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Final Decision Suspends California's AB 32 GHG Regulations: What Now?

By Whitney Hodges

On March 18, 2011, Judge Ernest Goldsmith of the San Francisco County Superior Court suspended implementation of AB 32, California's landmark law to reduce greenhouse gas ("GHG") emissions. In *Association of Irritated Residents v. California Air Resource Board*, [Statement of Decision] the Court found the California Air Resource Board (the "ARB")'s adoption of AB 32's Climate Change Scoping Plan (the "Scoping Plan") to be in violation of the California Environmental Quality Act ("CEQA"). The ruling determined that the ARB abused its authority by not adequately analyzing potential alternatives to a carbon "cap-and-trade" program aimed at limiting GHG emissions.

Background & Ruling

AB 32, also known as the Global Warming Solutions Act of 2006, requires California to reduce its GHG emissions to 1990 levels by 2020. As part of this emissions reduction program, the law necessitates the development of a Scoping Plan "for achieving the maximum technologically feasible and cost-effective reductions in [GHG] emissions from sources or categories of sources of [GHGs]." In theory, the Scoping Plan is intended to be a roadmap for achieving the required reductions. Its focal point is a proposal for a cap-and-trade program, which is now the focus of contentious litigation. In adopting the Scoping Plan, the ARB, a CEQA-certified regulatory agency, published a Functionally Equivalent Document ("FED"); effectively, the Environmental Impact Report ("EIR") for the Scoping Plan.

The petitioner, the Association of Irritated Residents (the "AIR"), challenged the Scoping Plan, grounding their suit on CEQA and the ARB's CEQA regulations requiring review of environmental impacts for certified regulatory programs. The AIR claimed that the ARB's FED was deficient; thus, a violation of CEQA invalidating the AB 32 Scoping Plan itself.

The crux of the AIR's argument was the ARB's conclusory analysis of the environmental impacts of the various Scoping Plan alternatives. The Court agreed, concluding that the ARB "provided little to no facts or data to support the conclusion." Specifically, the ARB did not sufficiently analyze the possibility of adopting a carbon tax in lieu of a cap-and-trade program. The Court highlighted the ARB's "extensive evaluation" of the cap-and-trade program, and opined that CEQA requires the ARB to "undertake [a] similar analysis of the impacts of each alternative so that the public may know not only why the cap-and-trade was chosen, but why the alternatives

were not." The Court's decision does not require the ARB to adopt a tax-based program, only that it must appropriately analyze and evaluate the environmental impacts of a carbon tax as a potentially viable alternative to cap-and-trade in compliance with CEQA guidelines.

Judge Goldsmith also found that the ARB had "jumped the gun" by implementing the Scoping Plan prior to adequately complying with CEQA. Specifically, the ARB adopted the Scoping Plan and held public workshops discussing future planned implementation actions prior to reviewing and responding to public comments. The Court ruled that taking such actions prior to completing the CEQA process "undermine[d] CEQA's goal of informed decision-making."

The Court ultimately enjoined the ARB from "any further implementation of the measures contained in the Scoping Plan until after [ARB] has come into complete compliance with its obligations under its certified regulatory program and CEQA."

AB 32 encompasses sixty-eight (68) regulatory policies in addition to the cap-and-trade program, and the Court's recent decision carries the potential to block the ARB from moving forward with these programs as well. In this vein, ARB spokesman, Stanley Young, succinctly stated, "a broadly worded writ puts at risk a range of efforts to move California to a clean energy economy and improve the environment and public health." Following is a brief discussion of the options possibly open to the ARB to prevent the Court's decision from indefinitely derailing AB 32.

Redo the Environmental Analysis

CEQA imposes both procedural and substantive requirements on any project that has the potential to affect the environment. At a minimum, an initial review of the project and its environmental effects must be conducted. Depending on the potential effects, a further, and more substantial, review may be required in the form of an EIR or its environmental regulatory agency counterpart, a FED. Under CEQA, a project may not be approved as submitted unless feasible alternatives are considered and viable mitigation measures adopted to substantially lessen the significant environmental effects of the project.

In the Court decision, Judge Goldsmith found flawed the ARB's contention that the FED's analysis was adequate because it was only meant to be programmatic (general) and not a project-specific EIR. The Court determined that "[w]hile a program-level EIR need not be as detailed as a project-level EIR, [ARB] must still provide the public with a clear indication based on factual analysis as to why it chose the Scoping Plan over the alternatives" and CEQA's "demand for meaningful information is not satisfied by simply stating that it will be provided in the future." Therefore, the ruling compels the ARB to revise and reissue the FED in conformity with Judge Goldsmith's mandates. If the ARB redoes the FED and then proceeds to re-adopt the Scoping Plan, it could mean an implementation delay of a year or more.

The South Coast Air Quality Management District ("SCAQMD") faced a similar situation in 2009. The Court invalidated an SCAQMD rule specifying how the agency accounts for and calculates the amount of emission reductions available to fund District offsets and offset exemptions, thereby effectively placing a moratorium on the issuance of certain essential facility and other air permits. The Court enjoined further issuance of permits under this invalidated rule

until the SCAQMD prepared an adequate CEQA document and adopted a new or revised rule that addressed the Court's decision. The SCAQMD planned to redo the documentation so it could re-adopt the rule as soon as possible. The SCAQMD estimated this process would take at least nine to twelve months; it, in fact, took much longer. However, in the interim, the SCAQMD was able to obtain legislation overriding the Court's decision, allowing the SCAQMD to proceed with its issuance of permits.

However, here, even if the ARB re-does the CEQA analysis and readopts the Scoping Plan with its cap-and-trade program intact, uncertainties still loom. The ARB must return with the revised FED to Judge Goldsmith to ensure compliance with the Court's writ of mandate. Additionally, the ARB will have to reissue the FED for public comment and respond to any comments prior to re-adoption of the Scoping Plan. Finally, the AIR, or another environmental justice group, will still retain the ability to again challenge the Scoping Plan on similar or different grounds. In the interim, if the ARB continues to take the requisite actions needed to implement the cap-and-trade program by January 2012, challengers will undoubtedly use this as further evidence the ARB again just "rubberstamped" the cap-and-trade program as a "fait accompli," without providing the meaningful evaluation of alternatives required by CEQA before the ARB takes final action. In short, even further delays could ensue.

Appeal the Decision and Seek a Stay of the Injunction

Following a dual pathway approach, the ARB intends to appeal the ruling while concurrently revising its CEQA analysis in accordance with Judge Goldsmith's decision. The appeal process should take twelve to eighteen months[1] while reprocessing the CEQA approval should take about a year. Either pathway results in a prolonged delay which puts at risk achieving the required GHG reductions in the AB 32 prescribed time-frame. Under AB 32's timing provisions, the controversial final cap-and-trade regulations have to be finalized by October 2011 to become effective on January 1, 2012.

The ARB is hoping to obtain a stay of the injunction while it appeals. This would allow it to finalize regulations implementing the Scoping Plan and the cap-and-trade program as it intended to do this spring and summer. Kevin Kennedy, ARB's former Assistant Executive Officer, articulates this desire by saying, "We could complete the rulemaking while the appeal is being heard." Should the ARB successfully obtain a stay, the ARB hopes to have prepared the necessary revised (and, this time, adequate) CEQA FED to remedy the earlier violation so, even if the ARB lost on appeal, it will lose no further implementation time. If the ARB loses the motion for a stay, then AB 32's implementation would face a lengthy delay by the appeal process. This could seriously jeopardize the likelihood of attaining AB 32's ambitious 1990 emissions reductions goals by 2020.

ARB-AIR Settlement

Could the ARB and the AIR now settle the legal action? In reality, many CEQA cases are resolved through settlement.[2] When a case is amenable to settlement, a CEQA-mandated settlement meeting can jump-start effective settlement discussions. Precedent has shown fruitful settlement discussions occur even during late stages of the litigation.

An example of a successful settlement agreement occurred in Los Angeles about a decade ago, and has been an exemplar for CEQA settlements ever since. During environmental review of the Staples Center, the developer was flooded with hundreds of critical comment letters from the Figueroa Corridor Economic Justice Coalition during the Draft Environmental Report review process. The group was concerned about the impact to the surrounding community, which has been traditionally low income minorities. The Economic Justice Coalition crystal-clear message they would challenge the project, coupled with time constraints facing the project (Staples had to be ready in time for the 1999-2000 season), created the ideal atmosphere for settlement negotiations. The parties ultimately created a Community Benefits Agreement, that stands as a model for similar agreements around the country.

Unfortunately, here, since *Ass'n of Irritated Residents v. CARB* has, in fact, already been adjudicated to a final trial court decision, settlement options to resolve the AIR's current challenge to AB 32's Scoping Plan are slim. However, the Court's decision does not preclude the potential to avoid continued future AB 32 CEQA litigation. Specifically, the AIR opposed the cap-and-trade program because they believe the program allows heavy industries, which are disproportionally located in or near low income communities, to purchase their way to air quality compliance rather than reducing their own emissions. Despite the inability to reach a settlement agreement on the current litigation, the ARB and the AIR could still parlay the standard established in the Staples Center Community Benefits Agreement to obtain the AIR's agreement not to challenge the ARB's re-drafted FED and re-adopted Scoping Plan in exchange for provisions benefitting low-income communities of color around heavy pollution emission sites, e.g., dedicated use of carbon allowance sale proceeds to reduce emissions in these communities. However, it is decidedly unclear at this point whether the AIR is even willing to consider a compromise allowing cap-and-trade program to proceed under any circumstances.

Legislative Action

As mentioned above, the SCAQMD successfully obtained curative legislation allowing it to resume its system of distributing emissions credits, which had been previously blocked by the Court. Is such a strategy viable here? Although theoretically possible, chances of the approach being successful here are extremely remote.

The ARB would not only have to author a bill, but would also have to mount an intensive lobbying and communications effort conveying the allegedly disastrous effects which would occur if implementation of AB 32's Scoping Plan was enjoined. Should such an ARB bill make it to the California Legislature, it will have to undergo bargaining sessions and committee meetings, all against the backdrop of a Legislature presently devoted to all-consuming and contentious budgetary negotiations. Even if, against all odds, legislation overriding the Court decision could be passed, significant delay would still have resulted, again undermining achieving AB 32's ambitious GHG emissions reduction goals by 2020.

Current Status

Presently, the ARB staff is attempting to clarify the scope of Judge Goldsmith's ruling terms of

the implementation and writ to be issued, so that it will apply solely to the cap-and-trade program, allowing the other Scoping Plan policies to continue as scheduled. Kennedy stated, "[W]e are in discussion with the petitioners to narrow the final risk so not all the measures in the Scoping Plan are put at risk…we do think there is room to make sure whatever the final decision is is written in a way that is more narrow than some of the readings might be at this point." ARB spokesman Young echoed those hopes stating: "we believe the plaintiffs did not intend to put on hold efforts to improve energy efficiency, establish clean car standards, and develop low carbon fuel regulators." However, the ARB may have a tougher road than anticipated. Jesse Marquez, executive director of Coalition for a Safe Environment, a plaintiff in the case, insists the plaintiffs will not be satisfied until cap-and-trade is completely eliminated from the ARB's plan and is, instead, replaced with direct regulation. When asked if there were any concession his group would make on a carbon market, Marquez replied, "Absolutely no…Even if you put in a tax, a tax still allows refiners to continue polluting…They'll just spend millions to offset their pollution. The only way to offset refiner pollution is to eliminate refiner pollution."

Taken at its word, any glimmer of hope to expedite a resolution to quickly advance the ARB's cap-and-trade program fades and significant delay, though not defeat , is inevitable.

Link to prior article: California Court Issues Tentative Ruling Enjoining AB 32 Implementation

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[1] In CEQA cases, the court of appeal manages the briefing schedule so that, to the extent feasible, the court must commence hearings on appeal within one (1) year of the date of the filing of the appeal. Pub Res Code § 21167.1(a).

[2] CEQA prescribes a unique settlement meeting procedure designed to promote settlement of litigation. Pub. Res. Code § 21167.8. The procedure is extrajudicial, but it provides for sanctions against a party who does not participate. The prescribed procedure is comprehensive and detailed. See Pub. Res. Code §§ 23.78-23.81. I