CALIFORNIA LEGISLATURE DEMANDS ADDITIONAL 40% CUT IN CARBON AIR EMISSIONS BY 2030

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Two climate change bills were passed by the California legislature recently: SB 32 and AB 197. Senate Bill 32 would require California to cut greenhouse gas levels to 40 percent below 1990 levels by 2030, extending the state's authority to enact climate policies beyond the 2020 reduction to 1990 levels. Assembly Bill 197 would support those goals by giving legislators more power over the Air Resources Board.

AB 197 is tied to SB 32, AB 197 is intended to increase oversight of the state's Air Resources Board and to adjust climate policies to consider impacts on poor communities. The bill would create six-year term limits for ARB members, add two nonvoting legislators to the board, create a new legislative committee with oversight on climate change policies and mandate that the ARB share more data with the Legislature. The bill specifically mentions targeting policies to "disadvantaged communities" and requires an assessment of "social costs" in areas such as agriculture and energy prices.

The Governor's Expectations

The Governor's goal is for California to obtain 50 percent of its electricity from renewables in 2030 (up from 25 percent today). He intends to accomplish this feat with zero-emissions vehicles becoming 25 percent of the fleet by 2035 (up from about 1 percent today), high-speed rail is displacing car travel, biodiesel replacing diesel in heavy-duty trucks, pastures converting to forests, and electricity replacing natural gas in heating.

SB 32, known as the Global Warming Solutions Act of 2006 is an environmental law passed by the California State Legislature and signed into law by Gov. Arnold Schwarzenegger on September 27, 2006. SB 32 says that by the year 2020, the level of emissions of greenhouse gases in the state must be reduced to the level that such emissions had in 1990. It is estimated that reducing the state's greenhouse gas emissions to 1990 levels would require an approximate 25% reduction over the level of emissions in 2006, the year the bill was signed.

Beginning in the fall of 2012, the state began auctions of "pollution credits" to businesses in the state that product carbon, such as oil refineries and power plants. In the auction, companies would bid to pay money to the state in exchange for the ability to continue to emit atmospheric pollutants at a higher-than-would-otherwise-be-allowed level.

The California Chamber of Commerce's Argument and the Court's Findings

The California's Chamber of Commerce challenged the cap and trade program in court arguing the auction of cap and trade allowances exceeds the scope of authority granted to ARB in SB 32 and that the sale of allowances at auction constitutes an illegal tax adopted without the requisite supermajority vote of the California State Legislature. The Sacramento Superior Court upheld the constitutionality of California Air Resources Board's cap and trade auctions in the related cases *California Chamber of Commerce v. ARB* and *Morning Star Packing Company v. ARB*. The court held that the sale of allowances is within the broad scope of authority delegated to ARB in SB 32. The

court found that it was "reasonable to assume that the legislature understood the phrase 'distribution of emissions allowances' to potentially encompass both giving away allowances and selling them via an auction or direct sale."

The court also rejected the argument that the auction provisions constituted an illegal tax because SB 32 was not passed by a two-thirds vote of the legislature, as required by Proposition 13. The court focused on the distinction between taxes and fees and reviewed the various categories of fees not subject to Proposition 13's supermajority requirement, including special assessments and related business charges, development fees, user fees and regulatory fees. The court found "the charges to be more like a regulatory fee/charge than a traditional tax." Thus, the court held the cap and trade market did not need to be approved by a supermajority of both houses of the California legislature.

The California Court of Appeal ordered the parties and interveners in the consolidated cases of *California Chamber of Commerce v. California Air Resources Board* (Case No. C075930) and *Morning Star Packing Co. v. California Air Resources Board* (Case No. C075954) to submit supplemental briefing on seven narrowly tailored questions.

The court first asked the parties what the rationale and purpose is for the regulations stating that the auction credits confer no property rights. Under CARB regulations, a "Property Right" is "any type of right to specific property whether it is personal or real property, tangible or intangible." 14 Cal. Code of Regs. § 95802(a)(299). An auction credit "does not constitute property or a property right." 14 Cal. Code of Regs. § 95820(c). The issue of property rights arises under an analysis of whether CARB's auction of carbon allowances is a valid regulatory fee.

Second, the court asked the parties to "[d]escribe the relationship, if any, between the probable environmental impacts caused by covered entities and the revenue generated from the auctions, and whether the record shows [CARB] established a reasonable relationship between the two." This question also arises under an analysis of whether CARB's auction of carbon allowances is a valid regulatory fee. Under the Sinclair Paint court decision, discussed above, there must, among other things, be a reasonable relationship between a regulatory fee and the burdens or benefits on the payor of that fee in order for the fee to be valid.

Third and fourth, the court posed questions regarding two possible defenses to the Proposition 13 challenge to the cap-and-trade auction system. In general, California's Proposition 13 (California Constitution, Article XIII A, Section 3) requires that "changes in State taxes enacted for the purpose of increasing revenues" be passed by two-thirds of all members of the state legislature.

The court asked whether the auction system could be defended against the Proposition 13 challenge on the grounds that it is akin to a development fee. Under California law, a development fee would not be a tax subject to a two-thirds vote. The court also asked whether the auction system could defeat the Proposition 13 challenge on the grounds that the auction system sells to covered entities the "privilege to pollute." Similar to questions 1 and 2, question 4 also arises under an analysis of whether CARB's auction of carbon allowances is a valid regulatory fee.

Fifth, the court asked whether the charges are levied for "unrelated revenue purposes" – meaning revenue purposes that are unrelated to the activity of regulating the fee payers themselves, apparently looking for a "nexus" to certain programs. In this question, the court specifically asked the parties to discuss the remedy as a practical matter if the court were to find certain programs are "not sufficiently tethered" to the goals of SB 32.

Sixth, the court asked whether the auction payments are voluntary or compulsory.

And finally, the court's seventh question is what is the remedy if the court determines the regulations are an invalid regulatory fee or an unconstitutional tax? Briefs on these questions were submitted in May 2016.

Importantly, the state's cap-and-trade program established under SB 32 was not included in either AB 197 or SB 32. The goals set by these two bills will need to be achieved with or without the cap-and-trade program. Governor Brown hopes that the new bills, once he signs them

into law, will put pressure on businesses to comply with SB 32 and accept, even embrace, the cap-and-trade program as an economically feasible means to reach California's new GHG goals. Our California environmental litigation attorneys will continue to watch the progress of the bills.