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Earthjustice Claims California GHG Plan Illegal; Citizen-Suit Powers Urged

Posted August 13, 2008

Attorneys with Earthjustice argue California's draft plan to implement a sweeping greenhouse gas (GHG)-reduction program fails on several counts to comply with the state's landmark 2006 state global warming law, charging that regulators have ignored potential new regulations on certain industry sectors and are advancing an illegal cap-and-trade program. Further, the activist legal group is urging regulators to recommend that lawmakers approve an enforcement scheme that would allow citizen-based legal challenges against all the regulations and market-based measures included in the climate plan.

The new Earthjustice arguments on behalf of the Center for Biological Diversity (CBD) are monumental because they provide a window to the potential legal landscape around California's climate change plan. While Earthjustice and CBD are considered to fall more toward the far left of environmental groups, in terms of views on how to reduce GHG emissions, they are expected to play a key role in affecting how California moves forward.

Because California's climate change program efforts are being closely watched by other state officials and federal policymakers as potential models, legal arguments over how they are developed may influence how future measures are crafted.

The California Air Resources Board (CARB) is the lead state agency implementing the 2006 global warming law, AB 32, which includes a requirement that the agency adopt by the end of this year a sweeping "scoping plan" to reduce GHG emissions to 1990 levels by 2020. In late June, CARB staff released a draft scoping plan that lays out all the regulations, market-based programs, incentive strategies and other measures the state plans to implement over the next several years to meet its GHG-reduction mandate.

CARB officials are currently reviewing a slew of stakeholder comments on the draft plan and are scheduled to release a revised version of the plan Oct. 3. The board is then slated to adopt the final scoping plan in November. Most of the regulations on various industry sectors would be promulgated over the following two years and become effective in 2012.

In a 14-page Aug. 11 letter to CARB, Earthjustice staff attorney William Rostov argues that several core sections of the draft scoping plan violate AB 32. In a broad sense, Rostov claims CARB has failed to meet the statute's mandate to adopt "maximum technologically feasible" GHG reductions through direct regulations on certain industry sectors.

"CARB inexplicably ignores this requirement and does not include it as a basis for evaluation," he writes. "By doing so, CARB removes an essential statutory standard for evaluating the scoping plan. As a consequence, decisions made by CARB appear politically motivated rather than based on a reasoned decision-making record."

As an example, Rostov charges CARB "arbitrarily chose not to regulate the agricultural sector even though technologically feasible reductions exist." In a footnote, Rostov argues that the agriculture sector could be required by CARB to electrify internal engines; improve the efficiency of irrigation pumps; or install solar-powered equipment that can replace some irrigation pumps.

"AB 32 simply does not exempt certain sectors from regulation," Rostov adds.

CARB inappropriately limits its emission-reduction plan to the minimum required by AB 32, which amounts to about 169 million metric tons of GHG reductions by 2020, Rostov continues. As a result, all the regulations and market-based measures included in the plan are not likely to achieve the emission-reduction target, he says.

"If even one rule is found not to be cost-effective or does not achieve its projected amount of reductions, CARB would

have proposed insufficient emissions reductions," Rostov states. "Thus, CARB should use the maximum technologically feasible requirement to identify the whole universe of potential reductions, and then apply the cost-effectiveness analysis to that larger universe."

The cap-and-trade program CARB has proposed—including a plan to link to the regional Western Climate Initiative (WCI)—also violates AB 32, Rostov claims. For instance, WCI's proposal includes several provisions that violate AB 32, including banking of emission credits, a different emissions-baseline starting point for regulated entities, and a less stringent declining emissions cap, Rostov says.

WCI is a proposed regional GHG cap-and-trade program that includes seven Western states and four Canadian provinces.

In addition, the lawyer questions how CARB could possibly comply with AB 32's requirement that the agency enforce a cap-and-trade program if California joins WCI.

It is "not obvious how CARB would be able to enforce the validity of credits generated in another state or a Canadian province," he says. "As CARB is well aware, WCI cannot create a trading system where states have enforcement powers outside their jurisdictional boundaries, because this type of arrangement would raise constitutional issues."

To significantly bolster enforcement of the California climate program in the years to come, CARB should include in the scoping plan a detailed recommendation that the California legislature approve a new law allowing "citizen enforcement" of all the CARB GHG regulations and market-based measures, according to Earthjustice.

This essentially amounts to the possibility for unlimited legal challenges by activist groups, based on past experience with citizen-suit provisions that have been attached to environmental regulations. For example, California's 1986 toxic chemical-warning law, Proposition 65, included a citizen-enforcement provision. Since then, tens of thousands of lawsuits have been noticed or filed by private "citizen enforcers," which usually take the form of small law firms.

Rostov argues that because AB 32 provides CARB with the authority to identify and make recommendations on "monetary and non-monetary incentives, CARB should use this authority to evaluate and recommend that citizens should have a statutory right to enforce the emission reductions measures that CARB adopts."

Such a new law could be based on the model of the federal Clean Air Act's private right of action, Rostov adds.

"In contrast, it would be an ironic twist if the public was only encouraged to participate in the rulemakings and then asked to stand aside and hope that these regulations will be successfully implemented."

CARB officials declined to respond specifically to Earthjustice's contentions. "CARB is still receiving public comment on the draft scoping plan," a CARB spokesman says. "We continue to consider the many comments and suggestions received to date, including those in the letter from Earthjustice, as we develop the proposed scoping plan for submission to the board in November."

A source with a major industry organization closely tracking the scoping plan called the Earthjustice positions potentially damaging to the overall effectiveness of the California program, specifically by challenging cap-and-trade and producing costly and crippling litigation via the citizen-enforcement provision.

"We are advocates of a well-designed cap-and-trade system," the industry source says, pointing out that the European Union currently operates a major trading program and that the federal government in the United States is seen as likely adopting a nationwide cap-and-trade program within the next few years. "That type of program has a proven track record."

A citizen-suit enforcement provision for all AB 32 regulations "looks like [something] trial lawyers could really use to their advantage," the industry source adds. "It would allow trial lawyers to go in and be the enforcing agency rather than CARB, or whoever CARB deems appropriate," likely resulting in numerous legal challenges that are arbitrary and frivolous and serve mostly to exact attorneys' fees out of companies attempting to comply with the CARB regulations, the source says.

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