

California Court of Appeal Upholds Statewide Climate Change Scoping Plan

The court of appeal in San Francisco has upheld the Climate Change Scoping Plan adopted by the Air Resources Board in December 2008. In its June 19th decision in *Association of Irrigated Residents v. California Air Resources Board*, the court rejected claims by environmental groups that the Plan violated the Global Warming Solutions Act of 2006, commonly known as AB 32. AB 32 requires California to reduce its greenhouse gas emissions to 1990 levels by 2020. To that end, AB 32 directs the Air Board, the agency responsible for implementing the law, to establish a statewide GHG emissions limit for 2020 and adopt a "scoping plan" that identifies ways to reduce emissions from stationary and mobile sources in order to meet that limit. **The Scoping Plan.** After more than 250 public workshops and 350 community meetings, as well as input from various specialized committees, the Air Board approved a Scoping Plan outlining the following key strategies for reducing GHG emissions in California:

- Expand and strengthen existing energy efficiency programs and building and appliance standards;
- Achieve a statewide renewables energy mix of 33 percent;
- Develop a California cap-and-trade program that links with similar programs in other U.S. states and Canadian provinces as part of the Western Climate Initiative in order to create a regional market-based emissions trading system;
- Establish targets for transportation-related GHG emissions in the state and pursue policies and incentives to achieve those targets;
- Adopt and implement emissions-reduction measures under existing California laws and policies, such as California's Clean Cars standards and Low Carbon Fuel Standard.
- Create targeted fee programs, such as a public goods charge on water usage that can be used to fund water efficiency programs and improvements and fees to fund the administrative costs of implementing AB 32.

Controversy Abounds. A number of these initiatives have proved to be quite controversial. For example, California Approved extensive cap-and-trade regulations last December, but in March two public interest groups filed a lawsuit in state court in San Francisco, arguing that the regulations do not comply with AB 32. Some commentators believe that additional lawsuits by industry groups are likely. Additionally, in December 2011, a federal judge in Sacramento issued a preliminary ruling finding that industry groups were likely to prevail in their challenge to the Air Board's Low Carbon Fuel Standard. While this regulatory program currently is in effect, its ultimate fate is far from certain. Not surprisingly, the Scoping Plan itself also has been the subject of controversy and litigation. In March 2011, a judge in San Francisco ruled that while the Plan complied with AB 32, the Air Board violated the California Environmental Quality Act by failing to adequately analyze alternatives to the Plan. The Air Board redid its environmental analysis to comply with the judge's order, leaving only the AB 32 claims for the appellate court to decide. **The Court's Rulings.** The case presented a number of claims under AB 32, including that the Plan (1) did not go far enough in seeking to reduce GHG emissions, (2) failed to use a standard measure to evaluate cost-effectiveness, (3) failed to include mandatory measures for the agricultural sector, and (4) did not adequately evaluate public health impacts.

- On the first claim, the court rejected the assertion that the Plan violated AB 32's requirement, set forth in section 38562 of the California Health & Safety Code, to achieve "the *maximum* technologically feasible and cost-effective reductions" by 2020. The court ruled that this language must be read in conjunction

with AB 32's specific directive to achieve 1990 emissions levels by 2020 and that the Air Board properly devised the Plan to reach those emissions levels. The court also refused to second-guess the Air Board's determination to reject alternative measures (such as imposing a carbon fee or non-market-based emissions limits) as infeasible and not cost-effective.

- As to the second claim, the court emphasized that cost-effectiveness is not easily measured, especially when trying to compare a market-based system with a command and control regulatory approach. Noting that the Air Board adequately explained these difficulties and the methodology it used, the court refused to reweigh the conflicting opinions on this complex technical issue.
- On the third claim, the court found that the Air Board extensively analyzed potential control measures for the agricultural sector. Due to the gaps in the scientific knowledge concerning GHG emissions from agricultural processes, the Plan includes only voluntary measures, with a commitment to undertake further research and a reassessment in five years. The court found that this approach was reasonable and that Board adequately explained its rationale.
- Finally, the court upheld the Plan's analysis of public health issues, concluding that AB 32 does not require a comparison of the health consequences of each measure that is adopted against the consequences that would occur if that particular measure is not adopted. The court also ruled there was nothing unreasonable in using the South Coast Air Basin and the City of Wilmington to illustrate public health issues from a regional and local perspective, without analyzing other specific regions and localities.

According to the court, while opinions may differ on the complex issues involved in attempting to reduce California's GHG emissions, the Air Board's findings and recommendations reflected the exercise of sound judgment, supported by substantial evidence and in conformance with AB 32.

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