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AB 32 Setback: Tentative Court Ruling Threatens to Delay Implementation of California Carbon Market

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In 2006, the California Legislature passed the landmark Global Warming Solutions Act of 2006 (“AB 32”) directing the California Air Resources Board (“CARB”) to prepare a Scoping Plan to identify how best to achieve its greenhouse gas emission (“GHG”) reductions.

The state’s ground-breaking climate change legislation has been the subject of intense scrutiny and public comment since its inception. Now, the immediate future of AB 32’s mandate may be in jeopardy, due to a tentative California superior court decision holding that CARB violated the California Environmental Quality Act (“CEQA”) in implementing AB 32 because it failed to consider alternatives to a cap-and-trade market and approved its Scoping Plan without adequate environmental review.

ASSOCIATION OF IRRITATED RESIDENTS V. CALIFORNIA AIR RESOURCES BOARD

In 2009, environmental justice organizations, community groups, and individuals opposed to CARB’s Scoping Plan and cap-and-trade program filed a suit seeking a writ of mandate against CARB. *Association of Irrigated Residents, et al. v. California Air Resources Board*, S.F. Superior Court No. CPF-09-509562. Petitioners challenged CARB’s implementation of AB 32, on the grounds that CARB failed to meet the mandatory statutory requirements of AB 32 and CEQA by treating the Scoping Plan as a post hoc rationalization for CARB’s preselected policy approaches.

The suit alleged that CARB violated the legislation in three instances, notably, by:

- excluding entire economic sectors from GHG controls and furthering a cap-and-trade program without confirming that potential reduction measures achieved maximum technologically feasible and cost-effective reductions;
- failing to sufficiently consider the total costs and benefits to the economy, environment, and public health before adopting the Scoping Plan; and
- failing to meet AB 32’s mandate that CARB account for information regarding GHG emission reduction programs on both a national and global level before recommending cap-and-trade regulatory measures.

Petitioners’ CEQA challenge focused on CARB’s Functional Equivalent Document (“FED”), which CARB must prepare pursuant to its certified regulatory program. The FED is a simplified version of an environmental impact report (“EIR”) or environmental impact statement (“EIS”) that addresses the potential environmental impacts of a regulatory action. Petitioners alleged that CARB violated CEQA and its own certified regulatory program when preparing and certifying the FED by failing to adequately analyze the impacts of measures proposed in, and potential alternatives to, the Scoping Plan, and improperly approving and implementing the Scoping Plan before completing environmental review.

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TENTATIVE RULING

On January 21, 2011, the California Superior Court in San Francisco issued a tentative decision in the case. The court denied petitioners' arguments challenging CARB's interpretation and implementation of AB 32, as well as petitioners' request to require CARB to revise the Scoping Plan. The court held that CARB's duty to enact a Scoping Plan was quasi-legislative in nature, and as such, CARB is afforded wide latitude in its statutory interpretation.

As to petitioners' CEQA claim, however, the court issued a tentative ruling for petitioners. In reaching its decision, the court relied on two primary conclusions: (1) CARB's discussion of alternatives was inadequate, and (2) CARB improperly approved the Scoping Plan prior to completing its environmental review. The court explained that the FED discusses five alternatives to the Scoping Plan; however, CARB provided very little facts or data to support its ultimate decision to choose the Scoping Plan over the other alternatives. The court found that CARB sought to create a *fait accompli* by prematurely establishing a cap-and-trade program before alternatives were subjected to public comment and official evaluation by CARB. CARB should have utilized data from other programs, studies, and reports to sufficiently analyze potential impacts of each of the alternatives. Not doing so, said the court, was an abuse of CARB's discretion in certifying the FED as complete. Further, the court held that CARB improperly approved and began implementing the Scoping Plan prior to completing review and responding to public comments—a violation of both CEQA and CARB's own certified regulatory program.

IMPLICATIONS FOR THE FUTURE OF AB 32

The court's proposed decision requires CARB to set aside its certification of the FED and enjoins the implementation of the Scoping Plan until CARB comes into compliance with its obligations under its certified regulatory program and CEQA. Both sides in the lawsuit are expected to file objections to the ruling shortly—they have 15 days from service to do so.

It is interesting to note that this action was brought by environmental organizations whose primary focus is on local environmental justice issues, rather than larger climate change matters. Originally, there was significant environmental opposition to cap-and-trade when AB 32 was adopted, which is one reason why cap-and-trade is not specifically mandated by AB 32 (California's Health & Safety Code merely states that CARB "may" use market-based compliance mechanisms to achieve its mandate). Now, environmental groups aiming to see more aggressive command and control are the primary opponents to cap-and-trade. Traditional environmental organizations, such as the Natural Resources Defense Council and the Sierra Club, are noticeably absent. Those organizations may feel that the priority is to move forward with AB 32 implementation.

But if the court's final decision mirrors its tentative ruling, new CEQA analysis will be required, and the nation's largest cap-and-trade program, scheduled to begin in January 2012, may necessarily be halted. While these are procedural hurdles, rather than substantive defects in CARB's approach, they add to CARB's burden in moving forward.

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