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AB 32 Update: Court's Decision Derails ARB's Implementation of Measures Contained In Its 2008 Scoping Plan

On March 18, 2011, San Francisco Superior Court Judge Ernest H. Goldsmith issued his decision in a case brought by a coalition of environmental justice and community groups challenging the California Air Resources Board's ("ARB") adoption of its greenhouse gases ("GHG") Scoping Plan — the state's overarching strategy for reducing GHG emissions. Specifically, the court ordered ARB to set aside certification of its California Environmental Quality Act ("CEQA") documentation and enjoined further implementation of the measures in the Scoping Plan until ARB comes into complete compliance with its CEQA obligations.

The immediate impact of the decision is to delay ARB's implementation of various GHG reduction efforts in California, including ARB's cap and trade program. The decision potentially may also impact implementation of other Scoping Plan programs adopted since January 2009, including ARB's Low-Carbon Fuel Standards and California's Renewable Electricity Standard, to name just two. The case is *Association of Irrigated Residents, et al.* ("Petitioners") v. ARB ("Respondents") (S.F. Sup. Ct., Case

No. CPF-09-509562). The Statement of Decision can be found by [clicking here](#).

Our early assessment suggests that ARB will need to decide whether to seek relief on appeal or fix the deficiencies identified by the trial court. It is worthwhile to note that the court-identified deficiencies are generally procedural in nature.

Background

In 2006, the governor signed the California Global Warming Solutions Act (commonly referred to as "AB 32"), establishing a broad framework requiring California to reduce its GHG emissions back to 1990 levels by 2020 (an approximate 30 percent reduction in GHG emissions from a business-as-usual level). As part of that framework, AB 32 directed ARB to prepare a Scoping Plan to outline the activities to be undertaken to meet the GHG reduction targets. The Scoping Plan, adopted by ARB on December 11, 2008, includes a range of GHG reduction actions, including proposals for prescriptive regulations, various compliance mechanisms, monetary and nonmonetary incentives, voluntary actions and market-based mechanisms, such as the proposed cap and trade system. ARB is required under AB 32

to adopt specific regulations to meet the GHG reduction goals. Effectively, ARB began implementing the Scoping Plan in January 2009, and has since conducted rulemaking workshops and hearings to implement it.

In 2009, Petitioners filed a petition for writ of mandate seeking to enjoin ARB's implementation of the Scoping Plan. Petitioners alleged that ARB (1) violated certain substantive requirements mandated by AB 32, and (2) violated its CEQA obligations in preparing and certifying its CEQA Functional Equivalent Document ("FED") evaluating the environmental impacts of the Scoping Plan.¹ The court's analyses focus on two distinct areas of Petitioners' claims: AB 32 and CEQA.

AB 32 Claims

Regarding the alleged violations of AB 32, Petitioners argued that ARB failed to: (1) develop a Scoping Plan that achieved the "maximum technologically feasible and cost-effective" GHG reductions, (2) evaluate whether the cap and trade program measures were technologically feasible and cost effective, (3) evaluate total costs and benefits of the Scoping Plan measures to the economy and environment, and (4) consider all relevant information regarding other GHG reduction programs prior to recommending the cap and trade program.

¹ Public agencies may prepare a FED in lieu of an environmental impact report ("EIR") if the secretary of the Natural Resources Agency certifies its regulatory program. See Public Resources Code, § 21080.5. Agency documentation prepared under a certified equivalent program must still meet basic CEQA requirements.

In dismissing these claims, the court applied a deferential standard to evaluate ARB's conformance with AB 32. The court recognized that ARB possesses the technical expertise and the responsibility to protect California's air resources and enjoys substantial discretion to determine the mix of measures needed to achieve GHG reductions. In summary, the court stated, "ARB's plan to effectuate AB 32 survives challenge by Petitioners given ARB's quasi-legislative authority and the wide latitude afforded the agency under the arbitrary and capricious standard of review." Accordingly, Petitioners' demand that ARB revise the substance of the Scoping Plan was denied.

CEQA Claims

Petitioner's CEQA-related claims, however, were partially successful, since the court applied a less deferential standard of review. Petitioners claimed that ARB violated CEQA's and ARB's own approved regulatory program in preparing and certifying its FED by: (1) failing to adequately analyze the impacts of the measures described in the Scoping Plan, (2) failing to adequately analyze and discuss alternatives to the Scoping Plan, and (3) impermissibly approving and implementing the Scoping Plan prior to the closing of the public comment period.

The court first found that ARB sufficiently identified and analyzed potentially adverse environmental impacts of measures in the Scoping Plan and that, for this program-level assessment, ARB met its obligations

under both CEQA and its own CEQA equivalent-certified regulatory program.² The court also determined that localized impacts associated with the cap and trade program, along with other programs discussed in the Scoping Plan, were properly deferred by ARB, as those impacts could be assessed in later rulemakings.

However, the court then concluded that ARB missed the mark on two important (albeit procedural) aspects of complying with applicable CEQA/FED requirements. First, the court concluded that ARB's discussion of alternatives to the Scoping Plan was inadequate, because "[i]nformative analysis is absent." Second, the court concluded that ARB improperly approved the Scoping Plan in December 2008 prior to completing its environmental review process and responding to public comments, which occurred in May 2009.

Alternatives Discussion. Concerning ARB's discussion of alternatives, the court found that ARB "failed to adequately describe and analyze alternatives sufficient for informed decision-making and public review." Here, the court noted that while the Scoping Plan describes five project alternatives (four of which are described in just over three pages), the discussion is short on factual analyses and amounts to a "discourse on cap and trade justification." In sum, the court

² Under CEQA, a FED can be prepared for an entire program. If such a program FED is prepared, second-tier documents can be prepared for specific projects. Preparing environmental documents using this type of multilevel approach is commonly referred to as "tiering." See 14 C.C.R., § 15152.

decided that ARB abused its discretion in certifying its FED as complete.

Approval Timing. Concerning ARB's approval of the Scoping Plan prior to completing its environmental review, the court ruled that ARB adopted its Scoping Plan in December 2008, but did not fully review and respond to public comments until May 2009. This timing, the court determined, violates CEQA's and ARB's certified regulatory program informational requirements. Thus, ARB did not proceed in the manner required by law, and implementation of the Scoping Plan without first completing its environmental review process is an abuse of discretion.

Delay in Implementing AB 32?

Though ARB is likely to appeal and request a stay of enforcement of this decision, it also appears that ARB will need to fix deficient portions of the Scoping Plan and prepare a new FED,

which will be subject to a new round of public notice and comment. ARB could also potentially seek a legislative solution from California lawmakers.

Impacts of Decision

As ARB considers its options, there are many questions that will take time to answer, but several important takeaways from this decision. First, the court did not rule against ARB on the substantive choices it made in the Scoping Plan, the broad outlines of how California will seek to reduce GHG emissions to 1990 levels, or the specific mandates ARB will implement to achieve GHG reductions mandated by AB 32. Second, however, the court uses fairly strong language "commanding ARB to set aside its certification of the FED and enjoining any further implementation of the measures" in the Scoping Plan "until after [ARB] has come into complete compliance with its obligations." Third, ARB will need to bolster specific portions of the

Scoping Plan's alternatives analyses to pass muster with the court, which retained jurisdiction over this matter to assess ARB's compliance with CEQA. Fourth, ARB's implementation of GHG reduction programs covered by the Scoping Plan has been dealt a setback by several months to a year or more, making it very difficult, if not impossible, to meet many AB 32-mandated deadlines. Finally, the hope of near-term certainty necessary for successful regulatory programs and craved by businesses subject to such programs is some time off.

The questions that will take time to answer generally revolve around how ARB will proceed and whether the Scoping Plan programs adopted since January 2009 are impacted by this decision.

This, of course, creates even greater uncertainty regarding the future of AB 32 and California's GHG reduction goals as a whole.