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Association of Irrigated Residents v. California Air Resources Board: Climate Change and Environmental Justice

INTRODUCTION

California embarked on its journey toward climate change mitigation in 2006 by passing comprehensive legislation that set ambitious goals for the state. In the multi-year implementation effort led by the California Air Resources Board that followed, the environmental justice community continually expressed its concerns about both the quality of the process and the results therefrom. Unsatisfied with the final regulations, the environmental justice advocates headed to court, claiming that the inadequate process resulted in regulations that violated the state legislation itself. However, as discussed here, California courts held that the regulations were consistent with both the authority delegated and the goals defined by the state legislature.¹ In the end, these decisions reveal that the environmental justice community may have little recourse to advocate for their principles in the courts.

I. BACKGROUND

A. *California's Ambitious Plans*

California's landmark climate change legislation, the Global Warming Solutions Act of 2006 (AB 32), formalized goals that were first set by former Governor Arnold Schwarzenegger. At the 2005 United Nations World Environment Day event, the Governor signed Executive Order S-3-05 establishing California as a leader in combatting climate change.² In his order, the Governor cited concerns about public health, water supply, public lands, and agriculture that make California uniquely vulnerable to temperature increases and other effects of climate change. The order declares that a reduction in greenhouse gas (GHG) emissions will not only mitigate these consequences, but will also benefit the state's economy through savings and increased profits associated with new technologies in this field. In order to

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1. *See Ass'n of Irrigated Residents v. Cal. Air Res. Bd.*, 206 Cal. App. 4th 1487, 1493 (2012).
2. Cal. Exec. Order S-3-05 (2005), available at <http://gov.ca.gov/news.php?id=1861>.

realize these outcomes, it concludes by setting targets for GHG reductions through 2050 and directing the Secretary of the California Environmental Protection Agency (Cal/EPA) to coordinate a team to report biannually on progress and impacts.

In its first report, the Climate Action Team (CAT) established by Cal/EPA provided in-depth analysis of climate change impacts, as well as a number of strategies to reduce emissions in the state.³ Strategies included measures aimed at increasing efficiencies in the transportation and energy sectors, reforestation, and new minimum environmental standards in various industries, among others. While many of the strategies were already being implemented by state agencies, the report also noted areas where legislative authority would be required for implementation. The report includes a special section on “market-based options for California” recommending a cap and trade system.⁴ It discusses design options such as allowances, offsets, and enforcement and lays out the next steps—including legislative authority—necessary to support cap and trade.

At the same time, lawmakers and advocates began working together to develop legislation that would provide this authority and give the Governor’s executive order “the full force of law.”⁵ The legislation was jointly authored by Assembly Member Fran Pavley and Assembly Speaker Fabian Núñez and was supported by the Natural Resources Defense Council and the Environmental Defense Fund.⁶ While some business interests, including the California Chamber of Commerce, opposed the bill, others agreed to support it, creating a broad network that was critical for the bill’s success.⁷ At the end of August 2006, the Governor announced his support and the legislature approved the bill. It was signed into law on September 27, 2006.⁸

AB 32 formalized the governor’s emissions reduction goal to achieve 1990 level GHG emissions by 2020. It designated California’s Air Resources Board (ARB) as the lead agency to develop regulations for reporting and verification of state-wide GHG emissions, and programs and enforcement systems to support the goal.⁹ The bill requires ARB to utilize an “open public process”¹⁰ to develop regulations intended “to achieve the maximum technologically feasible and cost-effective greenhouse gas emission reductions”

3. CAL. CLIMATE ACTION TEAM, CLIMATE ACTION TEAM REPORT TO GOVERNOR SCHWARZENEGGER AND THE LEGISLATURE (2006), available at http://www.climatechange.ca.gov/climate_action_team/reports/index.html.

4. *Id.* at 65.

5. *Making a Difference (E2 and AB 32)*, ENVTL. ENTREPRENEURS, Oct. 2006, available at <http://www.e2.org/jsp/controller?docName=campaignDisplay&activityName=GlobalWarmingCA>.

6. *Id.* at 5, 8.

7. *Id.* at 3, 4.

8. *Id.* at 9.

9. CAL. HEALTH & SAFETY CODE § 38530 (West 2012).

10. *Id.* § 38560.

and incorporate measures to achieve these reductions in a “scoping plan.”¹¹ The bill further requires that ARB review “market-based compliance mechanisms” and permits ARB to adopt such a mechanism as part of the approved regulations.¹²

ARB published its Climate Change Draft Scoping Plan in June 2008, relying heavily on CAT’s 2006 report.¹³ This Scoping Plan comprises dozens of measures that cut across levels of government and industries to increase energy efficiency and incentivize the development of clean technologies. Many of these measures are mutually reinforcing; for example, a low carbon fuel standard, integrated transportation planning by local governments, and a tire inflation program all seek to decrease the carbon intensity of California’s transportation sector. Other major measures include the nation’s most aggressive renewable portfolio standard, public goods charges on the use of water and high global warming potential gases (e.g., refrigerants used in industrial processes that have a significantly higher impact on global warming than carbon dioxide (CO₂)), energy and resource efficiencies (e.g., through solar water heating and more stringent green building codes) and an economy-wide cap and trade program.

B. Cap and Trade Program Essentials

The cap and trade program outlined by ARB will set firm limits on GHG emissions for 85 percent of the state’s emission sources.¹⁴ Cap and trade programs work by setting an absolute limit (the cap) on emissions and requiring each emitting entity to obtain permission (an allowance) for each unit of emissions they release.¹⁵ The total number of allowances is equivalent to the emissions cap and emitting entities must obtain allowances equal to their own emissions for each period.¹⁶ The system effectively puts a price on pollution, forcing covered emitters to internalize the cost of the damage they are doing to the environment¹⁷ and incentivizing them to reduce emissions in the future.¹⁸ As compared to other regulatory approaches, a cap and trade system minimizes

11. *Id.* § 38561(a).

12. *Id.* § 38561(b).

13. See *AB 32 Scoping Plan*, CAL. AIR RES. BD., <http://www.arb.ca.gov/cc/scopingplan/scopingplan.htm> (last updated Apr. 3, 2013).

14. CAL. AIR RES. BD., CLIMATE CHANGE SCOPING PLAN C-13 app. C (2008) (“Sector Overviews and Emissions Reductions Strategies”), available at <http://www.arb.ca.gov/cc/scopingplan/document/scopingplandocument.htm>.

15. Nathaniel O. Keohane, *Cap-And-Trade is Preferable to a Carbon Tax*, in CLIMATE FINANCE 58 (Richard B. Stewart et al. eds., 2009).

16. ROBERT N. STAVINS, A U.S. CAP-AND-TRADE SYSTEM TO ADDRESS GLOBAL CLIMATE CHANGE 8 (2007).

17. Gilbert E. Metcalf & David Weisbach, *The Design of a Carbon Tax*, 33 HARVARD ENVTL. L. REV. 499, 500 (2009).

18. See Stavins, *supra* note 16.

the cost of emissions reductions by enabling emitters to find and choose the least-cost method of compliance, whether that be reducing emissions directly or purchasing allowances at market-based rates.¹⁹

However, cap and trade programs have been criticized for sacrificing equity for economic efficiency²⁰ and creating a disparate impact on minority and low-income communities.²¹ This is because cap and trade programs allow GHG-producing facilities—often located near these vulnerable communities—to continue polluting. Opponents note that facilities that produce GHG emissions also tend to produce other air pollutants such as sulfur oxides, nitrogen oxides, and benzene.²² Unlike CO₂, these co-pollutants are detrimental to the health of nearby populations, causing an increase in illness and death from respiratory and heart diseases.²³

Under a cap and trade program, a facility could maintain its conventional operations and emission levels while buying allowances, ensuring compliance with the program. However, this would provide no relief for the local community, as co-pollutant emissions continue unabated. Even worse from an environmental justice perspective, a facility might increase its emissions at a particular location where it is very costly to modify operations, and decrease them at another location where it is cheaper to retrofit or modify the facility. The former community would thus bear an increasingly disproportionate share of the overall public health burden. In this way, a cap and trade program can be less effective as a regulatory scheme in which the state requires individual facilities to reduce emissions.

C. California's Proposed Cap and Trade Program in Brief

The scoping plan sketches out some basic elements of a cap and trade program for California and broad principles to guide the specific planning stages.²⁴ It begins by identifying the capped entities: in 2012, the program began by covering large electric utilities (comprising both in-state generation and imported electricity) and industrial facilities; in 2015, the program will be extended to fuel distributors, creating an economy-wide cap and trade system.²⁵ It makes a preliminary estimate of the emissions limit for 2020 and requires that emissions are steadily reduced in each of the intervening years.²⁶ The plan provides for initiating a process to fully develop the regulations in partnership

19. *Id.*

20. Alice Kaswan, *Environmental Justice and Domestic Climate Change Policy*, 38 ENVTL. L. RPTR. NEWS & ANALYSIS 10287, 10294 (2008).

21. *Id.* at 10298–99.

22. *Id.* at 10298.

23. CAL. AIR RES. BD., RECOMMENDATIONS ON DRAFT AB 32 SCOPING PLAN 9 & n.17 (2008).

24. CAL. AIR RES. BD., *supra* note 14.

25. *Id.* at 31.

26. *See* CAL. AIR RES. BD., *supra* note 14, at C-17–18.

with stakeholders and experts in the field, considering such factors as allowance distribution, offset regulations, reporting, enforcement, and penalties for noncompliance.²⁷ The plan concludes by setting January 1, 2011 as the deadline for rule development in order to implement the program by January 1, 2012.²⁸ ARB adopted the scoping plan in December 2008.²⁹

II. ASSOCIATION OF IRRITATED RESIDENTS V. CALIFORNIA AIR RESOURCES BOARD

A. *The Role of Environmental Justice in the AB 32 Process*

In anticipation of the wide-reaching effects of this legislation, AB 32 required ARB to work with diverse interests through a public process to develop the scoping plan.³⁰ ARB convened a number of groups to advise on various aspects of the plan, including an Environmental Justice Advisory Committee (EJAC), Economic and Technological Advancement Committee, and Market Advisory Committee, which made cap and trade program design recommendations.³¹ ARB held over a dozen public workshops and meetings in Sacramento and throughout the state.³² By the time ARB adopted the scoping plan, they had received comments from more than 42,000 people via mail, email, and website submissions.³³

In particular, the EJAC expressed its concerns to ARB in three communications during 2008 that foreshadowed the community's eventual lawsuit.³⁴ Early on, the committee warned the ARB chairperson that staff was not collecting—nor planning to collect—information necessary to discern the impacts of ARB proposals on vulnerable communities and to “maximize the benefits and minimize the harms” of those proposals.³⁵ Instead, citing peer-review commentary on the plan's economic analysis, the EJAC believed that the plan “gives the appearance of justifying the chosen package of regulatory measures rather than evaluating it or looking at policy options.”³⁶ The

27. *Id.* at C-23–24.

28. *Id.* at C-24.

29. Climate Change Scoping Plan, Res. 08-47 (Cal. Air. Res. Bd. Dec. 11, 2008), available at http://www.arb.ca.gov/cc/scopingplan/document/final_sp_resolution.pdf.

30. CAL. HEALTH & SAFETY CODE § 38560 (West 2012).

31. See *Advisory Groups and Committees*, CAL. AIR RES. BD., <http://www.arb.ca.gov/cc/committees/committees.htm> (last updated June 30, 2010).

32. See CAL. AIR RES. BD., *supra* note 14, at ES-2–3.

33. *Id.*

34. See e.g., Letter from Angela Johnson Meszaros & Jane Williams, Co-Chairs, Env'tl. Justice Advisory Comm. on the Implementation of Global Warming Solutions Act 2006 (AB 32), to Mary Nichols, Chairman, & James Goldstene, Executive Officer (May 7, 2008), available at <http://www.arb.ca.gov/cc/ejac/ejac.htm>.

35. *Id.* at 2.

36. See Letter from Angela Johnson Meszaros & Jane Williams, Co-Chairs, Env'tl. Justice Advisory Comm. on the Implementation of Global Warming Solutions Act 2006 (AB 32), to Mary

committee also emphasized the role of “procedural justice”—the “idea that those most affected by environmental hazards should have a role in decision making about those hazards”—in the environmental justice movement as well as in AB 32 itself,³⁷ and the EJAC was ultimately disappointed in ARB’s engagement with their issues, citing a lack of “any meaningful consideration or response to our comments and recommendations” and a failure to even present and discuss their issues fairly in the final plan.³⁸

B. *The Lawsuit*

Stakeholders remained dissatisfied with the final scoping plan approved by ARB and subsequently filed suit in California Superior Court on June 10, 2009.³⁹ The plaintiffs were five environmental justice organizations and six individuals.⁴⁰ Each of the organizations had provided comments and testimony to ARB during the development of the scoping plan.⁴¹ All six of the individuals served on the EJAC, including the committee’s co-chair.⁴² The plaintiffs comprising the Association of Irrigated Citizens (AIR), complained that the scoping plan “does not reflect the advice and recommendations of the EJAC regarding environmental justice issues”⁴³ and that public participation was thwarted when attendees at a hearing were delayed for hours before given an opportunity to speak, and Spanish-speakers were subjected to extra obstacles to participation.⁴⁴

AIR’s legal challenge asserted that ARB had failed to comply with AB 32 statutory requirements as well as the California Environmental Quality Act (CEQA).⁴⁵ They alleged that ARB’s scoping plan does not “achieve the maximum technologically feasible and cost-effective greenhouse gas emission reductions,” as required by the law⁴⁶ because it fails to compare the benefits of various technologies and strategies, and it wholly or partially excludes some sectors from which significant reductions could be achieved, such as agriculture and industry.⁴⁷ AIR argued that a cap and trade program, in particular, may not be a means by which to achieve the maximum feasible and

Nichols, Chairman, & James Goldstene, Executive Officer at 2 (Oct. 1, 2008) (“Recommendations on Proposed AB 32 Scoping Plan”), available at <http://www.arb.ca.gov/cc/ejac/ejac.htm>.

37. *Id.* at 7.

38. *Id.* at 1.

39. Complaint, *Ass’n of Irrigated Residents v. Cal. Air Res. Bd.*, No. CPF-09-509562 (Cal. Super. Feb. 19, 2010), 2010 WL 6813171.

40. *Id.* at ¶¶ 19–32.

41. *Id.*

42. *Id.*

43. *Id.* at ¶ 53.

44. *Id.* at ¶ 193–94.

45. *Id.* at ¶¶ 79–176.

46. CAL. HEALTH & SAFETY CODE § 38560 (West 2012).

47. Complaint, *supra* note 39, at ¶¶ 79–112.

cost-effective reductions, and that ARB failed to investigate or develop the policies necessary to ensure it could be.⁴⁸ AIR also alleged that ARB failed to investigate the costs and benefits to public health and the environment as required by AB 32.⁴⁹

They also charged that ARB did not comply with CEQA in the process of preparing and adopting the scoping plan. CEQA requires that state and local agencies identify significant environmental impacts of proposed projects and review mitigation measures and alternatives to the project.⁵⁰ To the extent that alternatives or mitigation measures exist that would avoid the significant environmental impacts, they should be employed. However, if “specific economic, social, or other conditions” make the alternatives or mitigation measures infeasible, the project may be approved.⁵¹ The report ARB must complete under this statute is called a Functional Equivalent Document (FED), so named because it is a streamlined study that agencies with certified regulatory programs may prepare in lieu of a full environmental impact report.⁵² AIR charged that ARB did not adequately evaluate the costs and benefits of the cap and trade program or its alternatives as required in its FED⁵³ and that ARB further violated CEQA requirements when it approved and began implementing the plan long before reviewing and approving the FED.⁵⁴

On May 11, 2011, the trial court held that ARB had abused their discretion in approving the plan without adequate review of project alternatives and before completing the CEQA process through review and adoption of the FED.⁵⁵ The court therefore set aside ARB’s approval of the plan and the FED and enjoined it from further action until it came into compliance.⁵⁶

However, the court held in favor of ARB with regard to the plan’s compliance with AB 32 requirements.⁵⁷ To reach its conclusion, the court applied a deferential “arbitrary and capricious” standard of review to these challenges, as described in *Yamaha Corp. of America v. State Board of Equalization*.⁵⁸ The first step in this analysis evaluates whether the legislature delegated law-making authority to the administrative agency to pursue the stated legislative goal.⁵⁹ The court found that the language in AB 32 conferred

48. *Id.* at ¶¶ 104–12, 125–27.

49. *Id.* at ¶¶ 113–23.

50. CAL. PUB. RES. CODE § 21002 (West 2012).

51. *Id.*

52. CAL. PUB. RES. CODE § 21080.5.

53. Complaint, *supra* note 39, at ¶¶ 135–38, 164–73.

54. *See id.* at ¶¶ 129–33.

55. *Ass’n of Irrigated Residents v. Cal. Air Res. Bd.*, 2011 WL 8897315 (Cal. Super. May 20, 2011).

56. *Id.*

57. *Id.*

58. 19 Cal. 4th 1 (1998).

59. *Id.* at 10.

discretion on ARB to formulate the measures in the scoping plan.⁶⁰ When that level of authority is granted, the second step in the analysis is to consider whether the administrative action is “reasonably necessary” to accomplish the legislative goal.⁶¹ The standard the court applies to make this determination is whether the actions of the agency are arbitrary and capricious with respect to the legislative goal, and without evidentiary support that they will be effective.⁶² Thus, the court did not evaluate whether ARB was “right or wrong . . . to choose cap and trade.”⁶³ And even where the court found that there were “flaws in the analyses”⁶⁴ or that ARB’s interpretation of AB 32 was “overbroad,”⁶⁵ this was insufficient to conclude that ARB was arbitrary and capricious.⁶⁶

C. *The Appeal*

The case was appealed by both ARB and AIR.⁶⁷ While the appeal was pending, ARB proceeded to make the corrections as ordered by the trial court, certifying a supplemental FED and then re-adopting the same scoping plan in August 2011.⁶⁸ Thereafter, ARB’s appeal was dismissed and the issues remaining on appeal were AIR’s allegations that ARB had not satisfied the requirements of AB 32.⁶⁹

AIR argued that the trial court did not properly apply *Yamaha* and other California Supreme Court precedents because, even where the legislature has delegated authority, the court should not apply the arbitrary and capricious standard when a regulation is challenged as inconsistent with the plain language of the statute.⁷⁰ When an agency’s quasi-legislative regulation is challenged as fundamentally inconsistent with a statute, AIR argued, the proper standard of review is “respectful non-deference.”⁷¹ Only if the regulation is found consistent, should the court move on to decide if it is “reasonably necessary to effectuate the purpose of the statute” via the arbitrary and capricious standard.⁷² Therefore, the trial court had erred in skipping to the

60. *Ass’n of Irrigated Residents v. Cal. Air Res. Bd.*, 2011 WL 312702 at *5 (Cal. Super. Jan. 24, 2011).

61. *Yamaha*, 19 Cal. 4th at 16–17.

62. *Id.*

63. *Ass’n of Irrigated Residents*, 2011 WL 312702 at *13.

64. *Id.* at *17.

65. *Id.* at *18.

66. *Id.*

67. *Ass’n of Irrigated Residents v. Cal. Air Res. Bd.*, 206 Cal. App. 4th 1487, 1493 (2012).

68. *Id.* at 1494.

69. *Id.*

70. Opening Brief for Petitioners and Cross-Appellants at *16, *Ass’n of Irrigated Residents v. Cal. Air Res. Bd.*, 206 Cal. App. 4th 1487 (2012) (No. A132165).

71. *Id.*

72. *Id.* at *16 (quoting *Yamaha Corp. of America v. State Bd. of Equalization*, 19 Cal. 4th 1, 11 (1998)).

arbitrary and capricious standard without evaluating whether ARB's regulations and cap and trade program violated the plain language of AB 32.⁷³ AIR continued to argue that the actions ARB took were in violation of the requirements of AB 32 because they would fail to achieve the maximum reductions and because the agency did not conduct sufficient public health analyses.

However, the appellate court agreed with the trial court that the proper standard was the deferential arbitrary and capricious standard, and that the trial court had satisfied itself that ARB was within its scope of authority.⁷⁴ The court followed the Supreme Court in finding that a "more deferential standard of review is appropriate" when an agency "has been granted considerable discretion to determine what is necessary to accomplish a valid legislative goal."⁷⁵ Therefore, the court did not address whether or not the cap and trade program violated the plain language of the statute.

The court found that AB 32 was in fact "exceptionally broad" in its directives to ARB on the scoping plan, requiring the arbitrary and capricious standard of review.⁷⁶ Based on that standard, the court found that ARB was not arbitrary and capricious and that it had significant evidentiary support for a cap and trade program and other measures adopted in the scoping plan.⁷⁷ The court cited what it considered extensive evaluation of proposed measures, industry considerations, and public health impacts.⁷⁸ The court particularly noted that "the Board went to exceptional lengths to obtain informed and scholarly input on the complex scientific and economic issues" which lent evidentiary support for the adoption of the scoping plan.⁷⁹ The court also placed emphasis on the fact that many of these measures are preliminary in nature and will be analyzed in greater depth, and more conclusive data will be available in the future.⁸⁰

III. DISCUSSION

Even under the more stringent standard of review that AIR advocated, AIR probably would not have succeeded on their substantive arguments alleging failure to comply with AB 32. The appeals court made it clear that ARB had done exhaustive studies as required by AB 32 and that while the issues were "complex" and data were often still preliminary and inconclusive, they still provided "significant evidentiary support" for their proposed course of

73. *Id.* at *16-17.

74. *See Ass'n of Irrigated Residents*, 206 Cal. App. 4th at 1495.

75. *Id.* (quoting *S.F. Fire Fighters Local 798 v. City and Cnty. of S.F.*, 38 Cal.4th 653, 670 (2006)).

76. *Id.*

77. *Id.* at 1502.

78. *Id.* at 1502-05.

79. *Id.* at 1497.

80. *Id.* at 1505.

action.⁸¹ On this basis, it would not appear that the court would find that AIR had provided sufficient evidence that another course of action would clearly deliver more “technologically feasible and cost-effective reductions.” The court found that ARB did the best it could to achieve those results in an atmosphere of uncertainty about the interaction of complex economic and environmental factors. Therefore, it does not seem likely that the court would have found a violation of the plain language of AB 32, under even the “respectful non-deference” standard.

Regardless of this loss in the courts, it is not hard to see why environmental justice advocates feel aggrieved. It would appear that AIR had an uphill battle from the start. Many of the elements of ARB’s scoping plan originated with the CAT’s 2006 report and may have been a *fait accompli*—notwithstanding AB 32’s later charge to incorporate community participation in the development of the plan. While ARB did invite significant community participation and even incorporated advice from some of their various committees, their post-hoc adoption of the FED only lends credence to the suspicion that the larger structure of the program was effectively a done deal, since limited alternatives were only considered after the plan itself was already adopted. To the extent this was the case, this clearly offends the basic environmental justice principle of procedural justice.

CONCLUSION

Ultimately, environmental justice, and procedural justice specifically, was not the question presented to the courts in this case. And even where legislation requires consultation with the community in the development of regulations, as AB 32 does, it may be that this is insufficient to ensure that all voices are really considered by decision makers. The facts and laws of this case were not strong for the advocates from the environmental justice community. However, inviting the underserved into the halls of power in our democracy is an important goal still in search of an effective outlet.

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81. See *supra* notes 77–80.

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