California Air Resources Board Issues Draft Plan For Reducing Greenhouse Gas Emission

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On June 26, 2008, the California’s Air Resources Board (“CARB”) released its eagerly anticipated Draft Scoping Plan to implement California’s landmark Global Warming Solutions Act of 2006 (known as AB 32), which requires California to reduce statewide greenhouse gas (“GHG”) emissions by nearly 30% by 2020. CARB will finalize the Scoping Plan later this year, after an extensive outreach program. CARB will adopt implementing regulations by 2011 and they will become effective by January 2012.

The draft Scoping Plan (“Plan”) is broad in scope but light on details. Nevertheless, the Plan is the first official document by CARB indicating how it will address several critical policy issues. CARB Chair Mary Nichols emphasized in testimony before the State Senate that “it will take all the tools in the toolbox” for California to accomplish the necessary reduction in GHG emissions.

CARB missed the opportunity to clarify in the Plan the extent to which companies that voluntarily reduce their GHG emissions will receive credit for their actions when regulations mandating emissions reductions take effect. In February 2008, CARB issued a “Policy Statement on Voluntary Early Actions to Reduce GHG Emissions,” indicating that CARB will work with the California Climate Action Registry (“CCAR”), a non-profit GHG registry organization formed in 2001, to establish a process for documenting early reductions. But the policy statement fell far short of indicating whether and how “credit” would be given, if at all, for the early reductions. The Plan contains only a single paragraph regarding voluntary early actions, and even then simply recounts the Policy Statement.

Key Elements of CARB’s Roadmap for Achieving the 30% Reduction in GHG Emissions

The Plan establishes CARB’s intention to reduce GHG emissions through a combination of market mechanisms, mandatory measures and regulations, voluntary measure and fees. Some of the key recommended elements include:

1. Cap-and-Trade System for GHG Emission Allowances for “Covered Sectors”

Certain “covered sectors” of activities in California account for 85% of GHG emissions. Each source in these sectors will be subject to a system of declining GHG emissions allowances issued by CARB under a total emissions cap, as well as an allowance trading system. The Plan’s Lynch-pin is a cap-and-trade program that would apply to the electricity sector, the transportation sector, the commercial and residential sector, and large industrial sources (those emitting more than 0.5 million metric tons per year of carbon dioxide (“CO₂”) equivalents). The cap-and-trade system would link to a western
regional cap-and-trade system, which is based on California’s membership in the Western Climate Initiative (“WCI”) with seven other states and three Canadian provinces. Regional systems reduce the prospect of “leakage,” i.e., the movement of activities out of California and resultant avoidance of GHG emission reductions. According to CARB staff, California would only link with particular jurisdictions in the WCI whose programs are compatible with AB 32’s requirements.

The Plan does not resolve whether offsets (i.e., surplus reductions that occur outside of the covered emissions within the cap) to meet compliance obligations will be allowed. AB 32 requires that offsets be “real, additional, verifiable, enforceable, and permanent.” Offsets can provide a relief valve on the cost of emissions credits under a cap-and-trade system; however, the Plan suggests that restricting the maximum use of offsets to 10% of each covered sector’s compliance obligation would allow early testing of the system’s viability. The Plan does not address the controversial issue of whether the offsets must originate in California, noting only that CARB is “considering limiting the use of offsets for regulatory compliance obligations to help ensure a significant portion of required reductions come from within the State and within the regulated sectors.”

2. Energy Efficiency Standards for Buildings and Appliances

These include “green building” construction and operation standards for new and existing buildings, as well as required energy reductions through stringent building codes and appliance efficiency standards.

3. Renewables Portfolio Standard (“RPS”) for Investor-owned and Publicly-Owned Utilities Increased to 33% By Year 2020

A controversial and unresolved issue is whether utilities can use a portion of their “renewable energy credits,” or RECs, as partial fulfillment of required GHG emission reductions.

4. Motor Vehicles GHG Standards

The Plan estimates that almost 20% of the necessary GHG emission reductions will come from implementing California’s “Pavley regulations,” the 2004 regulations requiring significantly greater average fuel efficiency in cars sold in California. The U.S. Environmental Protection Agency has stalled the State’s implementation of these regulations by denying California’s request for a required federal Clean Air Act waiver to allow such state regulation. Automakers are also challenging the Pavley regulations on preemption and other legal grounds in a pending action in federal district court in central California. The Plan states that “[i]t is highly likely that ARB will ultimately be permitted to implement the Pavley regulations.” However, the Plan outlines two possible backup strategies if California cannot implement the Pavley regulations: (1) withhold vehicle certification absent equipment meeting the equivalent of emission standards or (2) impose a fee on the purchase of high GHG-emitting motor vehicles.

5. Energy/Emission Audits at Large Industrial Facilities

Audits of major industrial facilities would evaluate the energy efficiency of sources within the facility to assess the potential to further reduce emissions of GHG and other pollutants. The audits would enable CARB to mandate further emissions reductions at the facility. This recommended measure will be examined closely because it could implicate confidential business information.

Effect of the Plan on Environmental Review of Proposed Projects Under the California Environmental Quality Act (“CEQA”)

The role of CEQA in the attainment of regional greenhouse gas targets does not receive a great
deal of attention in the Plan. The Plan highlights that improved land use and transportation planning in major urban areas could provide a 2% reduction in GHG emissions.

The driver for the application of CEQA to force GHG emission reductions in projects is legislation adopted in 2007 known as SB 97. SB 97 requires the California’s Office of Planning and Research (“OPR”) to adopt CEQA guidelines for the mitigation of GHG emissions and their effects by 2010. On June 19, 2008, OPR issued a Technical Advisory for lead agencies that make CEQA decisions to provide guidance for dealing with GHG emissions and their impacts and mitigation. Paul Hastings is issuing a separate Client Alert analyzing OPR’s Technical Advisory.

Integration of Plan with Local Fees and Carbon Trading Schemes

The Plan itself does not specifically address the issue of overlapping local programs. In May 2008, the Bay Area Air Quality Management District imposed an annual greenhouse gas fee of 4.4 cents per metric ton of CO2 equivalents emitted by permitted sources. At its June 2008 Board meeting, the South Coast Air Quality Management District directed its staff to develop regulations to implement a program—the SoCal Climate Solutions Exchange—to verify voluntary GHG emissions reductions by facilities which could be sold or traded on that exchange. In the June 26, 2008 CARB meeting, Chair Mary Nichols responded to an inquiry about duplicative programs by simply stating that she is “concerned about the possibility for confusion and duplication and undermining the program if there is a patchwork around the State.” Ms. Nichols said that CARB needed to strike a balance between the need for local regulation, where there are unique local geographic or socio-economic interests, with the need to send a clear and consistent message to the regulated community about California’s GHG emissions program.

Federal Preemption Remains Unresolved

As of June 2008, seven bills to regulate GHG emissions had been introduced into the 110th Congress, six of which would establish a mandatory cap-and-trade program similar to the one proposed in the Plan. CARB Chair Nichols testified in May 2008 before a California Senate Committee that any cap-and-trade program adopted by CARB “will have to be linked to the federal program.” The Plan adds that California’s future cap-and-trade program may even be used as a model for a federal program.

It remains to be seen whether the federal legislators will be as deferential to California’s system as CARB envisions. Several of the current proposals in Congress expressly provide that they do not preempt state climate change programs, while others are silent on the issue. A bill drafted but not yet introduced by Senator George Voinovich (R-OH), the Incentives-Based Climate Policy Act, is the only legislation that would expressly preempt state climate change programs.

What Happens Next?

Public comment on the draft Scoping Plan can be submitted in writing through August 1, 2008, or during many workshops held in July throughout the State. The workshop schedule can be found on-line at http://www.arb.ca.gov/cc/scopingplan/meetings/meetings. This summer, CARB will issue a “Supplemental Evaluation” of the estimated economic and health effects of the Plan. A revised proposed Scoping Plan will be released October and presented for adoption at the November 20 – 21, 2008 CARB meeting.

The details of the proposed new regulatory system will become tangible only in the rulemaking. AB 32 requires that CARB adopt the regulations implementing the emissions limits and reduction measures in the final Scoping Plan by January 1, 2011, to become operative on January 1, 2012.
Paul Hastings has over 1,200 lawyers in 18 offices throughout the world, nine of them outside the United States. The firm’s Sustainability and Global Climate Change Practice integrates members of the Environmental Practice with members of the Land Use, Energy, Project Development and Finance, Corporate, and Tax Practices.

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1 These bills include the Boxer-Lieberman-Warner Climate Security Act of 2008 (S. 3036 and S. 2191); the Bingaman-Specter Low Carbon Economy Act (S. 1766); the McCain-Lieberman Climate Stewardship and Innovation Act (S. 280); the Sanders-Boxer Global Warming Pollution Reduction Act (S. 309); the Kerry-Snowe Global Warming Reduction Act (S. 485); the Olver-Gilchrest Climate Stewardship Act (H.R. 620); and the Waxman Safe Climate Act of 2007 (H.R. 1590).