

MR. WYMAN: Thank you very much.

2 I'm Bob Wyman with the law firm of Latham and
3 Watkins, and I'm speaking today on behalf of the
4 California Climate Coalition.

5 I think my personal first exposure to the Air
6 Resources Board enforcement process goes back to 1981,
7 which was actually a litigation matter. So it was sort of
8 an extreme experience to start things out. And with
9 perhaps that exception over the last 30 years I'd have to
10 say that I think the ARB enforcement staff has done a
11 pretty darn good job of exercising discretion in
12 individual cases.

13 But I also think that over the last few years --
14 and this will be true to an increasing degree -- that the
15 number and complexity of regulations is getting to the
16 point where a fresh look is definitely warranted. So I do
17 want to applaud you all for doing this. I think it's
18 really an exercise whose time has come.

19 The California Climate Coalition as part of the
20 Scoping Plan testimony last year recommended that the
21 Board direct staff to undertake a troubleshooting exercise
22 to anticipate the types of noncompliant problems that are
23 likely to occur as AB 32 and its complementary measures
24 like the low carbon fuel standard and renewable portfolio
25 standard start taking effect, because it's our belief that

1 due entirely to circumstances beyond the control of many
2 of the regulated entities in this hybrid program that
3 there will be a lot of noncompliance as some anticipated
4 in the early years. So some of it will be confusion and a
5 lack of education. Some of it will be that compliance
6 assumes and depends on events which are outside the
7 regulated entity's control.

8 I mean, the obvious illustrations that have been
9 discussed are the absence of a transmission line for
10 renewable power to meet the renewable portfolio standard.
11 And you can think of any number of permitting conditions
12 or permitting requirements that have to occur for folks to
13 achieve their tonnage obligations under the AB 32 program.
14 And surely the low-carbon fuel standard -- there is a huge
15 assumption about the ability to site low-carbon
16 alternative fuel supply facilities here in the state. So
17 there are probably dozens of circumstances that are novel,
18 unanticipated that will stymie even the best intended of
19 those who are subject to these programs.

20 So I guess the first recommendation that we have
21 made to your Board that we would make to you is that you
22 start now anticipating what's likely to happen over the
23 next few years and brainstorm what some of these
24 situations might be through some kind of simulation. It
25 won't be that hard. I think you have a lot of expertise

1 in the audience and on the web of people who are going to
2 have to comply with these regulations and who have in the
3 last few years complied with a whole new wave of
4 regulations that have been complex that you've
5 acknowledged.

6 I think as a result of that in a year or so as a
7 lot of these regulations start to take effect, you'll
8 probably identify a handful of the most likely scenarios
9 which you can do an anticipatory strategy, perhaps address
10 head on. So that's our first recommendation.

11 Our second recommendation is that even the best
12 intentions are likely not to succeed fully. So we do
13 think it's appropriate for you to consider a process you
14 haven't had in the past, except in isolated cases, and
15 that's something like a variance process or some kind of
16 administrative hearing. I know you've had that in some
17 limited circumstances, but I think the scope of that
18 probably needs to be expanded.

19 And there is I think -- although evidence is
20 mixed -- certainly there are lots of good examples in this
21 state of where that process has enabled the administrative
22 agency in a publicly transparent way to adjudicate
23 disputes of fact to avoid what could otherwise fester and
24 be a longer-term problem. It can be done efficiently.
25 You can have class variances if there is a problem that's

1 common to a number of regulated entities. But I think
2 it's appropriate.

3 And I would encourage you to do some
4 brainstorming on that front as well, because no matter how
5 well intended the regulatory design is, there will be
6 unanticipated problems. And rather than start with some
7 kind of polarizing enforcement debate, even if it leads to
8 a wise and prudent exercise of your discretion, I think it
9 would be better, given this unique period of time we have,
10 at least during a transition and possibly thereafter to
11 have a fairly robust variance process.

12 On the third issue, the last point I'll comment
13 on, you know, at this point I do think it would be helpful
14 to have more in writing than you have. Obviously, there
15 are lots of cases one can envision where one would want
16 you to have the discretion not to be tied to a penalty
17 policy, because not every circumstance is a cookie cutter,
18 and we recognize that.

19 On the other hand, I do think there are a lot of
20 folks out there who have a lot at stake who are investing
21 in this state and really want to know what the rules of
22 the game will be. So somewhere in the middle, some
23 additional written advise that defines and describes your
24 penalty policy probably would be appropriate. And we
25 certainly commit as a coalition over the next few weeks to

1 think about what that balance is. But we recognize that
2 you have many times in the past exercised your discretion
3 in a way that might have been difficult if you had a
4 policy that defined all possible permutations. So some
5 balance is probably appropriate here. But at least at
6 this hearing, we err slightly on the side of more than
7 what you currently have.

8 So we appreciate the opportunity to testify
9 today. We look forward to participating in some
10 trouble-shooting exercises with you. And thank you for
11 the opportunity to speak.