



CAP-AND-TRADE IN CALIFORNIA IS IMMINENT

The California Air Resources Board (“CARB”) has approved a supplemental environmental analysis of the Scoping Plan implementing California’s Global Warming Solutions Act (AB 32). The supplement supersedes and replaces the project alternatives section of the environmental assessment (also known as the Functional Equivalent Environmental Document) previously approved by CARB. CARB also reapproved the 2008 Scoping Plan. Both actions were taken by CARB at its public hearing held on August 24, 2011. These two actions increase the likelihood that CARB will approve final regulations for a California cap-and-trade program by October 28, 2011. If the regulations are approved as currently written, the cap-and-trade program will begin in January 2012.

PREVIOUS CHALLENGE TO THE ENVIRONMENTAL ASSESSMENT

As described in our *Commentary*, “[California Superior Court Enjoins California’s Cap and Trade Program for Greenhouse Gas Emissions](#)” (March 2011),

13 petitioners challenged CARB’s adoption of the Scoping Plan in *Association of Irrigated Residents v. California Air Resources Board*. On March 18, 2011, the San Francisco Superior Court determined that CARB had not adequately evaluated alternative approaches to achieving greenhouse gas emission reductions as required by the California Environmental Quality Act (“CEQA”), and on May 20, 2011, the Court ordered CARB to take no action in reliance on the Scoping Plan (including the cap-and-trade program) until CARB complied with CEQA. CARB appealed the decision, and on June 24, 2011, a California Court of Appeal stayed enforcement of the Superior Court’s order. *California Air Resources Board et al. v. Association of Irrigated Residents et al.*, Cal. Ct. App. No. 132165 (June 24, 2011).

The appeal of the Superior Court decision remains pending. On August 25, 2011, the Court of Appeal granted an extension of time for CARB to file its opening brief.

SUPPLEMENT TO THE ENVIRONMENTAL ASSESSMENT

While CARB disagreed with the Superior Court decision, it developed a supplement to the environmental assessment “in the interest of public participation and informed decision-making.” (CARB Notice of Decision filed August 26, 2011.) The supplement expands upon the original assessment and, in the process, addresses deficiencies identified by the Superior Court. The updated analysis was released for public comment on June 13, 2011, and CARB released staff’s responses to the submitted comments on August 19, 2011. CARB released a final supplement on August 19, 2011 that reflects minor modifications to the draft supplement made in response to written comments.

The supplement does not consider additional alternatives to implement AB 32, but instead includes an updated and more detailed evaluation of each of the five original alternatives: (1) no project; (2) cap-and-trade; (3) direct regulation; (4) carbon fee or tax; and (5) a combination of 2, 3, and 4. CARB’s analysis of these alternatives is discussed in more detail in our Summer 2011 issue of *The Climate Report*.

In its presentation to CARB at the August 24 public hearing, staff concluded that alternatives 2 (cap-and-trade) and 5 (combination of strategies) had the highest potential to meet the objectives of reducing greenhouse gas emissions as mandated by AB 32. Staff identified the 2008 Scoping Plan (which includes a cap-and-trade program as well as direct regulations and other mechanisms) as the preferred option, for the following reasons: (1) the quantitative cap provides greater certainty that the 2020 emission goal in AB 32 will be achieved; (2) the program described in the Scoping Plan is the most likely to achieve cost-effective emission reductions; and (3) the program minimizes the migration of emission sources (businesses) out of California (also known as leakage).

The supplemental analysis concludes that there is the potential for adverse environmental impacts associated with implementation of the greenhouse gas emission reduction measures in the Scoping Plan. However, CARB did not adopt mitigation measures as a condition of approving the Scoping Plan. As stated in CARB Resolution 11-27—which certifies the environmental assessment as revised by the supplement, and approves the Scoping Plan—a more detailed environmental analysis, including development of feasible mitigation measures, will be performed during the rulemaking process for the individual measures recommended in the Scoping Plan. CARB argues that specific mitigation measures cannot be identified until it develops the details of each measure and conducts additional project-level analyses of the impacts of each measure. A statement of overriding considerations was adopted as part of CARB Resolution 11-27.

NEXT STEPS

As reported in our *Alert*, “[CARB Releases Modified Cap-and-Trade Regulations for Final Approval](#)” (August 2011), CARB released modified cap-and-trade regulations on July 25, 2011. The deadline to submit comments on the modifications was August 11, 2011. On September 12, 2011, CARB issued notice of additional proposed changes to the cap-and-trade regulations that reflect, in part, the comments CARB has received. The deadline for public comments on this second set of revisions is September 27, 2011. The proposed modifications can be found at <http://www.arb.ca.gov/regact/2010/capandtrade10/capandtrade10.htm>.

CARB is scheduled to consider the proposed regulations for final approval at its public hearing on October 20, 2011. As indicated in the September 12 notice, CARB will consider the related environmental analysis and written responses to environmental comments. CARB must finalize the regulations within one year of the initial public notice of the proposed regulations to avoid an obligation to restart the rulemaking process by issuance of a new proposed notice. CARB has determined that this deadline is October 28, 2011.

If both sets of proposed modifications to CARB's cap-and-trade regulations are approved as written, the following deadlines will be established:

- The first compliance period will begin on January 1, 2013, rather than on January 1, 2012, and will extend to December 31, 2014;
- Sources must register with CARB by January 31, 2012 (or within 30 days of the effective date of the regulations, whichever is later) if they meet program inclusion thresholds for any year between 2008 and 2011 (an entity cannot hold an emission allowance or credit until the Executive Officer approves the entity's registration);
- July 15, 2012 is the deadline for an entity to submit an auction registration application for the first emission allowance auction (the Executive Officer must approve registration for an auction before an applicant may participate in the auction);
- The first auction of emission allowances will be held on August 15, 2012;
- On or before November 1, 2012, CARB will place individual emission allowances into the holding accounts of eligible covered entities;
- The second auction of emission allowances will be held on November 14, 2012;
- The obligation for most covered sources to have compliance instruments (defined as allowances, offset credits, and sector-based offset credits) at least equal to their carbon dioxide equivalent ("CO₂e") emissions begins on January 1, 2013;
- The first sale from the Allowance Price Containment Reserve will be held on March 8, 2013; and
- The deadline for most covered sources to surrender compliance instruments for CO₂e emitted in calendar year 2013 is November 1, 2014.

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.

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