legal conclusion, a legal conclusion is not a fact that can be considered evidence. *See* Fed. R. Evid. 704.
65. Under the Agreement, California agrees to accept compliance instruments issued by Quebec to satisfy its regulatory requirements, and Quebec agrees to reciprocate. *Id.* at 6 (Art. 6).	Disputed	Plaintiff is offering an improper legal conclusion about the legal force of the Agreement. *See* E.D. Cal. L.R. 260(a); Fed. R. Evid. 704. CARB's obligation to accept compliance instruments issued by Quebec to satisfy its regulatory requirements arises from California regulations. Cal. Code Regs, tit. 17, § 95943. Quebec's obligation to accept compliance instruments issued by California arises under Quebec's regulation. *See, e.g.*, Iacangelo Decl., Ex. 23, p. 78 (Appendix B.1).
66. The word "shall" appears over fifty times in the Agreement; the phrase "the parties shall" appears twenty times in the Agreement. *See id.* at 2-13.	Objection / Undisputed/	Defendants understand this undisputed fact to refer only to the existence of the statement, not the legal effect as such a legal conclusion would be improper in a Statement of Undisputed Facts. *See* E.D. Cal. L.R. 260(a). To the extent that Plaintiff offers this to state a legal conclusion, a legal conclusion is not a fact that can be considered evidence. *See* Fed. R. Evid. 704. Defendants count over 50 uses of "shall," 21 uses of "the parties shall" in the body, and 1 in the annexes.
67. Termination of the Agreement requires unanimous consent of the parties and is not legally effective until "12 months after the last of the Parties has provided is consent to the other Parties." *Id.* at 13 (Art. 22).	Objection / Disputed	Plaintiff is offering an improper legal conclusion about the legal force of the Agreement. *See* E.D. Cal. L.R. 260(a); Fed. R. Evid. 704. In addition to being a legal conclusion, the cited document does not say "legally" effective. The burden to provide such evidence falls on the moving party. *See S.*

		California Gas Co. v. City of Santa Ana, 336 F.3d 885, 888 (9th Cir. 2003).
68. In the event of either withdrawal or termination, a party's "obligations under article [15] regarding confidentiality of information . . . continue to remain in effect." *Id.* at 11 (Art. 17) (corrected typographical error from Plaintiff's Statement).	Objection / Undisputed	The statement constitutes an improper legal conclusion about the legal force of the Agreement. *See* E.D. Cal. L.R. 260(a); Fed. R. Evid. 704. Additionally, the cited language concerns only withdrawal, not termination. *Cf. S. California Gas Co. v. City of Santa Ana*, 336 F.3d 885, 888 (9th Cir. 2003) (the burden to provide evidence falls on the moving party).
69. The Agreement provides that other jurisdictions that wish to reduce GHG emissions "may be added as a Party to the Agreement if the candidate Party has adopted a program that is harmonized and can be integrated with each of the Parties' programs," and all parties agree to the accession to the Agreement. *Id.* at 11 (Art. 19).	Objection /Undisputed	Plaintiff is offering an improper legal conclusion about the meaning of an Article of the Agreement. *See* E.D. Cal. L.R. 260(a); Fed. R. Evid. 704. Defendants do not dispute the quoted text, but that text is better understood in context.
70. Ontario was briefly a party to the Agreement but withdrew in July 2018. Iacangelo Decl., Exh. 32—-Linkage California Cap-and-Trade Program: Facts About the Linked Cap-and-Trade Programs at 1-2; Iacangelo Decl., Exh. 33—"Linkage" at 1; Iacangelo Decl., Exh. 34—Archived – Cap and trade.	Disputed as Phrased	Defendants do not dispute that Ontario was a party to the 2017 agreement. But Exhibit 33 to the Iacangelo Declaration shows that California, Quebec, and Ontario had an operational linkage until "July 3, 2018, [when] the Ontario government published a regulation (386/18) revoking Ontario's cap-and-trade regulation (144/16), and suspended all Ontario entity CITSS accounts." Although Defendants do not dispute that Ontario effectively withdrew from the agreement, the cited evidence does not specifically establish that Ontario withdrew from the agreement or when it did so.
71. Notwithstanding Ontario's departure from the Agreement, California determined that Ontario allowances "held in California covered entity, opt-in covered entity, and general market participant accounts . . . remain valid for compliance and trading purposes." 17 CCR § 95943(a)(2).	Disputed in part, Undisputed in part, Merits Clarification	Defendants do not dispute that Ontario effectively withdrew from the 2017 agreement. Plaintiff's use of ellipsis omits potentially relevant language from the regulation. The quoted subdivision states, in full: "Government of Ontario (effective January 1, 2018 through June 15, 2018). Compliance instruments issued by the Government of Ontario that are held in California covered entity, opt-in covered entity, and general market participant

		accounts, or that are held in approved external GHG ETS (other than Ontario) covered entity, opt-in covered entity, and general market participant accounts, as of June 15, 2018 continue to remain valid for compliance and trading purposes." Cal. Code Regs., tit. 17, § 95943(a)(2) (2020). Defendants dispute any fact that extends beyond the plain text of the regulation. To the extent that Plaintiff is offering a legal conclusion, that is improper in a Statement of Undisputed Facts. *See* E.D. Cal. L.R. 260(a). To the extent that Plaintiff offers this to state a legal conclusion, a legal conclusion is not a fact that can be considered evidence. *See* Fed. R. Evid. 704.

Dated: February 10, 2020

Respectfully Submitted,

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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

THE UNITED STATES OF AMERICA,

Plaintiff,

v.

THE STATE OF CALIFORNIA; GAVIN C. NEWSOM, in his official capacity as Governor of the State of California; THE CALIFORNIA AIR RESOURCES BOARD; MARY D. NICHOLS, in her official capacity as Chair of the California Air Resources Board and as Vice Chair and a board member of the Western Climate Initiative, Inc.; WESTERN CLIMATE INITIATIVE, INC.; JARED BLUMENFELD, in his official capacity as Secretary for Environmental Protection and as a board member of the Western Climate Initiative, Inc.; KIP LIPPER, in his official capacity as a board member of the Western Climate Initiative, Inc., and RICHARD BLOOM, in his official capacity as a board member of the Western Climate Initiative, Inc.,

Defendants.

2:19-cv-02142-WBS-EFB

[PROPOSED] ORDER GRANTING DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Date:	March 9, 2020
Time:	1:30
Courtroom:	5
Judge:	Honorable William B. Shubb
Trial Date:	Not Set
Action Filed:	October 23, 2019

[PROPOSED] ORDER

Plaintiff the United States of America moved for summary judgment on its causes of action arising under the Treaty Clause and Compact Clause of the United States Constitution. State Defendants opposed, and cross-moved for summary judgment on the same causes of action.

The Court has the power to decide any claim or defense on which summary judgment is sought. Fed. R. Civ. P. 56(a). Having considered the arguments and evidence, the Court concludes that:

(1) State Defendants are entitled to judgment as a matter of law as to Plaintiff's First Cause of Action pertaining to the Article I Treaty Clause; and,

(2) State Defendants are entitled to judgment as a matter of law as to Plaintiff's Second Cause of Action pertaining to the Compact Clause.

Accordingly, the Court GRANTS State Defendants' Motion and DENIES Plaintiff's Motion.

A statement of the reasons for this Order, as required by Rule 56(a), will follow.

IT IS SO ORDERED.

Hon. William B. Shubb
United States District Judge
Eastern District of California

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