

Carbon Market Executive Briefing

Association of Irrigated Residents v. California Air Resources Board

Summary and Implications for California Cap-and-Trade Program

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Association of Irrigated Residents v. California Air Resources Board

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California Environmental Quality Act (“**CEQA**”)

Purpose: requires government agencies to consider environmental consequences before approving plans and policies or committing to a course of action on a project

Procedural Requirement: agencies must identify environmental effects, mitigation measures and alternatives to the proposed project in an Environmental Impact Report (“**EIR**”)

Certified Regulatory Program

> Certain agencies, such as the California Air Resources Board (“**CARB**”), are “Certified Regulatory Programs” and file functionally equivalent documents (“**FEDs**”) instead

“Tiering”: allows agencies to conduct EIRs or FEDs in two steps

- > Program EIR/FED is prepared for a series of actions that may be considered one large project
- > Project EIR/FED examines the impact of a specific development project and may incorporate by reference earlier EIRs or FEDs

Global Warming Solutions Act of 2006 (“**AB 32**”)

Adopted and signed into law in 2006

- > Sets 2020 reduction goal into law
- > Directs CARB to prepare a scoping plan (the “**Scoping Plan**”) to identify how best to achieve the 2020 limit

Scoping Plan

- > Approved December 12, 2008
- > CARB conducted a first-tier, program FED for the Scoping Plan
 - > Appendix J of the Scoping Plan: 119-page program FED
 - > Program FED assessed a number of options, including no source-specific regulatory requirements without cap-and-trade component, carbon fee, no action, a variation of the proposed measures in the Scoping Plan

Cap-and-Trade Draft Regulations

- > Approved December 16, 2010
- > Appendix O contains the project FED

AIR v. CARB: Parties, Action and Posture

Petitioners: a collection of concerned citizens and nonprofit organizations

Respondents: CARB, the Chairman of CARB, and members of CARB

Nature of Action: Petition for Writ of Mandate, filed June 10, 2009

Court: Superior Court of California, County of San Francisco, Judge Goldsmith

Decision: Tentative Statement of Decision: Order Granting in Part Petition for Writ of Mandate entered January 24, 2011

- > A tentative decision does not constitute judgment, is not binding, and may be modified by the court. Any party may object to this tentative decision within 15 days after service. The court could then order a hearing on the objection
- > In *AIR v. CARB*, the period to object ends February 14, 2011. To date, no objections have been filed
- > Judge Goldsmith must sign and file a judgment within 50 days after the announcement or service of the tentative decision, whichever is later, or if a hearing was held, within 10 days of the hearing

AIR v. CARB: Arguments

Petitioners make arguments in two general categories

1. CARB improperly interpreted and failed to comply with AB 32 by
 - > excluding sectors of the economy from greenhouse gas emission controls
 - > failing to consider total costs and benefits to the environment, economy, and public health before adopting
 - > failing to consider all information regarding other greenhouse gas emission reduction programs
 - > including a cap-and-trade program
2. CARB violated CEQA and its Certified Regulatory Program because its FED
 - > failed to adequately analyze the impact
 - > failed to adequately analyze alternatives
 - > implemented Scoping Plan prior to completion of the FED

Respondents argue that they complied with AB 32 and CEQA, and that petitioners disagree with their policy decisions

AIR v. CARB: Court Analysis and Holding

Judge Goldsmith held

1. CARB did **not** improperly interpret or fail to comply with AB 32
2. CARB **did** violate CEQA because it
 - > failed to adequately analyze alternatives to cap-and-trade in the program FED (e.g., no source-specific regulatory requirements without cap-and-trade component, carbon fee, no action, a variation of the proposed measures)
 - > improperly approved the Scoping Plan prior to FED completion

Court is proposing to issue a Peremptory Writ of Mandate

1. commanding CARB to set aside its certification of FED
2. enjoining implementation of the Scoping Plan until after CARB complies with its obligations under its certified regulatory program and CEQA

AIR v. CARB: Implications

1. Order to set aside the Program FED

- > CARB must revise its FED, fleshing out its analysis of alternatives to cap-and-trade
- > Re-certify its FED and re-adopt the Scoping Plan
 - > Likely to take 6 months from final court decision?

2. Enjoining further implementation of Scoping Plan

- > Issues: Can CARB host its offset workshop in March? Can CARB publish new, final version of the regulations?
 - > Recall Cap-and-Trade regulations have their own specific FED
 - > But that FED incorporates the Scoping Plan FED by reference pursuant to CEQA Guidelines §15150
- > Issue: what will be the exact language of the Peremptory Writ of Mandate?