
California at the Crossroads

Chapter 7 – AB 32

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Introduction:

AB 32 is the “Global Warming Solutions Act of 2006.”² This piece of California state legislation presents itself as a serious attempt to deal with the global warming crisis. There’s an obvious problem, however, with the concept that a single state within the United States can do anything very significant about a problem that is truly planetary in scope. As big and important as California is, it is hard to believe that California, acting alone, can solve the global warming problem. Effective international action is required, and everyone knows that. Action at the federal level is the very least we ought to be looking for.

Given the dimensions of the difficulties, what did the California Legislature and the Governor actually think they were doing, when the Legislature enacted AB 32 and the Governor signed it? Perhaps more pertinent, what did California actually do in enacting this much-heralded law? This Chapter of *California at the Crossroads* will provide some background on the global warming threat, and then will try to answer the question, “what was California actually doing when it enacted the “Global Warming Solutions Act of 2006”? The Chapter will end with a discussion of the implementation of AB 32, which is just getting underway as this book goes to press.

To give readers a hint about the ending, at the very start of this Chapter, it is not yet completely clear what California “thought it was doing,” or what it was actually doing, in enacting the “Global Warming Solutions Act of 2006.” AB 32 may ultimately turn out to have been a sincere, audacious, and principled effort by state politicians to provide much-needed national leadership on the most serious problem of our time. Or, the passage of AB 32 might have been a rather cynical attempt by the Governor, and other California politicians, to get political credit for providing such leadership, when there was not any real intention or effort to do what needs to be done. Maybe there was a little of both of these things involved in the enactment of AB 32!

How AB 32 is ultimately implemented will provide the best answer to the question about “what California was doing” when it enacted the “Global Warming Solutions Act of 2006.” The passage of AB 32 could end up being lots of “sound and fury,” signifying very little, or it could be one of the most important accomplishments in the history of United States politics, which could literally help save our world.

To get started, let’s look at the global warming crisis, and assess its scope, and do a quick scan of the political background to California’s action on AB 32. Then, let’s study the law itself, and examine how it was passed

through the California State Legislature. Finally, let's see what's happening as the implementation of AB 32 proceeds.

Global Warming Is A Real Crisis:

Many members of the general public in the United States became aware of global warming as a significant threat to our environment, economy, and civilization when they read about, or saw, *An Inconvenient Truth*, a documentary film about global warming presented by Al Gore, the former Vice President of the United States. The film premiered at the 2006 Sundance Film Festival, and went into general release throughout the United States that year. It is said to be the fourth highest-grossing documentary film produced in the United States to date.³

In fact, a realization that human activities are causing the rapid warming of our planet, and that this global warming poses a severe threat not only to the natural environment, but also to the continued existence of human civilization, was not a complete "news flash" in 2006. Scientists began raising the alarm about human-caused global warming as early as the 1970's, and in 1988, an "Intergovernmental Panel on Climate Change (IPCC)" was established under the auspices of the United Nations Environment Programme. The main purpose of the IPCC was to begin formulating a scientifically valid understanding of just how big a threat global warming might become, assessing "the scientific, technical and socioeconomic information relevant for the understanding of the risk of human-induced climate change."⁴ By 1992, and the

Rio “Earth Summit,” scientists and political leaders from around the world were starting to take global warming very seriously. *Agenda 21*, which documents the findings made at the “Earth Summit,” noted that “the potential impact of . . . climate change could pose an environmental threat of unknown magnitude and could even threaten human survival in certain areas...”⁵

In 1997, at a meeting in Kyoto, Japan, the “Kyoto Protocol” was negotiated, setting binding targets for 37 industrialized countries and the European Community to reduce greenhouse gas (GHG) emissions by an average of five percent against 1990 levels over the five-year period from 2008 to 2012.⁶

Scientific concerns continued to grow after Kyoto. In a “Third Assessment Report,” published in 2001, the IPCC concluded that temperature increases over the twenty-first century could be significantly larger than previously thought, and that the evidence for human influence on climate change was stronger than ever. Though a few “contrarians” continued to object that there was inadequate “proof” of human-caused climate change, there was an extensive acceptance of this assessment within the large community of IPCC scientists.⁷ It is fair to say that the Third Assessment Report represented a thorough, carefully explained view of the state of climate change science in 2001, and that its views are now accepted in the scientific community.

The most recent IPCC report, issued in 2007, was based on the input of more than 1,200 authors and 2,500 scientific expert reviewers from more than 130

countries.⁸ This report documents extremely serious impacts now expected to occur, as global warming continues. These include the likelihood of large reductions in the water resources available to support existing societies. According to the IPCC, “hundreds of millions of people face water shortages that will worsen as temperatures rise.”⁹ Food shortages are likely. Species are in ever greater peril, and there will be an escalating number of extreme weather events, and serious impacts to human health.¹⁰”

The threat of global warming, in other words, is a clear and present danger to the continued existence of the “world as we know it.” The world we “know,” in this sense, and the world that we most immediately inhabit, is often called “civilization.” This is a world we have created ourselves, but our civilized world is utterly dependent, in the last analysis, upon the world of nature, which we did not create. It is “our world,” the “civilized” world, that is most threatened by global warming. While human-caused global warming will have manifold adverse effects on the natural environment, it is the impacts that these changes in the natural world will have upon our existing social, political, and economic structures that pose the most direct threat to human beings.

There is a growing appreciation and public awareness that global warming is a genuine “crisis.” This sense of “crisis” is beginning to be a factor in our political and economic life, and was certainly a significant part of the reason that AB 32 was passed by the California State Legislature. Our sense

of “crisis,” however, may not yet be sharp enough to appreciate the genuine reality of what we face. Global warming is often portrayed as a “slow” process, and Al Gore and others talk about global warming by reciting the story about how to boil a frog: you put the frog in cool water, and then slowly heat the pot. The frog never quite gets the idea, and finally boils to death. If you tried to throw the frog into a boiling pot, the frog would jump out in an instant. In this story, our civilized world is the frog, slowly being cooked, and even if we’re smarter than the frog, and have a kind of intellectual appreciation of our situation, no one is really jumping out of the pot just yet. After all, it’s still quite comfortable. Burning fossil fuels increases our global warming problem, and we know that this is a something we have to stop. Nonetheless, when gasoline prices go up, there is a broad public acceptance of a call to “drill, baby, drill.” In other words, while we’re aware that we’ve got a greenhouse gas emissions problem, things do seem to be moving slowly. Human beings are smarter than frogs, and we figure that we’ll get it together to jump out in time. Maybe a frog would be so stupid that he’d miss the real deadline. But not us! It’s a slow process. We’ve got plenty of time. We’ll jump out of the pot a little bit later!

It might just be, though, that things are going to happen a bit quicker than we think. Each successive IPCC report does seem to note that conditions are worse than previously anticipated, and renowned climate scientist James Hansen thinks we may pass a “tipping point” in 2016.¹¹ What is likely to be at work are unexpected “positive feedback loops.” Economist Gunnar Myrdal,

admittedly in a different sphere, has called the phenomenon “circular and cumulative causation,¹²” and his explanation makes clear that our way of thinking about change often presumes that we can count on stability being restored as changes occur, as if we truly lived in a Newtonian universe where every action leads to an equal and opposite reaction. The actual nature of change is just the opposite. Each change that occurs causes “more of the same,” and helps accelerate further movement in the same direction as the original change. Put in the global warming context, circular and cumulative causation does seem to be at work. Here’s just one example: the melting of ice in the Arctic not only indicates that global warming is occurring. It actually causes global warming to increase. The ice sheet that previously reflected sunlight, once it melts, is replaced by darker-colored water that absorbs more heat. The heated water then melts more ice. As changes occur, they accelerate.

The global warming “worst nightmare” scenario, in the arena of positive feedback loops and circular and cumulative causation, might well involve the release of methane hydrates now frozen in the Arctic tundra, which would in turn heat up the oceans enough to release methane clathrates trapped in sea ice. If the tundra is warmed enough, currently frozen methane could turn from a solid state to a gas, and escape into the atmosphere. Methane is twenty times more powerful as a greenhouse gas than CO₂, and large quantities do exist as methane hydrates within the Arctic tundra. It’s at least possible that global warming could lead to a major release of this currently trapped

methane, and that the impact of such a rapid release of methane would be a very rapid increase in the earth's temperature, with this temperature increase then causing further changes in the Earth's atmosphere, similar to the atmospheric changes that occurred at the end of the Permian Period, when a series of methane releases came close to wiping out all life on Earth.¹³

In summary, scientists and increasing numbers of ordinary people, including political leaders, now agree that human-caused global warming is real, and that it's a real crisis, and that we need to make fundamental changes in the activities that are contributing to global warming if we want to be sure that our civilization will survive. The crisis we face can perhaps best be described by science, but it is not "scientists" who can solve our problem.

Our problem is that virtually everything we do helps cause global warming. If we continue our current economic, political, and social arrangements we are going to cook our world. To confront the global warming crisis, if we're serious, we need to take action, immediately, to change the way our society operates. If we are burning fossil fuels, we have to stop. If our land use policies and transportation systems contribute to global warming, we need to change them. If our tax system doesn't penalize those who add carbon to the atmosphere, that tax system has to be modified. All of this needs to happen as soon as possible, and the changes can't be accomplished by some "technical fix" that scientists will provide, and we can't solve the problem by individual action alone. The changes we need to make to confront the global

warming threat will be made only through politics and political action. Through governmental activity. Through new laws and regulations. AB 32 is California's response to a crisis that is preeminently political.

The Passage of AB 32 and What It Says:

Beginning as early as 1997, almost ten years before the California State Legislature passed AB 32, efforts began in the United States Congress to enact comprehensive global warming legislation at the federal level. Each year, more and stronger measures were put forward, but efforts in Congress, opposed by the Bush Administration, all failed.¹⁴ In view of these failures, a number of the national environmental groups that had been working for global warming legislation in Congress, and specifically including the Natural Resources Defense Council (NRDC)¹⁵ and Environmental Defense (ED),¹⁶ decided that they would attempt to have significant global warming legislation enacted in California. Acting as the "sponsors" of AB 32, NRDC and ED asked Assembly Member Fran Pavley to author a comprehensive global warming bill. Pavley was already experienced. In 2002, she had been successful in passing Assembly Bill 1493,¹⁷ which made California the first state in the nation to require the reduction of greenhouse gas emissions from automobiles.¹⁸

Clearly, the national environmental groups which came to California to work on a global warming bill in the California State Legislature had decided that enacting a strong law in California would be a strategic way to move towards a more comprehensive national system. California, after all, is the largest

state in the United States, and it has a history of enacting progressive state legislation. In late 2004, which is when work on AB 32 began, both houses of the State Legislature were in the hands of the Democratic Party, and the passage of the Pavely Bill, several years earlier, demonstrated that the state was prepared to take on the auto companies and other major interests, to make a real difference on global warming. In addition, Governor Arnold Schwarzenegger, who had been elected in a recall election in October 2003, had proclaimed himself an “environmentalist,” and might well sign a strong global warming bill if it got to his desk.

AB 32 was introduced into the State Assembly on December 6, 2004, right at the start of the two-year legislative session scheduled for 2005-2006. At that point, the bill did not betray its ultimate ambitions. As introduced, AB 32 would have made some minor changes to the functions and duties of the California Climate Action Registry. While “insiders” knew that a major global warming bill was contemplated, nothing in the text of the bill itself disclosed this intention. Such an “under the radar” approach to major legislation is not unusual. In this case, one part of the strategy was to pass a relatively innocuous bill out of the Assembly, with the idea that the major changes needed would occur in the State Senate. The Senate, at this time, was thought to be more “environmental” than the Assembly, so this approach allowed future changes to the bill to be made in the House that would tend to be most sympathetic. Minor amendments to the original language of AB 32 were adopted on March 31, 2005, and the bill passed out of the

Assembly to the State Senate on April 11th. At that time, the bill still addressed changes to the Climate Action Registry.

On June 22, 2005, more than two months after the bill passed the Assembly, AB 32 was significantly amended in the Senate to disclose its real aims. The new amendments titled the bill as the “California Global Warming Solutions Act of 2006,” and would have required the State’s Air Resources Board to adopt a statewide greenhouse gas emissions limit on or before January 1, 2008. Perhaps even more significant than the title change, or the substantive requirements added to the bill, was the fact that the Speaker of the Assembly became the lead author of AB 32. Assembly Member Pavley was an incredibly effective legislator, but the fact that AB 32 was “Speakerized” greatly enhanced its prospects in the Assembly. The sponsors and supporters of the bill thought that the votes for strong global warming legislation were already present in the Senate. Getting the Speaker of the Assembly to take personal control of AB 32 gave it the best possible chance of passage through both houses.

The fact that the State Senate was generally sympathetic and that the Speaker of the Assembly was now the main author of the bill did not mean that AB 32 was going to be easy to pass. The bill passed the Assembly in its initial form on April 11, 2005. It didn’t pass the State Senate until August 30, 2006, more than sixteen months later, and it passed the State Assembly, as amended by the Senate, on August 31, 2006, which was the very last day of the

two-year legislative session. The vote tally in the Senate was 23 in favor, and 14 opposed, with 21 votes needed for passage. The tally in the Assembly was 47 members in favor, and 32 opposed, with 41 votes needed. Proving that “Speakerizing” a bill does work, Speaker Nunez did not bring the bill over to the Assembly for the final vote in the house of origin until he had enlisted a full 41 members of the Assembly as official co-authors of AB 32.

Most of the changes made to AB 32 as it worked its way through the State Senate reflected negotiations and discussions that were private, as opposed to changes that resulted from testimony at the scheduled Committee hearings. The bill was amended four times between June 22, 2005 and its passage in the Senate on August 30, 2006, and the last amendments were made on August 30th, the date the bill passed.

What does AB 32 do in its final form, as signed by the Governor? Not unimportantly, the law begins with a set of “findings.” This list of findings presents the Legislature’s view of “what California was doing” in enacting AB 32. First, the Legislature acknowledged the crisis, declaring that global warming “poses a serious threat to the economic well being, public health, natural resources, and the environment of California.” The Legislature specifically noted that global warming “will have detrimental effects on some of California's largest industries.” Trumpeting California’s past record as a “national and international leader on energy conservation and environmental stewardship,” the Legislature announced its intention to place California at

the “forefront of national and international efforts to reduce emissions of greenhouse gases.”

The Legislature did acknowledge that “national and international actions are necessary to fully address the issue of global warming,” but stated that “action taken by California to reduce emissions of greenhouse gases will have far-reaching effects by encouraging other states, the federal government, and other countries to act.” Projecting California into a “ global leadership role,” as the legislation plainly intended to do, was not just altruism. The Legislature said that California’s implementation of AB 32 will “position its economy, technology centers, financial institutions, and businesses” in a “leadership role,” and that the State would get great economic benefits from doing that. Finally, the Legislature stated its intent that that the State Air Resources Board should take action on global warming “in a manner that minimizes costs and maximizes benefits for California's economy, improves and modernizes California's energy infrastructure and maintains electric system reliability, maximizes additional environmental and economic co-benefits for California, and complements the state's efforts to improve air quality.¹⁹”

According to the Legislature’s view, in other words, as outlined in the law itself, AB 32 is an inspired and heroic effort to lead the nation and the world in the face of a genuine crisis, and to make sure that California profits economically by doing so. The law is well within the American entrepreneurial tradition of “doing well by doing good.”²⁰ The Governor

clearly agreed. In the dramatic celebration he organized in connection with the bill signing, Governor Schwarzenegger said, “when I campaigned for governor three years ago, I said I wanted to make California No. 1 in the fight against global warming. This is something we owe our children and our grandchildren. Some have challenged whether AB 32 is good for businesses. I say unquestionably it is good for businesses. Not only large, well-established businesses, but small businesses that will harness their entrepreneurial spirit to help us achieve our climate goals.²¹”

The “substance” of AB 32 is both breathtakingly dramatic and “minimalist” at the same time. The key substantive provisions are found in the *California Health and Safety Code*, Sections 38550, 38551, 38560, 38560.5, 38561, and 38562, but the Legislature did not, in enacting this new law, actually spell out how California was going to accomplish the objectives that the Legislature articulated. Rather than set up a system actually to change current behavior through legislation (knowing that such a legislative effort would have been doomed to fail, politically), the Legislature delegated its legislative powers to the State Air Resources Board (ARB), which is appointed by the Governor. The Legislature has structured AB 32 so that all the law actually does is to set a goal, and to establish a procedural timeline. Achieving the goal is going to be the responsibility of the ARB. AB 32 does represent a formal commitment on behalf of the state to do whatever is necessary to reduce the state’s greenhouse gas emissions to 1990 levels by the year 2020, and while that is a strikingly ambitious statement of

legislative intention, it's the ARB that is going to decide how actually to make this happen. By January 1, 2008, the ARB was directed to "determine what the statewide greenhouse gas emissions level was in 1990, and approve in a public hearing, a statewide greenhouse gas emissions limit that is equivalent to that level, to be achieved by 2020."²² The goal itself, thus, is legislatively established, and it is the most far reaching and dramatic greenhouse gas reduction goal ever proposed in the United States.

Once the numeric limit was set by the ARB, which acted on schedule, by January 2008, the law then requires the ARB to approve a "Scoping Plan," outlining how the greenhouse gas reductions limit will be achieved. AB 32 requires the "Scoping Plan" to be adopted by January 1, 2009,²³ but that plan is just a "plan." The law doesn't require actual regulations to be adopted until January 1, 2011.²⁴ That date, probably not coincidentally, just happens to be the date that a new Governor will take office. Furthermore, once these regulations are adopted, they will not become "operative" until January 1, 2012.²⁵

While AB 32 sets the strongest emissions reduction goal yet proposed within the United States, it's fair to say that no significant change in behavior is actually required by AB 32 until January 1, 2012. The only exception is for a few minimal "early action" requirements, adopted by the ARB in June 2007, which will become effective on January 1, 2010.²⁶ The timeline established by AB 32 thus means that greenhouse gas emissions can continue to increase until

2012, an apparent violation of what noted newspaper columnist Molly Ivins used to call the first rule of holes:²⁷ “when you’re in a hole, stop digging.” Since the timeline specified in AB 32 will allow emissions to continue to grow until 2012, this will make it that much more difficult to accomplish the needed reductions. To be effective, the regulations will have to require fundamental and massive changes in the way Californians live and work. They will also have to be so strong and effective that they can succeed in reducing whatever emissions are occurring in 2012 to the 1990 emissions levels in a breathtakingly short time span, during the eight-year period from 2012 to 2020. Until those regulations take effect, business as usual will be the rule in California, at least so far as AB 32 is concerned.

Implementation of AB 32

The ARB released its proposed Scoping Plan on October 15, 2008, outlining how the ARB proposed to accomplish the “ambitious but achievable reduction in California’s carbon footprint” mandated by AB 32.²⁸ A “discussion draft” of the Scoping Plan had been released earlier, in June 2008, and a number of public hearings were held on the draft plan. Comments from the environmental community on the discussion draft were generally supportive, but many environmentalists thought that the ARB could be more ambitious, and demand more reductions, particularly with respect to the ARB’s proposed plan to achieve reductions in the land use and transportation sector. ClimatePlan, a network of leading environmental, public health, civic and social equity organizations, told the ARB that it should “adopt a higher target for land

use in the draft Scoping Plan, coupled with a more robust framework that encourages regions, localities, and individuals to reduce vehicle miles traveled (VMT) and GHG emissions through improved land use and transportation decision making.²⁹ In the Scoping Plan, the ARB noted that the “transportation” sector accounted for 38% of California’s current greenhouse gas emissions, and that if no action were taken greenhouse gas emissions in that sector would grow by approximately 25%.³⁰ Nonetheless, the ARB’s draft scoping plan called for a reduction of only two million metric tons of CO₂ equivalent, as part of a plan that proposed a total reduction of 169 million metric tons.³¹ ClimatePlan urged a reduction target of at least 10 million metric tons for the land use sector, and a report commissioned by ClimatePlan said that it would be realistic to achieve a reduction in the range of 14.4 to 17.9 million metric tons.³²

The ClimatePlan letter is illustrative of a fundamental question about how the ARB will actually implement AB 32. If the global warming crisis is real, and if California wants, truly, to provide national and world leadership, the ARB should be demanding the maximum reductions possible in every sector of the economy. The sprawl pattern of development that has characterized California land use for more than fifty years is what has caused the transportation sector to be the single biggest contributor to global warming emissions. If there were ever a time to change our state’s land use policies, now should be that time, in view of the global warming threat. Legislative efforts have never been successful in moving the state towards a “smart

growth” future, requiring more compact forms of development that save farmlands and natural resources while cutting vehicle miles traveled. AB 32 gives the ARB tools it could use to require better land use planning, and without better land use planning, it is unlikely that the ambitious goals of AB 32 will be realized. Nonetheless, the ARB’s Scoping Plan shows no real willingness to take on this critically important issue. The same is true in other sectors. A sense of genuine “crisis,” encompassing a demand that everything possible should be done as soon as possible, with respect to reducing the emission of greenhouse gases, doesn’t seem to be driving the ARB’s proposals so far.

In a way, the ARB should not be faulted for this apparent lack of zeal. AB 32 itself seems premised on the idea that a rather relaxed timeline for regulatory implementation can accomplish the dramatic changes mandated by the law. That is, in fact, a questionable premise. California Attorney General Jerry Brown, who formerly served as Governor from 1975 to 1983, and who may run for Governor again, in 2010, is directly addressing the failure of AB 32 to mandate the most rapid change possible in response to the global warming threat. He isn’t, however, using AB 32 to accomplish that end. Instead, the Attorney General is relying on the California Environmental Quality Act (CEQA),³³ which says, among other things, that no governmental agency in California should approve any project that has a significant adverse impact on the environment unless the government agency has eliminated or mitigated that adverse impact to the greatest degree feasible. It’s clear

from the legislative findings contained in AB 32, if it weren't clear otherwise, that projects that increase global warming emissions do have a significant adverse impact on the environment. In fact, they put both human civilization and natural resources in great peril. Attorney General Brown has established a "Global Warming Unit" within the Department of Justice, and is seeking to enforce CEQA requirements on a project by project basis, where proposed projects might have a significant global warming impact.³⁴ If the "first rule of holes" has applicability in the arena of global warming, the Attorney General, as opposed to AB 32 itself, is attempting to apply the appropriate remedy. If new projects are required to have "zero impact" with respect to new releases of greenhouse gas emissions, we will stop digging the hole deeper from which hole AB 32 is ultimately supposed to remove us, by rolling back current emission levels to the levels of 1990.

A further controversy in AB 32 implementation is whether or not the "trading" of emission credits should be permitted. Federal legislative proposals have virtually all identified a "cap and trade" approach to emission reductions. The idea is that the government will set a "cap" on total emissions, then issue "emission credits" allowing pollution up to that capped amount, and then establish a program that will permit businesses to "trade" the emission credits as between themselves. This imports market concepts into what would otherwise be a purely regulatory environment, and allows polluters who would otherwise have to reduce their greenhouse gas emissions to buy credits, instead. The polluters selling credits would presumably either go out of

business or be able to achieve reductions beyond the amount of reductions mandated by the regulations that affect them.

A huge fight about “cap and trade” occurred during the effort to enact AB 32. The Governor took the position that California’s law should set up a “cap and trade” system, comparable to the “cap and trade” proposals being made at the national level, but the authors of AB 32 thought otherwise, as did environmental justice advocates who worked particularly closely with Speaker Nunez. In the end, the ARB was given an option to implement what AB 32 calls “market mechanisms,” such market mechanisms are not mandated by the law. The actual language in AB 32 is as follows:

38570 (a) The state board may include in the regulations adopted pursuant to Section 38562 the use of market-based compliance mechanisms to comply with the regulations.

(b) Prior to the inclusion of any market-based compliance mechanism in the regulations, to the extent feasible and in furtherance of achieving the statewide greenhouse gas emissions limit, the state board shall do all of the following:

(1) Consider the potential for direct, indirect, and cumulative emission impacts from these mechanisms, including localized impacts in communities that are already adversely impacted by air pollution.

(2) Design any market-based compliance mechanism to prevent any increase in the emissions of toxic air contaminants or criteria air pollutants.

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

(c) The state board shall adopt regulations governing how market-based compliance mechanisms may be used by regulated entities subject to greenhouse gas emission limits and mandatory emission reporting requirements to achieve compliance with their greenhouse gas emissions limits.³⁵

Environmental justice advocates believe, for good reason, that a “trading” program, if authorized, will have bad results for lower income communities, and communities of color. Polluting facilities located in such communities would not be required to reduce their global warming emissions, as they would otherwise have to do under the regulations, because they would be able to “buy” their way out of such regulations by trading with other polluters. Those selling credits to the facilities in disadvantaged areas will reduce pollution elsewhere, but the polluting facilities in the disadvantaged communities will continue to pollute. Other criticisms of the “cap and trade” approach are that it leads to “gaming” the market for pollution credits, and that it diverts attention from efforts to find effective pollution reduction strategies to efforts to find out how to make money in the market for pollution credits. In fact, the “cap and trade” system used in the European

Community to achieve the reductions called for by the Kyoto Protocol, do show such significant abuses.

AB 32, as finally enacted, clearly does not mandate a system that requires “trading” for emission credits. In fact, the law states that “market mechanisms” may be used, if a decision is made to include them in the AB 32 regulatory program, only to comply with the regulations adopted pursuant to Section 38562. Those regulations are going to be adopted on or before 2011. Nonetheless, the very first significant effort after AB 32 became effective was to develop a “market” approach.

If the ARB were to take the global warming crisis seriously, a “trading” program would not be allowed, or would be very much subsidiary to a strong and aggressive regulatory program. Since our continued existence as a civilized society is at stake, it seems most appropriate to require greenhouse gas reductions whenever and wherever they are found feasible. To allow some businesses “off the hook” because they are able to buy credits from some other business means that the society, overall, is foregoing the maximum possible greenhouse gas reductions.

Conclusion – What AB 32 Means

The meaning of AB 32, in the end, is going to depend on how it is implemented, and the jury is out on that. The law provides the Air Resources Board with plenary power to make California a national and international

leader in efforts to combat the effects of global warming, as those effects impact both natural systems and our human society and economy. If the ARB decides to provide such leadership, however, it will need to take seriously the threats posed by the continued emission of greenhouse gases into the atmosphere. It will have to be willing to require fundamental changes in the way we live and work.

Global warming is not just “inconvenient.” It presents a fundamental challenge to the civilizations that human beings have constructed, and the principles upon which we have constructed them. We are in real peril. While the structures of our civilized societies cannot be altered overnight, we can begin to construct a different kind of society and economy that is based not on endless and continued consumption but on living sustainably in a world of limited resources. We can either choose (or not) to move away, as quickly as possible, from the burning of fossil fuels which puts our world at risk.

One of the ideas behind those who sponsored AB 32 may have been simply to set a “high bar” for a national law that will supersede it. California clearly can’t solve the global warming crisis by itself, by taking state-level actions, and if a federal global warming law were enacted, it’s quite possible that this federal law might preempt state systems, and that California would never actually have to adopt regulations in 2011. That outcome, however, whether intended or not by those who sponsored AB 32, would

almost certainly mean that the ambitious goals of AB 32 would be “discounted.”

If Earth is “in the balance,” as the title of one of Al Gore’s books announces,³⁶ Californians now have the opportunity to show how human beings can truly “change the world” in the face of a global threat. To do this, the internal tensions within AB 32 must be resolved in favor of its call for genuine change. As I hope this Chapter has illustrated, AB 32 does announce the need for California to chart a fundamental new direction, to meet the global warming challenge. But it also offers a tempting prospect that we can somehow turn that global warming challenge into a new business stimulus. If that’s what we decide it’s all about, we will almost certainly lose the opportunity to reconstruct our economy and society and on a better and more sustainable footing.

To my mind, how AB 32 treats land use will be a critical indicator. Senate Bill 375³⁷, passed by the Legislature in 2008, and signed by the Governor, establishes a complicated planning process for transportation planning agencies, and is intended to help stimulate better land use policies at the regional and local level. Among the provisions of SB 375 is a requirement that the Air Resources Board set regional greenhouse gas reduction targets. Now that this law is in effect, the ARB will undoubtedly undertake that task as part of its implementation of AB 32. The question, however, is whether the ARB will go beyond the incentive based system set up by SB 375, after it

establishes the reduction targets. AB 32, augmented by SB 375, provides the ARB with the ability to require “smart growth” approaches to land use, instead of continued sprawl. Without a commitment to changing land use policy, it is unlikely that California can really make the kind of changes we need to make, to confront the global warming challenge.

What was California actually doing when it enacted the “Global Warming Solutions Act of 2006?” It was certainly making a dramatic statement about the need to make major changes, to confront the dangers of global warming. It was certainly promoting itself as a national and even world leader in this effort, and it was certainly expressing a hope that doing the right thing would bring tangible, economic benefits to the state. But was California truly *serious* about doing what actually needs to be done? That question has yet to be answered, and every one of us can help answer it by participating in the ARB rulemaking process that is yet to come.

Endnotes:

¹ Gary A. Patton served as an elected member of the Santa Cruz County Board of Supervisors from 1975 to 1995, and is the author of Santa Cruz County's successful growth management program, adopted by the voters of Santa Cruz County in 1978. Mr. Patton has extensive experience in land use and local government matters, and has served as both the Executive Director and General Counsel of the Planning and Conservation League, a statewide environmental group founded in 1965. In his role as General Counsel of the Planning and Conservation League, Mr. Patton has also helped coordinate a statewide consortium of environmental litigators. From 1995 to 2005, Mr. Patton served as the Executive Director of LandWatch Monterey County, a community-based nonprofit organization that helps promote and inspire sound land use policies through grassroots community action. He has also taught an introductory course in environmental law at De Anza College, in Cupertino, and provides a weekday "Land Use Report" on Central Coast radio station KUSP. He is recognized as a statewide environmental leader, and frequently speaks on environmental and land use topics around the state. Mr. Patton graduated with distinction from Stanford University in 1966, with a Bachelor's degree in United States history, and with Honors in Social Thought and Institutions. He received his Juris Doctor degree from Stanford Law School in 1969, and attended Union Theological Seminary, as a Rockefeller Brothers Fellow. He was admitted to the practice of law in California in 1971.

² *California Health and Safety Code*, Section 38500 ff.

³ The claim that *An Inconvenient Truth* is the fourth-highest grossing documentary made to date is found in Wikipedia, the free Internet encyclopedia, at http://en.wikipedia.org/wiki/An_Inconvenient_Truth. A good deal of information on *An Inconvenient Truth* is available on the official website, at <http://www.climatecrisis.net/>.

⁴ Union of Concerned Scientists website - http://www.ucsusa.org/global_warming/science_and_impacts/science/ipcc-backgroundunder.html#The_First_Three_Assessments.

⁵ Daniel Sitarz, ed. *Agenda 21: The Earth Summit Strategy To Save Our Planet*. Earthpress: Boulder, CO, 1993, Page 80.

⁶ The text of the Kyoto Protocol can be obtained at http://unfccc.int/essential_background/kyoto_protocol/items/1678.php.

⁷ The Union of Concerned Scientists provides an excellent documentation of the growing scientific agreement that human-caused global warming is real, and that it is a real threat to the natural world and human society: http://www.ucsusa.org/global_warming/science_and_impacts/science/ipcc-backgroundunder.html#The_First_Three_Assessments.

⁸ Union of Concerned Scientists website:

http://www.ucsusa.org/global_warming/science_and_impacts/science/findings-of-the-ipcc-fourth.html.

9 Ibid.

10 Ibid.

11 *Wikipedia* article, http://en.wikipedia.org/wiki/James_Hansen.

12 Gunnar Myrdal. *Economic Theory and Under-Developed Regions*. Gerald Duckworth & Co., Ltd.: London, England, 1957. See Chapter 2, “The Principle of Circular and Cumulative Causation.”

13 The so-called “Clathrate Gun Hypothesis” is explained in a *Wikipedia Encyclopedia* entry: http://en.wikipedia.org/wiki/Clathrate_Gun_Hypothesis. While there is not a broad scientific agreement that such a methane release event is likely, the possibility certainly denotes a “worst case scenario,” and reputable climate scientists do take the possibility seriously. In a 2004 article printed in the *Baltimore Sun*, John Atcheson puts it this way: “We can't afford to have the first sign of a failed energy policy be the mass extinction of life on Earth. We have to act now.” <http://www.energybulletin.net/node/3647>.

14 The Pew Center on Global Climate Change provides an excellent outline of proposed federal legislation on their website at http://www.pewclimate.org/what_s_being_done/in_the_congress/109th.cfm.

15 Information on the Natural Resources Defense Council (NRDC) can be found on the NRDC website at <http://www.nrdc.org/globalWarming/default.asp>.

16 Environmental Defense (the name it used in 2006) is now called the Environmental Defense Fund (EDF), which is their original name. Information on EDF can be found on their website at <http://www.edf.org/page.cfm?tagID=65>.

17 Among other things, AB 1493 amended section 42823 of the California Health and Safety Code. Full information on the bill can be found on the California LegInfo website at http://www.leginfo.ca.gov/pub/01-02/bill/asm/ab_1451-1500/ab_1493_bill_20020722_chaptered.html.

18 California Progress Report, “Fran Pavley – An Environmental Legend...” http://www.californiaprogressreport.com/2008/06/fran_pavleyan_e.html.

19 All quotations to the “findings” contained in AB 32 are to provisions found in the *California Health and Safety Code*, Section 38501 (a) through (h).

20 The concept that doing the “right thing” is how to become economically well off has a long history in the United States, with Benjamin Franklin frequently being cited as teaching this lesson. See Evan Carmichael’s “Lesson #5,” in his series of “motivation and strategies for entrepreneurs” at <http://www.evancarmichael.com/Famous-Entrepreneurs/624/Lesson-5-Do-Well-by-Doing-Good.html>

21 A report of the Governor’s signing ceremony is available on the Governor’s website at <http://gov.ca.gov/index.php?/press-release/4111/>.

22 *Health and Safety Code*, Section 38550.

²³ *Health and Safety Code*, Section 38561(a).

²⁴ *Health and Safety Code*, Section 38562(a).

25 Ibid.

²⁶ *Health and Safety Code*, Section 38560.5.

27 Molly Ivins, http://womenshistory.about.com/od/quotes/a/molly_ivins.htm.

28 *Climate Change Draft Scoping Plan: A Framework For Change*, June 2008 Discussion Draft, Page ES-1.

29 ClimatePlan letter dated August 20, 2008, addressed to Mary Nichols, Chairman, California Air Resources Board, a copy of which can be found at <http://www.climateplanca.org/resources.html#ab32resources>.

30 *Draft Scoping Plan*, Page 7.

31 Ibid., Page 11.

³² Reid Ewing, Ph.D, *CO₂ Reductions Attributable to Smart Growth in California*, University of Maryland National Center for Smart Growth Research and Education, September 2008, Page 4.

33 *California Public Resources Code*, Section 21000 ff.

34 Attorney General Jerry Brown’s efforts to use CEQA to deal with global warming impacts are outlined at <http://www.ag.ca.gov/globalwarming/ceqa.php>.

35 *California Health and Safety Code*, Section 38570 (a)-(c).

36 Al Gore. *Earth in the Balance*. Plume: New York, 1993.

37 Senate Bill 375, authored by State Senator Darrell Steinberg, will become effective on January 1, 2009. The bill makes numerous changes to state law. It is available at http://www.leginfo.ca.gov/cgi-bin/postquery?bill_number=sb_375&sess=CUR&house=B&author=steinberg .