Legal Update for June 28, 2012 (Tori Sundheim, Legal Intern)

Climate Change Scoping Plan Directed to recommend: direct emission reduction measures, alternative compliance mechanisms, market based compliance mechanisms, and potential monetary and nonmonetary incentives for sources and categories of sources that the Board finds are necessary or desirable to facilitate the achievement of the maximum feasible and cost-effective reductions of greenhouse gas emissions by 2020.

- Update plan "at least once every five years."
- Adopted its plan/regulations Jan 1, 2011.
- **Delta Plan: similar requirements and processes, complex**

Jan 24 2011 First Case: <u>Assoc. of Irritated Residents v. California Air Resources Board</u>, 2011 WL 312702 (2011).

The court found flaws with the environmental review and its analysis of alternatives to the Plan's recommended GHG reduction measures including cap and trade.

Two claims were reviewed:

1. **Whether the ARB failed to meet some statutory requirements its enabling Act and**
2. **Whether there was a failure to comply with CEQA by treating the Scoping plan as a post hoc rationalization for chosen policy approaches**.
    - Standard of Review is still arbitrary and capricious, but for factual determinations the agency must have relied on substantial evidence to make a finding: the agency must use enough relevant information and reasonable inferences using facts and expert opinions.
    - **ARB did not include any facts or data to support the conclusions stated in its alternatives analysis** (in Functionally Equivalent Document FED) and **ARB never considered the alternatives**, and when the plan was adopted without that consideration it fell out of compliance **with its own CRP**
        - "different approaches could mean more or less reduction activity in any given sector," and "While the magnitude of impacts might increase or decrease, it would be speculative to try to estimate the effects at this time, before the details of specific measures are developed."

Legal Update for June 28, 2012 (Tori Sundheim, Legal Intern)

This appeal determined (once again) whether the plan adopted complied with its own enabling Act, and the appeals court applied the standard for review in almost the same way as the trial court.

The appeal is only on the first claim since ARB lost on the second claim in the lower decision and updated its analysis of alternatives to the Plan's recommended GHG reduction measures including cap and trade.

June 19: Assn. of Irritated Residents v. California Air Resources Bd., A132165, 2012 WL 2307679 (Cal. App. 1st Dist. 2012).

- **Standard of Review**
  - Is the plan "within bounds of statutory mandate?" If so, then apply arbitrary and capricious standard to determine whether plan is reasonably necessary to effectuate the purpose of the statute (Global Warming Solutions Act 2006).
    - Very deferential, agency has been granted considerable discretion to determine what is necessary to accomplish a valid legislative purpose. Broad Directives.
    - "The voluminous administrative record makes clear that the Board approached this challenge by soliciting and obtaining knowledgeable input from industry, academia, environmental organizations, and members of the general public. It is not for the court to reweigh the conflicting views and opinions that were expressed on these complex issues, which in the end are largely matters of judgment in all events. We are satisfied that the record provides ample support for the recommendations on which the Board settled, and that its choices were thoughtfully considered, well within the scope of the Legislature's directive, and not arbitrary or capricious."
- **Appealed Issue**: Whether the "Climate Change Scoping Plan" adopted by the ARB complies with the requirements of the Global Warming Solutions Act of 2006? Petition by nonprofit orgs, individuals and Association of Irritated Residents alleges plan is not in compliance, on appeal three main violations:
  1. **The Act calls for feasible and cost effective emissions reductions, when it Limited the scoping plan measures to only those necessary to achieve the minimum reductions required by [the Act],** it acted within its power and it was only the first step, as the plan is updated every 5 years.
  2. **Cost-effectiveness is not easily measured, but ARB acted appropriately to try to create and apply a standard criteria for cost-effectiveness and its record supports the recommendations it chose after it:** consulted industry, academia, environmental organizations and members of the general public.
  3. **ARB did not fail to include feasible and cost-effective direct regulations from the agricultural and industrial sectors in the scoping plan** (choosing only to regulate industry through the cap and trade program and allow agricultural sources to provide offsets to industry). It did consider them, which is enough.
- **Held: ARB did not disregard the statute or act arbitrarily or capriciously in adopting the scoping plan**