

Calif. cap-trade plan dealt blow by S.F. judge

Wyatt Buchanan, Sacramento Bureau
S.F. Chronicle, Friday, Feb. 4, 2011

Sacramento - -- The California Air Resources Board violated state environmental law in 2008 when it adopted a comprehensive plan to reduce greenhouse gases and again last year when it passed cap-and-trade regulations, a San Francisco Superior Court judge has ruled in a tentative decision.

If the decision is made final, California would be barred from implementing its ambitious plan to combat global warming until it complies with portions of the California Environmental Quality Act, though it is not yet clear what the air board would have to do to be in compliance. The state's plan, which implements AB32, the Global Warming Solutions Act of 2006, would reduce carbon emissions to 1990 levels by 2020.

The Air Resources Board and those who brought the lawsuit, a variety of environmental groups represented by the Center on Race, Poverty and the Environment, a San Francisco organization, have until Tuesday to respond before the court makes a final ruling.

In his decision, Superior Court Judge Ernest Goldsmith ruled that the air board approved the larger plan to implement AB32 prior to completing the required environmental review, and that the board failed to adequately consider alternatives to cap and trade.

The Air Resources Board "seeks to create a fait accompli by premature establishment of a cap-and-trade program before alternative (sic) can be exposed to public comment and properly evaluated by the ARB itself," Goldsmith found, adding that the air board's "analysis provides no evidence to support its chosen approach."

The judge said the air board's reasoning for approving the larger plan without a complete review "undermines (the state environmental quality act's) goal of informed decision-making." Air board officials argued that the board had "adopted" a decision rather than having made an "approval." Goldsmith called that argument "an empty distinction given that the implementation has commenced."

The California Environmental Quality Act, signed into law by then-Gov. Ronald Reagan in 1970, is intended to ensure that state and local agencies identify potential negative environmental consequences from their activities and to either mitigate those consequences or prevent them altogether.

The plaintiffs, including a group called the Association of Irrigated Residents, have backed AB32 and helped defend it against Proposition 23, a ballot measure in November that would have suspended it indefinitely. Even though their suit could now suspend AB32's implementation, "There's a way to both be supportive of AB32 implementation but to be responsible in that support and ethical in that support, and we ask the same of the board," said Alegría De La Cruz, legal director for the Center on Race, Poverty and the Environment.

Adequate review

Environmental advocates have for months raised concerns about whether the air board was adequately addressing the impacts of implementing AB32 on disadvantaged communities. Goldsmith issued his ruling on Jan. 21 and the parties received notification of the ruling last week, but the decision has received little public attention.

In an e-mail, Stanley Young, a spokesman for the Air Resources Board said, "We are reviewing this tentative decision and will respond within the allotted time."

The cap-and-trade portion of the suit hinges on the air board's evaluation of five alternatives to that regulation. In its analysis, the air board spent 10 pages discussing an alternative of doing nothing while the four other alternatives received only three pages total.

Those alternatives include a variation of the adopted plan and other carbon reduction measures.

On the overall carbon emission reduction plan, the court found the air board approved it prior to issuing responses to public comment as is required by law and the air board's own regulatory program.

The court dismissed, however, claims that the plan to reduce emissions violated AB32 itself.

Additional analysis

Michael Zischke, an attorney not affiliated with the case who specializes in the California Environmental Quality Act, said, "At a minimum it is a delay and whether it has more of a substantive effect depends on what the air board does."

The industries that are impacted by cap and trade need the problem resolved as soon as possible, said Shelly Sullivan, spokeswoman for the AB32 Implementation Group, an organization made up of those industries, which include oil companies, manufacturers, cement makers and Chambers of Commerce.