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Failure to Launch

Alan Ramo
Golden Gate University School of Law, alan_ramo@att.net

THE RECORDER
ESSENTIAL CALIFORNIA LEGAL CONTENT

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Should the procedural steps in the California Environmental Quality Act delay the state Air Resources Board's climate change policy? After all, fundamentally CEQA's purpose is to require the avoidance of unnecessary adverse environmental impacts from state-sanctioned activities, not to delay beneficial pollution-reduction activities.

This question is now at the forefront of a San Francisco Superior Court decision issued on March 18 that blocks the implementation of the California Global Warming Solutions Act, commonly known as AB 32. AB 32 requires that the state's greenhouse gas emissions be reduced to 1990 levels by 2020 to help avert global climate change. San Francisco Superior Court Judge Ernest Goldsmith held that CARB failed to sufficiently analyze alternative approaches and respond in time to public comments about its proposed cap-and-trade program put forth in its scoping plan, a blueprint of greenhouse gas regulation required by the act and adopted in December 2009. Ironically, to many commentators, it was the more grassroots, left-leaning environmentalists, not industry, who brought this petition for a writ of mandate.

CONCERNS ABOUT CAP-AND-TRADE

Cap-and-trade is the approach to environmental regulation that engendered so much controversy on the national stage and has led Republicans to scuttle national comprehensive climate change legislation. The idea, used apparently successfully to minimize acid rain under the federal Clean Air Act, is intended to utilize market mechanisms to minimize industry and governmental regulatory costs. Basically, government awards credits or allowances to pollute to each industrial source based upon their current baseline emissions. Then over many years, the cap on total pollution, and thereby the cap on each source, is gradually lowered until a goal of lowered emissions is achieved. Industries that reduce their pollution below their cap obtain additional credits that they can then sell or trade to those industries that find it technologically difficult or expensive to control their pollution. In this manner, cap-and-trade, with little intrusive governmental regulation, can use the market to achieve reductions where it is most cost-efficient and technologically achievable. It is also hoped the provision of credits for reductions below the cap will spur innovation.

Whether this market-regulatory approach works in the real world and in a nondiscriminatory fashion is another question. While the acid rain program is generally lauded, Southern California's RECLAIM program was significantly criticized by environmental groups as being flawed, and it eventually seemed to

break down during the energy crisis. Significant claims of fraud have been made about the South Coast's auto-scrapping credit program. Massive assertions of fraud and fake credits have been lodged about the European Union's global warming trading program.

In addition to these concerns about cap-and-trade in general, grassroots and so-called environmental justice advocates have their own specific concerns (environmental justice is the doctrine — first officially recognized by President Clinton's executive order and now accepted in such states as California — that addresses the disproportionate impact of environmental impacts due primarily to race and class). They worry that there may be unusual market dynamics involving facilities in urban core areas that might actually cause them to increase emissions or delay needed pollution reductions if cap-and-trade is poorly designed. The result, in their view, would be discriminatory given the heavy disproportionate minority populations in those areas. They prefer carbon taxes or outright command-and-control regulation — direct implementation by government of specific pollution control strategies at each source of pollution.

These grassroots and environmental justice advocates — represented by the Center on Race, Poverty and the Environment and Communities for a Better Environment — raised these concerns to the California Air Resources Board, the primary agency charged with implementing state global warming laws. According to Goldsmith, CARB dismissed four alternatives to the proposed cap-and-trade in three pages, with little substantive information. He stated that a carbon tax alternative was dismissed in two paragraphs of "bare conclusions." CARB did not even publish the staff's response to comments until after the board voted to approve the cap-and-trade concept.

QUESTIONING DELAYS

The ability of environmental agencies to carry out apparently beneficial programs without full environmental review procedures has been the subject of frequent litigation and much statutory crafting. For many activities, by statute or regulation, the agencies need not address the California Environmental Quality Act at all. Traditional enforcement activities are usually exempt, such as administrative compliance orders, civil or criminal actions, or the issuance of permits. Still other activities that are usually thought of as noncontroversial or having little likelihood of impacts are deemed exempt by regulation. There is a CEQA statutory categorical exemption for the renewal of existing projects, though that exemption can be overridden by a demonstration that in a particular case new adverse impacts may occur.

For environmental programmatic decisions and other activities deemed to have possible significant impacts, California has the approach of using an expedited procedure that is "functionally equivalent" to CEQA pursuant to California Public Resources Code §21080.5. An agency submits its abbreviated review program to the California Secretary of Resources, which assures it meets minimum requirements of Title 14, California Code of Regulations §15251(d). CARB developed its scoping plan through this expedited procedure, omitting CEQA steps such as initial studies, notices of preparation, negative declarations or full-blown environmental impact reports. But the essential elements of all of these concepts must remain, including the consideration of alternatives and responses to comments. Even under an expedited process, the fundamental concept that an agency must consider the public's view and take a hard look at alternatives remains.

Still many are now questioning the delay that may result from a writ stopping the implementation of the scoping plan. Notwithstanding those politicians who have made it a crusade to deny or minimize global warming, human-caused climate change is widely recognized in the scientific community, from the United Nation's international Nobel Prize winning Intergovernmental Panel on Climate Change to the United States' National Academy of Sciences. A detailed analysis by the U.S. government just last year found the threat of drought, flash floods, sea level rise, disruptions in agriculture, increased pollution and deaths

from very hot spells to be all too real and imminent. Many scientists worry the climate is nearing tipping points where abrupt, devastating changes in climate can occur.

Most alarming is that many climate gases, such as carbon dioxide, may last in the atmosphere for 100 years or more. Delay means living with the results for decades and increases the need for costly and transformative adjustments in our polluting activities, such as energy generation and transportation — two of the biggest sources of greenhouse gases.

However, if the problem of climate change is so imminent and severe, should a court give what CEQA law often labels irreversible momentum, or what the judge called a *"fait accompli,"* to an approach to pollution that at best may be ineffective and at worst discriminatory and counterproductive? Petitioners were not satisfied by CARB's promise to "monitor" the situation and "consider" measures to avoid discriminatory impacts in the future.

The court listed many questions unanswered by the staff in its discussion of the carbon tax alternative: "[H]ow fees or taxes are established, criteria for setting the amounts, what the California, United States and worldwide experience has been, how it is administered and by whom, what are the alternatives for use of the revenue and what sectors of the economy it should be considered for, or not, and why. [The scoping plan] does not provide the basic information necessary for [CARB] and the public to be informed about this alternative and its place in California's massive effort to improve the environment pursuant to legislative mandate."

The failure by the CARB staff to provide a response to comments before adopting the scoping plan raises a deeper issue. Addressing climate change requires building strong political support behind a well-thought-out strategy. CARB is obligated to review its staff response to comments to assure, as the California Supreme Court has put it, it "will fully consider the information necessary to render decisions that intelligently take into account the environmental consequences." Mountain Lion Foundation v. Fish & Game Com., 16 Cal.4th 105 (1997). But it also needs to do it, as the Supreme Court further stated, as it "promotes the policy of citizen input underlying CEQA."

An injunction enforcing CEQA requirements will not unduly delay the scoping plan's implementation. The automobile emissions programs and the expanded 33 percent renewable portfolio standard for electricity recently signed by Gov. Jerry Brown are moving ahead. The recession's effects have delayed emissions increases. Building public support by respecting public input and seriously exploring alternatives may in the end be the most important greenhouse gas strategy.

Alan Ramo is a professor at Golden Gate University School of Law, where he directs the environmental law program. He is the co-founder and former director of its Environmental Law and Justice Clinic.

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