



## JONES DAY COMMENTARY

# CALIFORNIA'S GLOBAL WARMING SOLUTIONS ACT: CREATING A HAZE OF UNCERTAINTY FOR BUSINESS

In 2006, California enacted the California Global Warming Solutions Act ("AB 32"), setting forth an ambitious program aiming to combat global warming.<sup>1</sup> The law requires the California Air Resources Board ("CARB") to adopt rules and regulations that will achieve 1990 levels of greenhouse gas ("GHG") emissions by the year 2020.<sup>2</sup> CARB will ultimately take on an enforcement and monitoring role.<sup>3</sup> In addition, CARB must recommend initiatives to continue reducing GHG emissions beyond 2020.<sup>4</sup>

This *Commentary* summarizes the law, highlights its key provisions and timetables, and identifies several unresolved issues and potential consequences.

## HOW WILL CARB ACHIEVE THE REQUIRED REDUCTION IN GHG EMISSIONS?

AB 32 defines GHGs as the following six gases: carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, sulfur hexafluoride.<sup>5</sup> AB 32

sets forth the following timeline—with which CARB appears to be complying—to achieve the required GHG emissions reductions:

- **June 30, 2007:** Publish a list of discrete early action measures to reduce GHG emissions.<sup>6</sup>
- **July 1, 2007:** Appoint an Environmental Justice Advisory Committee and an Economic and Technology Advancement Advisory Committee.<sup>7</sup>
- **January 1, 2008:** Adopt reporting and verification regulations for GHG emissions, so CARB can monitor and enforce compliance.<sup>8</sup>
- **January 1, 2008:** Determine the 1990 GHG emissions level and set this level as the emissions limit to be achieved by 2020.<sup>9</sup>
- **January 1, 2009:** Approve a scoping plan for achieving maximum technologically feasible and cost-effective reductions in GHG emissions.<sup>10</sup> CARB must update this scoping plan at least once every five years.<sup>11</sup>
- **January 1, 2010:** Adopt regulations to implement the discrete early action measures previously published.<sup>12</sup>

- **January 1, 2011:** Adopt regulations setting GHG emission limits and establishing measures to achieve the maximum technologically feasible and cost-effective reductions in GHG emissions. These regulations take effect on January 1, 2012.<sup>13</sup> CARB may, however, adopt regulations before the January 1, 2011, deadline, and if it does, these regulations may take effect prior to January 1, 2012.<sup>14</sup>
- **January 1, 2020:** Emissions reduction target must be achieved.<sup>15</sup>

## WHICH STEPS HAS CARB COMPLETED?

**Discrete Early Action Measures.** On June 21, 2007, CARB adopted three discrete early action measures:<sup>16</sup>

- *Low Carbon Fuel Standard:* Sets goal to reduce carbon content of transportation fuels by at least 10 percent by 2020.
- *Restrictions on High Global Warming Potential Refrigerants:* Restricts the use of high global warming refrigerants for nonprofessional recharge of leaky automotive air conditioning systems.
- *Landfill Methane Capture:* Standardizes installation and performance of active gas collection and control systems at uncontrolled municipal solid waste landfills.

CARB adopted six additional early action measures at its October 25 and 26, 2007, meeting:<sup>17</sup>

- *Reduction of Sulfur Hexafluoride in the Non-Electric Sector:* Bans sulfur hexafluoride use in nonessential applications.
- *Reduction of High Global Warming Potential GHGs in Consumer Products:* Reduces the amount of high global warming potential GHGs used as propellants in consumer products such as aerosol cans, tire inflators, electronics cleaning, and dust removal products.
- *SmartWay Truck Efficiency:* Requires retrofitting of trucks and trailers with technology that increases energy efficiency, e.g., reduces aerodynamic drag.
- *Tire Inflation Program:* Requires regular tire checks and inflation.
- *Green Ports:* Provides alternative sources of power to docked ships, such as cables that plug into onshore electrical outlets, allowing the ships to shut off auxiliary engines.

CARB must implement these discrete early action measures by regulation no later than January 1, 2010.<sup>18</sup>

### Reporting and Verification Regulations for GHG Emissions.

On December 6, 2007, CARB approved regulations that mandate GHG emissions reporting. CARB first amended the regulations in response to comments on June 5, 2008. The comment period for these changes ended July 15, 2008.<sup>19</sup>

The mandatory reporting regulations apply to the following entities:<sup>20</sup>

- California cement plants
- Petroleum refineries, hydrogen plants, and other facilities in California that emit  $\geq 25,000$  metric tons of carbon dioxide in any calendar year after 2007 from the combustion of stationary combustion and process sources
- Electricity generating facilities and cogeneration facilities in California, or outside of California that provide electricity to retail end users in California, that have a nameplate generating capacity  $\geq 1$  megawatt and that emit  $\geq 2,500$  metric tons of carbon dioxide in any calendar year after 2007 from electricity generating activities, including hybrid generating facilities
- Electric service providers, publicly owned electric utilities, and community choice aggregators that provide electricity to retail end users in California
- Marketers that are the purchaser or seller at the first point of delivery for electric power imported into California, or the last point of receipt in California for power exported out of the state.

In 2009, these entities will have to submit reports on their 2008 emissions of GHGs.<sup>21</sup>

### Determination of the 1990 Greenhouse Gas Emissions Level:

The Emissions Limit for 2020. CARB determined that the 1990 level of GHG emissions measured 427 million metric tons of carbon dioxide equivalent and set that number as its target emissions limit for 2020.<sup>22</sup> CARB estimates that the limit will require a 30 percent reduction in projected “business-as-usual” emissions levels for 2020, or a 10 percent reduction in current emissions levels.<sup>23</sup> To achieve such an ambitious mark, California must reduce carbon emissions by four tons per person per year.<sup>24</sup>

**Draft Scoping Plan.** To meet the 2020 emissions limit, CARB unveiled its draft scoping plan in June 2008.<sup>25</sup> CARB consulted with Climate Action Team subgroups, the Environmental Justice Advisory Committee, the Economic and Technology Advancement Advisory Committee, stakeholders, and the public.<sup>26</sup> CARB will discuss this plan at its November 2008 meeting.<sup>27</sup>

Key elements of the draft scoping plan include:

- Cap and trade program (enforceable beginning in 2012) that links to partner programs within the Western Climate Initiative to create a regional cap and trade market for electricity sources, industrial sources, transportation fuels, and commercial and residential sources.<sup>28</sup> (Creating a regional program will help avoid leakage, offsetting emissions from non-California sources).<sup>29</sup>
- Carbon fees estimated at \$10 to \$50 per metric ton of carbon dioxide equivalent to influence investment decisions and fuel choices made by large suppliers of goods and services. Revenue would support further reductions in GHGs.<sup>30</sup>
- State government to set an example with a green building initiative, using cleaner fuels in state motor vehicles, requiring green practices by the entities providing goods and services to the government, and providing commuter alternatives for state employees.<sup>31</sup>
- Increase in transportation efficiency including use of hybrid vehicles, more aerodynamic trucks, and a high-speed rail system.<sup>32</sup>
- Use of solar panels on roofs and water heaters.<sup>33</sup>

## HOW AB 32 WILL AFFECT BUSINESS

AB 32 and its attendant regulations will likely affect, either directly or indirectly, any sizable business that emits GHGs and does business in California. As CARB continues the process of implementing AB 32's extensive mandates, businesses will face the complex task of understanding their obligations and opportunities under AB 32. Among other items, businesses should consider the following issues that AB 32 raises:

- AB 32's reporting requirements are potentially cumbersome and will require broad consideration by GHG-emitting businesses. Once businesses determine whether they are

subject to reporting obligations, businesses must then consider the required equipment and other needed infrastructure to adequately monitor emissions for reporting.

- AB 32 will likely affect businesses, both in and out of California, that sell electricity to California. The current reporting obligations apply to "retail providers," defined as entities that provide electricity to retail end users in the state. Out-of-state utilities must consider what effect AB 32 regulation has on their operations and consider the law's effect on potential revenue from California customers.
- As California develops a cap and trade system, businesses will pay for emissions but can potentially profit from emissions credit trading by selling credits gained from reduced emissions. Minimizing losses, or maximizing profits, from an emissions trading system will require vigilance on the progress of regulations and monitoring of facility emission levels.
- AB 32 forces businesses across varying industries to consider the specific effect of AB 32's regulation on their activities. As noted above, the early action measures provide very specific mandates to industries from energy to transportation to the operation of ports.

AB 32 requires businesses to assess the extent of their activity in California, the progression of emissions regulation, and the need to implement or alter institutional policies to comply with, and even benefit from, California's global warming laws.

## WHAT ARE THE POTENTIAL CHALLENGES TO AB 32?

AB 32 is one of the first efforts, by a legislative body at any level, to reduce GHG emissions. However, a federal GHG emissions program may soon be a reality. Though recent efforts have faltered (Senate Majority Leader Harry Reid pulled the Lieberman-Warner Climate Security Act (S. 3036) in June of this year after Senate Democrats were unable to break a Republican-led filibuster), the upcoming presidential election portends a shift in federal climate change policy.

AB 32 may also face constitutional challenges.<sup>34</sup> If AB 32 discriminates against out-of-state entities by, for example, "treating electricity generated outside the state differently

from electricity generated inside its borders,” the statute could be vulnerable to commerce clause challenges.<sup>35</sup> Even more broadly, if AB 32 ultimately links its program with any foreign cap and trade program, the federal government’s constitutional authority to regulate foreign commerce could preempt it.<sup>36</sup>

## CONCLUSION

AB 32 will have a broad and significant effect on business. No matter AB 32’s ultimate fate, it likely will prove to be a model statute for other states, and the federal government, to stem global warming and its potential effects.

## LAWYER CONTACTS

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## ENDNOTES

- 1 Cal. Health & Safety Code §§ 38501–99 (West 2006).
- 2 *Id.* §§ 38550, 38560.
- 3 *Id.* § 38580(a).
- 4 *Id.* § 38551(c).
- 5 *Id.* § 38505(g).
- 6 *Id.* § 38560.5(a).
- 7 *Id.* § 38591.
- 8 *Id.* § 38530(a).
- 9 *Id.* § 38550.
- 10 *Id.* § 38561(a).
- 11 *Id.* § 38561(h).
- 12 *Id.* § 38560.5(b).
- 13 *Id.* § 38562(a).
- 14 *Id.* § 38563.
- 15 Air Resources Board, California Environmental Protection Agency, Expanded List of Early Action Measures To Reduce Greenhouse Gas Emissions in California Recommended for Board Consideration 3 (October 2007), available at [http://www.arb.ca.gov/cc/ceea/meetings/ea\\_final\\_report.pdf](http://www.arb.ca.gov/cc/ceea/meetings/ea_final_report.pdf) (all web sites last visited Sep. 3, 2008).
- 16 *Id.* at 11–12.
- 17 *Id.* at 13–15; California Air Resources Board, Summary of Board Meeting 4 (Oct. 26–27, 2007), available at <http://www.arb.ca.gov/board/ms/2007/ms102507.pdf>.
- 18 Cal. Health & Safety Code § 38560.5(b).
- 19 See California Environmental Protection Agency, Air Resources Board, Mandatory Greenhouse Gas Emissions Reporting, <http://www.arb.ca.gov/cc/reporting/ghg-rep/ghg-rep.htm>.
- 20 See Second 15-Day Modified Regulatory Language for Public Comment, Proposed Cal. Code Regs. tit. 17, § 95101(b), available at <http://www.arb.ca.gov/regact/2007/ghg2007/ghgattachment1.pdf>.
- 21 *Id.* § 95103(a)(1).
- 22 California Air Resources Board for the State of California, Climate Change Draft Scoping Plan 8 (June 2008), available at <http://www.arb.ca.gov/cc/scopingplan/document/draftscopingplan.pdf>.
- 23 *Id.* at ES-1.
- 24 *See Id.*
- 25 *See Id.*
- 26 California Air Resources Board, Climate Change Draft Scoping Plan: A Framework for Change 7 (June 26, 2008), available at [http://www.arb.ca.gov/cc/scopingplan/meetings/062608/sp\\_08-6-4pres.pdf](http://www.arb.ca.gov/cc/scopingplan/meetings/062608/sp_08-6-4pres.pdf).
- 27 *Supra* note 22, at ES-1.
- 28 *Supra* note 22, at 13–14.
- 29 Cal. Health & Safety Code § 38505(j).
- 30 *Supra* note 22, at 41.
- 31 *Supra* note 22, at 12.
- 32 *Supra* note 22, at 15.
- 33 *Supra* note 22, at 16.
- 34 Erwin Chemerinsky et al., California, Climate Change and the Constitution, *Envtl. F.*, July–Aug. 2008, at 50–63.
- 35 *Id.*
- 36 *Id.*

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