

Client Alert.

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AB 32 Standstill? California's Cap-and-Trade Market on Hold until State Assesses Viable Program Alternatives

By Peter Hsiao, Jennifer Jeffers, William Sloan and Michael Steel

California's landmark Global Warming Solutions Act, Assembly Bill 32 ("AB 32"), suffered a major setback on Friday, March 18, when a California superior court judge ruled that the state did not adequately consider alternatives when developing its implementation plan. The decision in *Associated Irrigated Residents v. California Air Resources Board (CARB)* closely mirrors the court's February tentative ruling, the details of which can be found in our prior update by clicking [here](#).

The court concluded that CARB failed to meet the procedural requirements of the California Environmental Quality Act ("CEQA") in adopting its cap-and-trade regulations, which are scheduled to go into effect in 2012. In particular, the court held that CARB (1) failed to adequately describe and analyze alternatives in its Scoping Plan, specifically with regard to its justification for a cap-and-trade program; and (2) improperly began implementing the Scoping Plan prior to completing its CEQA-required environmental review process. The court held in favor of CARB on all substantive challenges to promulgating its regulations in compliance with AB 32.

The ruling does not prohibit CARB from adopting cap-and-trade regulations, nor does it explicitly require that the agency delay its implementation schedule. Rather, the court directed CARB to "enjoin any further implementation of the measures contained in the Scoping Plan" until the agency analyzes other alternatives to meet the state's environmental statute, such as a carbon tax, and sufficiently justifies its ultimate decisions.

The effect of the ruling on the state's cap-and-trade timetable is uncertain. CARB stated on Monday that it will appeal the ruling and respond to the court's order with a previously written 500-page environmental analysis that the agency says addresses the court's major CEQA concerns. CARB further downplays the impact of the ruling, asserting that the lawsuit is merely an anticipated hurdle in implementing state-wide climate change legislation and that the ruling will not create delays in the overall implementation process.

Should CARB complete the required analysis this summer and proceed with the cap-and-trade rulemaking, the effect of the court's recent decision would merely represent a snag in the overall programmatic process. However, more severe setbacks loom if CARB is unable to address the court's concerns by October—the key deadline for adoption of the cap-and-trade regulations scheduled to begin in 2012.

The immediate effect of the court's decision is to place cap-and-trade rulemaking on hold until CARB complies with CEQA. The ruling further indicates that other measures in the state's Scoping Plan, such as energy efficiency and clean car standards, may also necessarily be held up. The possibility of delaying these other programs may well provide environmental justice organizations with additional negotiating power in ensuring that CARB consider a full suite of

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Scoping Plan alternatives. However, broader delays to other Scoping Plan programs may also place clean energy and environmental programs at risk.

Agency officials claim that the success of AB 32 is critical to future national climate change efforts and will attract new “green” businesses to California. Those siding with plaintiffs, on the other hand, prefer a tax on carbon emissions and remain concerned that cap-and-trade regulations may inadvertently produce increased air pollution in the least wealthy parts of the state. The court has directed plaintiffs to draft the final order and we are closely following both the appeal and CARB’s substantive response to the court’s ruling.

Morrison & Foerster LLP is widely recognized as a leader among law firms in matters pertaining to climate change and greenhouse gas emissions, and maintains a full-service environmental law practice. For further information relating to AB 32 or other important climate change developments, please contact:

Peter Hsiao
(213) 892-5721
phsiao@mofo.com

Michael Steel
(415) 268-7350
msteel@mofo.com

William Sloan
(415) 268-7209
wsloan@mofo.com

Jennifer Jeffers
(415) 268-6113
jjeffers@mofo.com

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