

Cap-and-Trade Program Update: California Air Resources Board Releases Court-Ordered Alternatives Analysis Under CEQA

By Kerry E. Shea and Jessica R. Mullan

June 16, 2011

On June 13, the California Air Resources Board (CARB) released a [supplement to its previous Environmental Review Document](#) that considers new alternatives to California's cap-and-trade program, which was developed pursuant to California's landmark greenhouse gas (GHG) law, the [Global Warming Solutions Act of 2006 \(AB 32\)](#). CARB's supplemental environmental review document is designed to fortify its previous environmental review of the cap-and-trade program under the California Environmental Quality Act (CEQA).

As discussed in a previous [advisory](#), a recent San Francisco Superior Court decision in *Association of Irrigated Residents v. CARB* [[Case No. CPF-09-509562](#)] found that CARB failed to adequately analyze alternatives to cap-and-trade as a means of reducing greenhouse gas emissions. Under CEQA, CARB is required to consider "feasible alternatives to the proposed action" that reduce adverse environmental impacts and comply with CEQA's broad policy goals and substantive standards.

CARB's new cap-and-trade alternatives analysis under CEQA

In addition to a "no-project" alternative and the cap-and-trade program, the supplemental environmental review document CARB released yesterday analyzes three alternatives: (1) source-specific regulatory requirements, (2) a carbon fee or tax, and (3) a "combination" approach that incorporates select features from the cap-and-trade program, the source-specific regulatory requirements, and the carbon fee/tax proposals.

June 13 marks the beginning of the 45-day public comment period, which ends on July 28, 2011. CARB staff plans to hold a public workshop on its supplemental environmental review of the alternatives to cap-and-trade during the 45-day comment period, though the specific date has not been set. CARB will consider the supplemental environmental review document, public comments, and issues raised at the workshop at its board meeting scheduled for Aug. 24, 2011.

CARB's authority to proceed with cap-and-trade implementation while considering alternatives remains unresolved

Meanwhile, a flurry of orders from [San Francisco Superior Court](#) and appellate activity in the [First Appellate District of California](#) in the *Association of Irrigated Residents (AIR) v. CARB* [[Case No. CPF-09-509562](#)] case has left CARB's authority to immediately proceed with cap-and-trade implementation unresolved.

San Francisco Superior Court's May 20 Order enjoining cap-and-trade implementation

activities

On May 20, San Francisco Superior Court issued an injunction in the AIR v. CARB case, which enjoined CARB from engaging in any activity related to the cap-and-trade program, including any rulemaking and implementation activities, until CARB conducts an alternatives analysis on the cap-and-trade program that complies with CEQA. The Order did clarify that the injunction only applied to CARB's cap-and-trade program activities, not CARB's full AB 32 Scoping Plan. Specifically, the May 20 San Francisco Superior Court Order:

- Directs CARB to set aside [Board Resolution 08-47](#), which adopted and approved the Scoping Plan, *as it relates to cap-and-trade*;
- Directs CARB to set aside [Executive Order G-09-001](#), which approved and certified CARB's environmental review of the cap-and-trade program;
- Prohibits CARB from taking any actions in reliance on its environmental review document and the Scoping Plan, *as they relate to the cap-and-trade program*, until CARB has analyzed alternatives to the cap-and-trade program consistent with its obligations under CEQA; and
- Enjoins CARB from engaging in any project activity *related to the cap-and-trade program*, including any further rulemaking, implementation or other action in furtherance of [Resolution 10-42](#), until CARB has analyzed alternatives to the cap-and-trade program consistent with its obligations under CEQA.

A "stay" of the May 20 San Francisco Superior Court Order would allow CARB to proceed with cap-and-trade program implementation

CARB quickly appealed the San Francisco Superior Court's May 20 Order on May 24. If CARB can secure a stay that lifts that Order, it can proceed with cap-and-trade rulemaking and implementation while the case is on appeal. Whether and under what circumstances CARB is granted a stay from the May 20 San Francisco Superior Court order remains to be determined.

In an attempt to secure a stay from the appellate court, CARB filed a petition for writ of supersedeas on June 2. The First Appellate District of California issued a temporary stay of the San Francisco Superior Court Order on June 3, but for now this temporary stay is only in effect while the appellate court decides whether to grant CARB a stay for the entire time the case is on appeal. At a minimum, the temporary stay will remain in effect through June 20, the date by which the respondent, the Association of Irrigated Residents, must submit its brief in opposition to CARB's request for the stay.

Significant delays could jeopardize cap-and-trade program start date

The cap-and-trade program is currently scheduled to begin on Jan. 1, 2012. If CARB is forced to halt all cap-and-trade program activity while it completes its CEQA alternatives analysis, it is unclear whether CARB will be able to resume its rulemaking and

implementation activities quickly enough to meet this deadline. CARB's efforts to quickly complete its revised environmental review of cap-and-trade and its request for a stay at the appellate court level are designed to avoid such a delay if possible.

* * * *

For more information regarding this San Francisco Superior Court decision, CARB's appeal and its potential impact on California's cap-and-trade program, please contact a Davis Wright Tremaine climate change professional.

This advisory is a publication of Davis Wright Tremaine LLP. Our purpose in publishing this advisory is to inform our clients and friends of recent legal developments. It is not intended, nor should it be used, as a substitute for specific legal advice as legal counsel may only be given in response to inquiries regarding particular situations.