

Calif. Forges Ahead With Sweeping Climate Change Regs

By attorneys at Morrison & Foerster LLP

Law360, New York (January 30, 2017, 12:24 PM EST) -- With federal climate change regulations facing an uncertain future, the California Air Resources Board recently released a far-reaching new plan to reduce the state's greenhouse gas (GHG) emissions 40 percent below 1990 levels by 2030. The "2017 Climate Change Scoping Plan Update" (scoping plan) proposes a 10-year extension of the state's carbon cap-and-trade program, in addition to new GHG emission regulations aimed at the refinery sector. But confronted with a pending lawsuit and linkage obstacles with other carbon trading systems, the Golden State's cap-and-trade program is not without its own challenges.



William M. Sloan

Trump Administration Targets Climate Change Regulations

Running directly counter to the Obama administration's actions on climate change and clean energy deployment, President Donald Trump has promised to dismantle Obama's 2013 Climate Action Plan (CAP). From the Clean Power Plan to the finalization of U.S. Environmental Protection Agency rules on methane-emission reductions, Trump has vowed to unravel much of Obama's climate legacy.



Michael Steel

As part of Obama's multipronged plan to reduce carbon pollution, the CPP has been widely regarded as the CAP's linchpin. Adopted pursuant to Section 111(d) of the Clean Air Act, the CPP would establish the first-ever national standards to limit GHG emissions from existing power plants.[1] However, the U.S. Supreme Court has stayed implementation of the CPP while lawsuits challenging it are resolved. If fully implemented, the CPP would significantly influence how energy is generated, transmitted and consumed in the United States.



Dustin Elliott

With the new president, the survival of the CPP is very much in doubt. Beyond the pending lawsuits, in December 2016, a 24-state coalition led by West Virginia and Texas submitted a letter to Trump requesting that he rescind the CPP on the first day of his presidency.[2] In response, a counter coalition of states and cities sent Trump a letter urging him to preserve the rule and continue defending it in court.[3] New York Attorney General Eric

Schneiderman, then-California attorney general and now U.S. Sen. Kamala Harris, D-Calif, and others contend that any attempt to remand the rule or undermine its enforcement would only lead to more litigation.

In short, while some form of nationwide carbon emissions regulation remains probable in the long term, implementation of the CPP over the next four years is in doubt. Indeed, shortly after Trump was sworn into office, his administration deleted all references to climate change from the White House website. In addition, Trump's nominee for EPA administrator — Oklahoma Attorney General Scott Pruitt — has led the legal charge against the EPA in its attempt to implement the CPP.[4]

California Forges Ahead

In sharp contrast to Trump's promise to roll back federal climate change regulations, California Gov. Jerry Brown signed Senate Bill 32 into law on Sept. 8, 2016. By requiring California to reduce its GHG emissions by 40 percent from 1990 levels by 2030, SB 32 is one of the most aggressive carbon reduction laws in the world.

CARB released its updated scoping plan on Jan. 20, shortly after Trump's inauguration. Building on and modifying CARB's previous discussion draft from December 2016, the scoping plan proposes a multipronged regulatory scheme for meeting SB 32's ambitious goals. The centerpiece of this scheme is the state's carbon cap-and-trade program, which establishes carbon allowances for the state's most prominent electric power plants, large industrial plants and other major carbon emitters.[5] Those allowances are auctioned off, and the companies receiving the allowances are then free to buy and sell the allowances among themselves. In turn, the total carbon emissions cap decreases gradually over time, thereby modulating and smoothing the economic impact. The scoping plan makes clear that the cap-and-trade program, which has operated in the state since 2012, will serve as the primary tool by which California will reduce emissions for decades to come.

The scoping plan explored a number of alternative regulatory mechanisms, all of which were ultimately rejected as being more burdensome and less cost effective than the cap-and-trade system. Direct regulation, for instance, was considered but dismissed due to likely legislative and implementation barriers. A pure "carbon tax" alternative was also considered yet dismissed due to price-setting challenges and a lack of direct carbon reduction provisions. A "cap-and-tax" program proposed by CARB's Environmental Justice Advisory Committee (EJAC) was rejected for similar reasons.

In addition to proposing an extension of the state's carbon cap-and-trade system, the scoping plan includes a host of other elements designed to help California meet the ambitious climate goals established by SB 32. One new feature is a direct regulation aimed at the refinery sector. In addition to the implementation of retrofit control technology (RCT),[6] the scoping plan proposes to cut GHG emissions across the refinery sector by 20 percent from 2005 levels by 2030. In addition, the scoping plan proposes to make the low carbon fuel standard more stringent, targeting an 18 percent reduction in carbon intensity by 2030 (increased from 10 percent by 2020). Other features of the scoping plan include incorporation of California's renewable portfolio standard (requiring the state's utilities to draw half their power from renewable sources by 2030), as well as further reductions in methane, hydrofluorocarbon and black carbon emissions.[7]

Challenges Ahead

In view of the scoping plan's heavy emphasis on California's cap-and-trade program, the program faces a number of challenges moving forward.

First and foremost, the cap-and-trade program is the focal point of a lawsuit pending in California's Third District Court of Appeal, where the cap-and-trade auctioning of carbon allowances is being challenged as an

unconstitutional tax. The outcome of the case has significant implications for how the state administers its cap-and-trade program, especially given that any new state tax requires a two-third majority of both houses of the California Legislature.[8] Most significantly, detractors of the program have noted that while SB 32 passed and was signed into law in September of last year, it did not pass by a two-thirds majority.

California also continues to wrestle with the linkage of its cap-and-trade program to similar programs from other states and countries. To be sure, a long-term goal of the state's carbon trading system is to link to external systems and markets. Indeed, the scoping plan includes provisions to maintain California's existing link to Quebec's carbon trading program, and notes that discussions on California's linkage to Ontario's cap-and-trade system are underway. But as California's carbon emitters continue to reduce GHG emissions, additional reductions will be increasingly difficult to come by.

States and countries with less advanced carbon markets will, in theory, have more low-hanging fruit to yield large-scale emission reductions, thereby making efficient and fair linkage to California's increasingly advanced market more and more challenging. In addition, some environmental justice groups oppose the use of offset credits in the trading program, arguing that reductions should occur directly at the emission sources, which can often be located in disadvantaged communities in California. Has the Golden State created too much of a good thing? Onlookers and policymakers from around the world will watch as these issues continue to develop.

Looking Ahead

With many signs pointing to less federal carbon regulation, states are expected to carry the load with the continuation and advancement of carbon-emission regulation at least over the next four years. California's aggressive GHG emission reduction targets established in SB 32 position the Golden State at the cutting edge of these state-led regulatory schemes. As detailed above, CARB's recently released scoping plan sets forth a multipronged approach for accomplishing SB 32's goals, with the state's carbon-trading program operating as the linchpin.

The dynamic nature of California's carbon trading market should not be underestimated. From the pending legal challenges to the emerging linkage difficulties with external carbon markets, California's policy landscape continues to evolve as a preeminent staging ground for climate change regulation at both the national and global scales. Looking ahead, these issues present a host of complex legal, business and political considerations for companies both in and outside of California to weigh in their decision-making.

William M. Sloan and Michael Steel are partners and Dustin Elliott is an associate at Morrison & Foerster LLP in San Francisco.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] The EPA simultaneously adopted a final rule to establish greenhouse gas performance standards for new stationary sources, pursuant to Section 111(b) of the Clean Air Act. 80 Fed. Reg. 64510 (Oct. 23, 2015).

[2] Patrick Morrissey, A Communication From 24 States and State Agencies Regarding Withdrawal Of the Unlawful Clean Power Plan, State of West Virginia, Office of the Attorney General (Dec. 14, 2016), 2-3,

available at <http://www.ago.wv.gov/Documents/2016.12.14%20CPP%20Letter%20M0142296.PDF>.

[3] Eric Schneiderman, et al., New York, California, Hawaii, Iowa, Illinois, Maine, Maryland, Massachusetts,

New Mexico, Oregon, Rhode Island, Vermont, Virginia, Washington, the District of Columbia, Boulder (Colo.), New York City, Broward County (Fla.), South Miami (Fla.), Dec. 28, 2016, available at https://ag.ny.gov/sites/default/files/20161228_final_letter.pdf.

[4] See, e.g., Michael Phillis, “24 AGs Back Pruitt For Head of EPA,” Law360, Jan. 5, 2017, available at <https://www.law360.com/articles/877771/24-ags-back-pruitt-for-head-of-epa>.

[5] See 17 C.C.R. §§ 95811-95812 (detailing the categories and emission thresholds for “covered entities” under California’s cap-and-trade program).

[6] The refinery feature of the scoping plan is a nod to EJAC’s environmental justice concerns that the major emission sources are too often placed in disadvantaged communities. While GHG emission reductions aim to address global climate issues, GHG emission reductions in the refinery sector would likely result in simultaneous emission reductions in criteria pollutants — a largely localized issue for disadvantaged communities.

[7] The scoping plan also proposes the development of an "Integrated Natural and Working Lands Action Plan" to secure California’s land base as a net carbon sink, in addition to another plan aimed at the development of a biomass and waste-utilization scheme.

[8] Morning Star Packing Company et al. v. State Air Resources Board et al., No. C075954, filed Feb. 28, 2014 (3rd CA DCA). The Third District Court of Appeal heard oral arguments in the case on Jan. 24, 2017.