

California Court Issues Tentative Ruling Enjoining AB 32 Implementation

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On January 21, a San Francisco Superior Court issued a proposed decision that could significantly delay the implementation of the Global Warming Solutions Act of 2006 ("AB 32"). In *Association of Irrigated Residents, et al. v. California Air Resources Board*, Case No. CPF-09-509562, the Court held that the California Air Resources Board (CARB) failed to comply with the California Environmental Quality Act (CEQA). The Court found the CARB to have neglected to conduct a sufficient environmental impact review prior to adopting the State's AB 32 Scoping Plan (Plan). Specifically, CARB failed to adequately analyze all potential alternatives and prematurely adopted the Plan prior to fully responding to public comment.

ARB's Plan is the foundational road map charting ARB's main strategies to reduce the greenhouse gases (GHG) that cause climate change. It includes GHG reduction actions such as direct regulations, alternative compliance mechanisms, monetary and non-monetary incentives, voluntary actions, a market-based mechanism cap-and-trade system, and an AB 32 program implementation regulation to fund the program.

In *Association of Irrigated Residents*, the Court looks to issue a "peremptory writ of mandate" ordering CARB to set aside its certification of the Plan document and enjoin implementation of Plan climate change regulations until CARB is in "complete compliance with its obligations under its certified regulatory program and CEQA." Under this tentative ruling, CARB is ordered to halt implementation of the landmark climate change law in order to conduct further analysis of potentially less harmful alternatives.

Should this proposed decision remain unchanged, it would almost certainly delay the January 2012 commencement of California's landmark carbon cap-and-trade program aimed at reducing GHG emissions, as well as threaten numerous other earlier adopted climate change regulations. Since Congress deserted their endeavors to establish a national program, California is the lone state that has adopted an economy-wide cap-and-trade program.

Association of Irrigated Residents was filed in 2009 by a group of environmental justice groups opposing CARB's Plan and, specifically, the cap-and-trade program. The Court agreed with the plaintiffs' charge that CARB did not comply with CEQA requirements in its review and approval of the Plan. As a "certified regulatory program," CARB prepares a CEQA environmental review document

functionally equivalent to the traditional Environmental Impact Report (FED). As in an EIR, the FED must include an adequate analysis of project alternatives.

The plaintiffs successfully argued that CARB's CEQA alternatives analysis did not include an adequate justification for the Plan's adoption in lieu of several other alternatives including a carbon tax. Additionally, the Court found CARB had adopted the Plan in 2008 prior to fully finalizing responses to public comments on the document. Specifically, Superior Court Judge Ernest Goldsmith stated that CARB "seeks to create a *fait accompli* by premature establishment of the cap-and-trade program before alternative [sic] can be exposed to public comment and properly evaluated by the [CARB] itself." However, the Court also rejected the plaintiffs' argument that CARB's overall environmental impact analysis was too generalized in reliance on cases that upheld such analysis when an agency adopts a program-level document.

In another small victory for CARB, the Court rejected the substantive legal challenges to AB 32's Plan. The Court found that CARB did not act arbitrarily or capriciously in adopting the Plan and dismissed plaintiff's request to find the Plan inconsistent with AB 32.

If the tentative ruling stands, the CARB is left with few options for moving forward. CARB could (1) file an expedited appeal, requesting an interim stay pending the appeal; (2) revise and re-issue the FED to cure the Court-determined defects, through CARB's re-approval of earlier adopted regulations based on the amended FED would then also be necessary; or, (3) lobby for a legislative exemption effectively over-turning the Court's decision as the SCAQMD recently accomplished in a similar case.

The Court's ruling triggers a fifteen day period in which the parties in the case can file objections to be considered by the Court prior to issuance of the final order. Cal. Rule of Court 3.1590(g). The California Attorney General's Office, which is defending CARB in this matter, is considering filing an objection but has not commented further.

Updates to follow after the final order and opinion have been issued.

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