

California cap-and-trade plan faces setback

Published: 21 Mar 2011

California did not adequately consider alternatives to its plan to create a cap-and-trade market for carbon emissions, a judge ruled on Monday.

The state's regulator on climate change matters, the California Air Resources Board (Carb), will need to consider other possibilities to meet state environmental law, San Francisco Superior Court Judge Ernest Goldsmith wrote in an opinion. In particular he said that the state had not made a thorough examination of putting a tax on carbon.

In his ruling, Goldsmith wrote that Carb must halt "further implementation of the measures contained in the Scoping Plan until after respondent has come into complete compliance with its obligations."

Carb reacts

Stanley Young, director of communications at Carb, said the board did not agree with the court's decision and planned to appeal it. "In the meantime, we are clarifying the scope of the judge's order since slowing down the implementation of all measures in the Scoping Plan is at odds with the court's more limited discussion of the issue regarding the environmental analysis of the cap-and-trade draft regulation," he said.

Young said he didn't believe the plaintiffs want to put on hold efforts to improve energy efficiency, establish clean car standards and develop low carbon fuel regulations, other key elements of the Scoping Plan that are unrelated to the cap-and-trade programme. "A broadly worded writ puts at risk a range of efforts to move California to a clean energy economy and improve the environment and public health," Young said in an email.

Regarding the environmental analysis for cap and trade, Young said Carb had completed a "robust and comprehensive" 500-page environmental analysis that fully addresses the concerns the court raises. "We will rely on this analysis in responding to the court's decision," he said.

Bump in the road or more?

One analyst saw a potential major effect of the ruling. "This could be huge," said Jon Costantino, a senior advisor with law firm Manatt, Phelps & Phillips in Sacramento and former climate change planning manager at Carb.

If Carb is able to complete the analysis this summer and go forward with the cap-and-trade rulemaking, the decision would only amount to a "bump in the road," he said. "But it could be more problematic if Carb can't satisfy the court's concerns by October" -- the key deadline for adoption of the cap-and-trade regulation, he added.

Plaintiffs in the case challenged the plan, fearing it would inadvertently increase air pollution in some pockets of the state. With carbon trade due to start in California in 2012, it was not immediately clear if the ruling would threaten that schedule.

Air Resources Board Chairman Mary Nichols last week dismissed fears by many market participants that the lawsuit would delay the start of the programme. "The lawsuit is not a factor in terms of delay. It's just part of what you have to go through to implement a programme," she said, noting that a variety of legal challenges can be expected whenever the government tries to enact new environmental policies.

Unlikely opponents

California has forged ahead with its climate change plan, arguing it will attract new "green" business as it improves the environment, and environmentalists see its success as key to any future US federal effort.

The court case in question, though, is by "environmental justice" groups who seek to make sure environmental regulation benefits the least wealthy parts of society.

But Alegria De La Cruz, lead attorney for the group challenging the state's process, said that the judge clearly wanted a real discussion of alternatives. "It's not an exercise in futility," she said by telephone.

The judge, who directed plaintiffs to draft a formal order, or writ of mandate, made clear that cap and trade should be put on hold but also indicated other measures in the state's master document of climate change measures, called the Scoping Plan. "The order gives us lots of room to play there," she said.

The particular issue regards a document called a Functional Equivalent Document (FED) prepared to assess environmental consequences of the Scoping Plan, which sets out cap-and-trade goals. "In order to ensure that Carb adequately considers alternatives to the Scoping Plan and exposes its analysis to public scrutiny prior to implementing the measures contained therein, the court must enjoin any further rulemaking until Carb amends the FED in accordance with this decision," the judge wrote. De La Cruz estimated that the process of a new analysis, public review, state response to public comments, and adoption of the new document could take three and a half to five months.

Plaintiffs pleased

The Association of Irrigated Residents, the plaintiffs in the case, hailed the court's decision. "This ruling will compel ARB to fully consider those of us most affected by its decisions, and not just move forward in its haste to make major polluters happy," Association President Tom Frantz said in a statement.

The judge also rejected another challenge to cap and trade, which was part of the same case. That challenge was specifically related to the state's 2006 climate change law, known as AB 32. The Superior Court case is Association of Irrigated Residents vs. California Air Resources Board, CPF-09-509562.

Updated to add quotes by Carb's spokesperson Stanley Young.

By Rory Carroll
Washington DC and San Francisco