

May 26, 2011

AB 32 Scoping Plan Lawsuit Decision is Finally Official – Limits Scope to Cap and Trade

Author: [Jon Costantino](#)

It's official. San Francisco Superior Court Judge Ernest Goldsmith has suspended the completion of rulemaking for California's cap-and-trade scheme until the California Air Resources Board (CARB or Board) conducts a more thorough California Environmental Quality Act (CEQA) alternatives analysis under their approval of the policy road map, known as the Scoping Plan. Those following the case have been waiting for this final judgment to be issued.

On Friday, May 20, the seven-page [decision](#) made official what has been known since the original [tentative decision](#) released five months ago. What the Judge clarified in his final decision was that only the Cap and Trade program is affected by this decision and not the broader AB 32 program, including the Low Carbon Fuel Standard, as could have been interpreted under the first ruling. CARB has already appealed, thus starting a whole new legal proceeding.

This decision has something for both sides. Proponents of Cap and Trade point to the fact that this is only a procedural setback and opponents can claim victory citing the fact that CARB must revisit the underlying assumptions in the Plan. The fact that only the Cap and Trade analysis was ruled deficient demonstrates a very specific target by Environmental Justice groups.

It seems like this legal wrangle has gone on forever, and in some ways it has. The lawsuit was filed in January 2009, almost two years before the Cap and Trade regulation was even brought to the CARB Board. So what does all this really mean for those

subject to climate regulations? Basically, the AB 32 program in general and Cap and Trade specifically are still intact. CARB has some additional analytical work to do, but otherwise the judge has ruled that they acted in accordance with the law and their authority. The real question is how long will all this legal maneuvering take, and how will it affect the proposed January 2012 start date of the Cap and Trade program? CARB expects to complete the revised analysis in “mid-June.”

We will get clearer picture of what CARB’s staff’s view is when they present a Cap and Trade program update to the CARB Board in July (though it may be bumped to August). The update, originally scheduled for July when the Cap and Trade regulation was first approved last December and prior to the tentative ruling, was to provide the Board information on how the series of scheduled spring workshops and stakeholder meetings were going and what policy decisions were still left to be decided. But with the lawsuit preventing CARB from conducting any work in public, the update will be a much more important mile marker, and a much more publicized and watched event in the course of implementing this groundbreaking environmental program.

This case has already been appealed. So stay tuned for how it all plays out this summer and fall prior to the statutory deadline to complete the rulemaking--October 28, 2011. The real loser in this legal battle is the idea and possibility that California business will have any sort of certainty or ability to plan for this program moving forward. As of the ruling, CARB has only 22 weeks to finalize the program and all of its very complicated details. Not a lot of time when you consider the implication of the program.

The professionals at Manatt are fully engaged in this issue and those issues surrounding California’s efforts to reduce greenhouse gases. For additional information on how this ruling or the pending Cap and Trade regulatory requirements will affect you, or for assistance participating in CARB’s continued rulemaking process, contact [Jon Costantino](#) at 916-552-2365 in the [Energy, Environment & Natural Resources](#) practice group at [Manatt, Phelps & Phillips, LLP](#).