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CARB Releases Major Planning Document Guiding the Implementation of Landmark California Climate Change Law AB 32

On June 26, 2008, the California Air Resources Board ("CARB") unveiled a wide-ranging draft "Scoping Plan" that will affect nearly every aspect of the state's economic engine. In its final form, the Scoping Plan will guide the manner in which greenhouse gas ("GHG") emission reductions are achieved pursuant to California's landmark climate change law, AB 32. Among other mandates, AB 32 requires California GHG emissions to be reduced to 1990 levels by 2020, which translates into a reduction of about 169 million metric tons of carbon dioxide equivalent ("MMTCO2E") in the year 2020, compared to business-as-usual projections.

The draft Scoping Plan was greeted with enthusiasm from nearly all quarters, with nongovernmental organizations, utilities, and industry generally congratulating CARB staff for its outstanding work and aggressive outreach, while expressing certain concerns about implementation of the Scoping Plan.

A large proportion of emissions in California comes from the electricity, transportation fuels, natural gas, and large industrial sectors. For these sectors, emissions reductions would be achieved through a "cap-and-trade" program working in concert with traditional regulatory programs.

To meet the 2020 reduction goal, these sectors would have to reduce emissions by 147 MMTCO2E. Of these reductions, 112 MMTCO2E would be achieved through the traditional programs and 35 MMTCO2E would be achieved through the cap-and-trade program. Thus, traditional programs would be responsible for achieving just over 75 percent of the necessary reductions.

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CAP-AND-TRADE PROGRAM

The cap-and-trade program would cap emissions from the largest GHG emitters—electricity, transportation fuels, natural gas, and large industrial sectors—beginning in 2012. Over time the emissions cap would be lowered at a rate designed to meet the reduction goal mandated by AB 32. Once the cap is established, CARB can determine the total amount of allowances—permits to emit a specified quantity of carbon—available in the program. CARB envisions that some allowances initially would be freely allocated to the large emitters. According to CARB staff, within a short time a majority of allowances would soon be converted to auction, in combination with the carbon trading market. The details of auction versus allowances will be among the most contentious implementation issues.

CARB is considering the possible use of "offsets" within the program. Offsets are verifiable emission reductions from individual projects. According to the draft Scoping Plan, CARB is considering allowing offsets to be used for compliance purposes, with a possible limit on how many offsets an entity could rely on in meeting its compliance obligations. At this stage of the Scoping Plan process, CARB has neither indicated the breadth of entities nor scope of projects that could be part of an offsets program and is generally reserving its right to exclude offsets altogether.

The CARB program would eventually link with a regional cap-and-trade program under the auspices of the Western Climate Initiative, an effort involving Arizona, New Mexico, Oregon, Washington, Utah, and Montana, along with the Canadian provinces of British Columbia, Manitoba, and Quebec. It is doubtful that CARB would initially allow offsets from outside of the Western Climate Initiative and certain Mexican border states.

Regulations to implement the cap-and-trade program need to be developed by the end of 2010. Over the next two years it is considered likely that federal legislation will create a cap-and-trade program. CARB intends to harmonize the California system with the federal system if the timelines of the regulatory and federal legislative processes coincide appropriately.

TRADITIONAL REGULATORY PROGRAMS

Of the traditional regulatory programs, the greatest emissions reductions would be achieved by new standards governing vehicle emissions, vehicle fuels, energy efficiency, and use of renewable energy by electric utilities. Below we give a snapshot of the proposed reductions in certain sectors.

Renewable Portfolio Standard ("RPS")

By 2010 the current RPS requires California's investor-owned utilities (SCE, PG&E, and SDG&E) to obtain 20 percent of their electricity from renewable resources including wind, solar, geothermal, small hydroelectric, biomass, and biogas. The Scoping Plan proposes increasing the RPS to 33 percent by 2020 and would also require publicly owned utilities (such as the Los Angeles Department of Water and Power and the Sacramento Municipal Utility District) to meet the RPS.

Green Buildings

Buildings account for one-quarter of GHG emissions because of their consumption of electricity, natural gas, and water. CARB would work together with the California Energy Commission to encourage green buildings, which exceed minimum energy efficiency standards, decrease consumption of potable water, and reduce solid waste during construction and operation. CARB would encourage new state buildings to exceed minimum energy standards and meet the Leadership in Energy and Environmental Design ("LEED") Gold standard. CARB would encourage the retrofitting of existing state buildings to meet the LEED Silver standard. Although the details are sparse in the draft Scoping Plan, the scope of mandated green building could be extensive, given CARB's view of green buildings as creating efficiencies in GHG reductions that are not possible on an incremental basis.

Transportation and Goods Movement

In 2002 the California Legislature adopted AB 1493 (often known as the "Pavley Bill," after the bill's sponsor, former Assemblywoman Fran Pavley). AB 1493 requires that vehicle emissions be reduced to the maximum extent technologically feasible. Though AB 1493 is currently the subject of litigation, the draft Scoping Plan states that it is "highly likely that [C]ARB will ultimately be permitted to implement the Pavley regulations" and foresees large reductions totaling 31.7 MMTCO2E from this program.

Last year the Low Carbon Fuel Standard ("LCFS") was identified as one of nine actions that CARB would pursue early in the implementation of AB 32. The LCFS would reduce the carbon intensity of transportation fuels by 10 percent by

2020. Rulemaking is ongoing, and CARB will consider adopting an LCFS regulation in late 2008. Given that CARB will consider the full lifecycle of a given transportation fuel, the LCFS will likely favor the use of electricity and hydrogen over more obvious but carbon-intensive alternative fuels such as corn-based ethanol.

Other subsidiary measures under consideration include combining a fee program on high-emitting vehicles with a rebate program on low-emitting vehicles (sometimes referred to as "feebates"). CARB is also investigating the use of congestion pricing, which would charge tolls for road use during peak hours, with the revenue from the tolls possibly funding improved transit.

CARB foresees reductions in GHG emissions from the transportation of goods at ports and throughout the state. CARB has already adopted a regulation to require electrification of ships at ports. The Scoping Plan suggests that many other measures will be considered to improve efficiencies and reduce emissions from goods movement.

Local Government

About 2 MMTCO2E of reductions are expected to be achieved by local governments from what appear to be mostly voluntary programs that are merely encouraged by CARB. The 2 MMTCO2E figure may be slightly misleading because certain local government operations involving electricity and transportation are captured in other sectors. To assist in reductions by local governments, CARB envisions that revenues—whether acquired through the auctioning of allowances or imposition of carbon and other fees—could be used to fund well-designed land-use planning and infrastructure projects.

Carbon Fees

CARB will also evaluate the use of carbon fees and other fees to fund administration of the AB 32 program, achieve further emission reductions, and fund other program goals. However, the draft Scoping Plan falls short of stating what specific fees will be imposed. Carbon fees could be used hand in hand with the cap-and-trade program, and would possibly be levied on fossil fuel use, industrial process emissions, emissions of more powerful GHGs (high Global Warming Potential gases), and electricity imports. As to fossil fuels, CARB states that a fee could be levied at key delivery points for natural gas, gasoline, and diesel in a way that would affect all emissions from fossil fuel combustion.

CARB states that this higher price signal created by a carbon fee would have an effect on the investment decisions and fuel choices of suppliers of goods and services, moving these suppliers to reduce their GHG emissions. At a level of $10 per MMTCO2E, CARB estimates that $4 billion would be raised per year and that these revenues could be used in a variety of ways to achieve AB 32 goals.

CONCLUSION

CARB emphasized that the ultimate Scoping Plan will indeed be a "plan," and that the component measures will be implemented through the standard rulemaking process and possibly new legislation. With the publication of the draft Scoping Plan, the public now has until early August 2008 to provide written comments. CARB will adopt the final Scoping Plan in November 2008. Please contact any of the following attorneys if you have questions about AB 32 or the Scoping Plan process, please contact Craig Moyer or Randall Keen.

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FOR ADDITIONAL INFORMATION ON THIS ISSUE, CONTACT:

Craig A. Moyer Mr. Moyer's practice focuses on clean air, clean water, hazardous waste, CERCLA, oil spills, emergency response, community right-to-know and hazardous materials issues; analysis and review of environmental impact reports, and coastal zone and environmental permitting. He has advised clients in connection with myriad complex regulatory interactions. He has consistently affected rule modifications through litigation and in other ways enabling clients to take advantage of regulatory changes.

Randall W. Keen Mr. Keen's practice focuses on implementation of California's landmark greenhouse gas reduction mandates under AB 32, energy issues before the California Public Utilities Commission, public contracting, administrative law (including administrative hearings and writs), and legislative and statutory analysis. He advises clients on the regulations adopted by state agencies, including the California Air Resources Board, the California Energy Commission and the California Public Utilities Commission, that mandate reductions in greenhouse gas emissions and the potential effect of those regulations on client operations. He has represented a broad base of clients on electric industry restructuring matters and other aspects of state and federal energy regulation.

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