COX CASTLE NICHOLSON

LAND USE & NATURAL RESOURCES

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CLIMATE PLAN ENJOINED? TRIAL COURT ISSUES PROPOSED DECISION REGARDING IMPLEMENTATION OF AB 32 SCOPING PLAN

In a potentially far-reaching move, a San Francisco Superior Court judge has ruled that the California Air Resources Board failed to conduct an adequate environmental impact review before it adopted the State's AB 32 Scoping Plan in December 2008. This plan sets forth the Board's basic outline of actions to reduce California's greenhouse gas emissions. The court issued a proposed order which would enjoin "any implementation of the Scoping Plan" until the Board complies with the California Environmental Quality Act (CEQA).

The lawsuit was filed by a number of environmental justice groups challenging the Scoping Plan as failing to comply with the substantive mandates of AB 32, the Global Warming Solutions Act of 2006, and the impact review and procedural requirements of CEQA. The court issued a proposed decision on January 21 in which it rejected all of the substantive legal challenges to the Scoping Plan under AB 32, holding that the Board did not act arbitrarily and capriciously in adopting the Plan. Thus the court denied the environmental groups' request for an order rejecting the plan as inconsistent with AB 32.

The environmental groups were successful, however, in arguing that the Board did not comply with CEQA in its environmental review for the Plan, and in the adoption of the Plan itself. Like many environmental regulatory agencies, the Board's actions were part of a "certified regulatory program" which allows the preparation of a "functional equivalent" documents under CEQA instead of preparing environmental impact reports or negative declarations. Generally, these functional equivalent documents must include analysis that largely duplicates an EIR, although the agency is not formally subject to the requirement to prepare an EIR.

Among other things, a "functional equivalent" document must include an analysis of alternatives to the project. The environmental groups argued that the Board violated CEQA in three ways. They claimed that the Board failed to adequately evaluate alternatives to the adopted plan, that the impact analysis was too generalized, and that the Board improperly adopted the Scoping Plan before the environmental impact review had been completed.

The court agreed with the environmental groups on two of their three arguments. First, the court ruled that the analysis of alternatives failed to include a sufficient factual explanation justifying the Board's adoption of the Scoping Plan over several other alternatives, including an alternative that would rely on a carbon fee to reduce emissions. The court specifically found that the Board had tried to proceed with cap and trade as a *fait accompli* without sufficient evaluation of alternatives. Second, the court found that the Board acted prematurely. When the Board adopted the Scoping Plan in December 2008, it had not yet finished preparing the responses to comments on the "functional equivalent" document. Finally, the court rejected the environmental groups' claim that the impact

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analysis was too general and did not evaluate the impacts of potential biofuel facilities in sufficient detail. Relying on CEQA cases that have upheld a generalized analysis when an agency is adopting a program-level document, the court found that the general level of detail in the Board's analysis was sufficient.

Although the court's ruling is a proposed decision, the potential implications of the decision are profound. The court's order may change in response to comments or objections from the parties, but at a minimum, it likely will slow California's efforts to adopt a cap and trade program. The proposed decision also contemplates issuance of a broad writ of mandate, which would direct the Board to halt "any implementation" of the Scoping Plan until the Board complies with CEQA. This could affect not only the Board's December 2010 decision to proceed with a cap and trade program, but the implementation of many other measures as well. [*Association of Irritated Residents et al v. California Air Resources Board, San Francisco Superior Court Case No. CPF-09-509562.*]

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