MARCH 2011

CALIFORNIA SUPERIOR COURT ENJOINS CALIFORNIA'S CAP AND TRADE PROGRAM FOR GREENHOUSE GAS EMISSIONS

On March 18, 2011, the San Francisco Superior Court issued its decision in *Association of Irritated Residents v. California Air Resources Board*, setting aside and enjoining implementation of the Scoping Plan developed by the California Air Resources Board ("CARB") under California's landmark Global Warming Solutions Act of 2006 (AB 32). CARB must first comply with the California Environmental Quality Act ("CEQA"), which requires public agencies to undertake environmental review of certain "projects" that may have a significant effect on the environment. The Superior Court injunction likely will delay several of CARB's greenhouse gas ("GHG") emission reduction programs, including its proposed cap and trade program, which we evaluated in our January 2011 *White Paper* (available at www.jonesday.com/california__adopts__cap__and__trade).

AB 32 requires CARB to prepare a Scoping Plan to reduce GHG emissions in California to 1990 levels by the year 2020. CARB approved the Scoping Plan on December 12, 2008. Yet 13 petitioners challenged CARB's adoption of the Scoping Plan, including the Association of Irritated Residents and seven individuals. Petitioners asserted that CARB had failed to meet the mandatory statutory requirements of AB 32 and CEQA. The Superior Court rejected the challenge based on AB 32, but partially accepted the challenge based on CEQA.

CARB COMPLIED WITH AB 32

The Superior Court rejected Petitioners' challenge that CARB did not adequately evaluate the costs, and the economic and noneconomic benefits, of the Scoping Plan, as required by AB 32. In particular, the Superior Court upheld CARB's choice of a cap and trade program as the primary methodology to achieve the emission reduction requirements of AB 32, rejecting Petitioners' challenge that AB 32 required CARB to show that emission reductions from

the cap and trade program will be at least equivalent to reductions achieved through direct regulations. In addition, the Superior Court upheld CARB's calculation of statewide GHG emissions in 1990, which will be the target statewide limit for 2020. The Superior Court also upheld CARB's decision not to include in the Scoping Plan direct emission reduction measures from the agricultural sector and upheld the Scoping Plan's regulation of the industrial sector through a combination of direct emission reduction measures and inclusion in the cap and trade program.

CARB DID NOT COMPLY WITH CEQA

The Superior Court determined, however, that CARB had not adequately discussed or evaluated alternative approaches to achieving GHG emission reductions, as required by CEQA. The Superior Court also held that CARB had improperly approved the Scoping Plan before completing the required environmental review process.

Under its environmental review program, which has been certified by the State of California as functionally equivalent to CEQA, CARB prepared a Functionally Equivalent Document ("FED") instead of an Environmental Impact Report ("EIR"), as is otherwise required (with limited exceptions) by CEQA when a "project" (such as approval of the cap and trade program) may have a significant effect on the environment. The Superior Court determined that the FED's evaluation of environmental impacts was sufficiently detailed for a program-level environmental document.

However, the Superior Court also determined that the discussion of alternatives in the FED was inadequate. The FED concluded that the environmental impacts of four of the five alternatives (the first alternative was the "no project" alternative), which included programs focused on source-specific regulations and carbon fees, would be similar to the impacts from the mix of emission reduction measures adopted in the Scoping Plan. This finding was based on the observation that the Scoping Plan and the four alternatives all target the same basic level of emission reductions. Noting that the FED provided few or no facts to support this conclusion, the Superior Court held that CARB must include a factual analysis of each of the alternatives to the Scoping Plan, specifically pointing to the carbon-fee alternative:

> While 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. ARB's extensive evaluation of the proposed cap and trade program in Chapter II of the Scoping Plan provides the public with information about cap and trade only. CEQA requires that ARB undertake a similar analysis of the impacts of each alternative so that the public may know not only why cap and trade was chosen, but also why the alternatives were not.

Association of Irritated Residents, Case No. CPF-09-509562, Statement of Decision at 30–31.

The Superior Court also determined that CARB had improperly approved the Scoping Plan before completing the environmental review. In early December 2008, CARB adopted a resolution that approved the Scoping Plan. In January 2009, CARB held a public workshop concerning implementation of the Scoping Plan. The notice for that workshop confirmed that CARB had approved the Scoping Plan in December 2008. It was not until May 2009 that CARB's executive officer approved the agency's responses to the public's comments on the FED. Because CARB did not have the responses to comments when it adopted the resolution in December 2008, the Superior Court determined that CARB was unable at that time to make an informed decision when it approved the Scoping Plan, thus undermining both CARB's certified environmental review program and CEQA's goal of informed decision making by public agencies.

In its tentative decision issued in January, the Superior Court indicated that it intended to enjoin implementation of the Scoping Plan because CARB had not complied with CEQA. CARB filed objections to the tentative decision, arguing that the Scoping Plan is not a condition precedent to CARB's rulemaking authority under AB 32, and thus the Superior

Court could not issue an order enjoining implementation of the proposed measures. The Superior Court rejected this argument and held that if an agency's decision has been made in violation of CEQA, and if activities undertaken pursuant to that decision will prejudice consideration of alternatives, a court "may enjoin any or all activities that could result in an adverse change to the physical environment until the agency has come into compliance with CEQA." *Association of Irritated Residents*, Statement of Decision at 34. Thus, in the final decision, the Superior Court issued a writ of mandate as to the alternatives analysis and timing, "commanding ARB to set aside its certification of the FED and enjoining any further implementation of the measures contained in the Scoping Plan until after Respondent has come into complete compliance with its obligations under its certified regulatory program and CEQA." *Association of Irritated Residents*, Statement of Decision at 35.

IMPLICATIONS

One clear implication of the decision is that CARB must undertake an expanded GHG emission reduction alternatives analysis and add the analysis to the FED. Because the peremptory writ of mandate issued by the Superior Court commands that CARB set aside its certification of the FED, it is very likely that CARB will have to issue a new notice and recirculate the revised FED for comments and consultation under section 15088.5 of the CEQA Guidelines.

The peremptory writ of mandate also enjoins any implementation of the Scoping Plan until CARB has satisfied the requirements of CEQA and CARB's certified environmental review program. Absent any stay of the decision, a likely implication of the writ is that action to finalize CARB's cap and trade program will be deferred until after the revised FED for the Scoping Plan is certified.

It is likely that CARB also will have to defer other rulemaking actions implementing the Scoping Plan, including revisions to the low-carbon fuel standard, amendments to regulations governing transport refrigeration units, and consideration of other offset protocols for the cap and trade program.

LAWYER CONTACTS

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our "Contact Us" form, which can be found at www.jonesday.com.

Dickson C. Chin
New York
+1.212.326.7893
dchin@jonesday.com

Thomas M. Donnelly
San Francisco
+1.415.875.5880
tmdonnelly@jonesday.com

Charles Hungerford
San Francisco
+1.415.875.5843
chungerford@jonesday.com