

California Global Warming Solutions Act: Challenges in Implementing the Comprehensive Global Climate Change Statute

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Introduction

In the absence of federal legislation, government entities have been working on initiatives to address climate change at the regional, state, and local levels. The policies developed have been wide ranging and seek to reduce greenhouse gas emissions, develop clean energy resources, and promote energy efficiency.¹ Ultimately, both a national and international response will be essential to achieve large scale reductions in greenhouse gas (GHG) emissions; however, the early actions taken will play an essential role in serving as models for a national policy, as well as other states, “by developing and testing innovative solutions, demonstrating successful programs, and laying the groundwork for broader action.”² Cap-and-trade programs, renewable portfolio standards, and climate action plans have been popular elements of these early initiatives.³ Statewide emission reduction target plans have been adopted by 23 states, each with varying stringency, timelines, and planned actions to achieve their goals.⁴ California has long been a leader among the states in passing progressive environmental regulations; therefore, it is no surprise that it was the first state to pass a comprehensive statute addressing climate change when it enacted the Global Warming Solutions Act in 2006. This discussion provides a review of the Act as well as the successes and challenges that California has faced in its implementation.

California’s Long History Addressing Climate Change

¹ PEW CENTER ON GLOBAL CLIMATE CHANGE AND PEW CENTER ON THE STATES, CLIMATE CHANGE 101: STATE ACTION 1 (2011), *available at* <http://www.pewclimate.org/docUploads/Climate101-State-Jan09.pdf>.

² *Id.* at 1.

³ *Id.*

⁴ *Id.* at 7.

California is a diverse state with a densely populated shoreline and vast agricultural lands that make it particularly susceptible to the effects of global climate change. The Intergovernmental Panel on Climate Change (IPCC) has noted expected effects of climate change to include 1) rising sea levels affecting coastal states, 2) agricultural states potential to lose productivity, and 3) the potential for both worsening droughts and increasing wildfire risks within the dry western states.⁵

California has long enjoyed a reputation for being a leader in tackling environmental issues, and climate change is no exception. In 1988, the California state legislature directed the California Energy Commission to begin studying the potential impacts of global warming on the state and inventory GHG sources within its borders.⁶ This action was taken years before scientific research established the effects of GHGs on the climate. In 2000, the state continued its efforts by establishing a voluntary program that permitted companies, cities, and government agencies to record GHG emissions in order to receive emission reduction credits.⁷ Next, the states comprising the west coast, Washington, Oregon, and California, joined together in creating the West Coast Global Warming Initiative as a demonstration of their regional efforts to address climate change.⁸ In 2005, then Governor Schwarzenegger, signed Executive Order S-3-05 calling for a reduction of GHG emissions to 1990 levels by 2020 and to further reduce emissions to 80% below 1990 levels by 2050 mirroring the call by the international community in the Kyoto Protocol.⁹

Taking the Next Step: Global Warming Solutions Act of 2006

⁵ PEW CENTER ON GLOBAL CLIMATE CHANGE AND PEW CENTER ON THE STATES, *supra* note 1, at 1.

⁶ Matthew Cardosi, Comment, *Getting Warmer: California and Massachusetts Spark a Global Warming Revolution*, 24 TUL. ENVTL. L.J. 401, 403 (2011).

⁷ *Id.* at 403-04.

⁸ *Id.* at 404.

⁹ *Id.*

The California legislature enacted Assembly Bill 32 (AB 32), the Global Warming Solutions Act of 2006 (GWSA) making California the first state to enact an enforceable GHG emissions reduction target,¹⁰ which was the first statute to address the myriad threats posed by global climate change within a single comprehensive statute.¹¹ The GWSA transforms the GHG emission reduction goals contained within Executive Order S-3-05 into mandates. In order for the state to meet the mandated reductions, emissions would need to be cut approximately 30% from business-as-usual emissions levels projected for 2020, or about 15% from current levels.¹² This translates into reducing emissions from 14 tons of carbon dioxide down to about 10 tons for every person in California by 2020.¹³ State leaders see this challenge as an opportunity to support a green economy, secure energy independence, and achieve public health and safety goals.¹⁴

The California Air Resources Board's (CARB) first steps to implementation included developing discrete early actions (DEA) that could be swiftly enacted while simultaneously preparing a scoping plan to develop a framework for reaching the emission reduction mandate, each of which has become the focal point of legal challenges discussed below.¹⁵

The First Obstacle: Low Carbon Fuel Standards

The first step in GWSA implementation was CARB's development of DEAs to achieve GHG emissions reduction goals, which were intended to help spur immediate reductions through

¹⁰ Cardosi, *supra* note 6, at 404.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ California Environmental Protection Agency, Air Resources Board [CARB], *Assembly Bill 32: Global Warming Solutions Act*, CA.GOV (Oct. 16, 2011), <http://www.arb.ca.gov/cc/ab32/ab32.htm>.

existing technology in advance of more comprehensive future regulations.¹⁶ CARB set out to identify and adopt DEA regulations that were to be enforceable on or before January 1, 2010.¹⁷

In September 2007, the Board approved a list of nine DEAs, including the Low Carbon Fuel Standard (LCFS),¹⁸ which does not address the carbon content of actual fuel or vehicle emissions, but was designed to lower GHG emissions by reducing the carbon intensity of fuel throughout its full lifecycle.¹⁹ The LCFS reaches transportation fuels including standard gasoline, diesel fuel, compressed and liquefied natural gas, biofuels, ethanol, and a number of others, seeking a 10% reduction in the average carbon intensity by 2020.²⁰

Specifically, the LCFS establishes carbon intensity ratings for different fuel sources, which are estimates of emissions released during each phase of its lifecycle from extraction or production of the fuel source, to refining and transportation to the end user.²¹ For example, ethanol created from different plants in different parts of the world is chemically identical, but the LCFS provides a lower carbon intensity score to fuels produced with less land intensive mechanisms and in areas closest to California as a result of lower emissions generated during transportation.²²

A number of parties representing the corn ethanol, gasoline production, trucking, and petrochemical manufacturing industries brought suit against CARB seeking injunctive relief to prevent implementation of the LCFS program.²³ In *Rocky Mountain Farmers Union v.*

¹⁶ Cardosi, *supra* note 6, at 406.

¹⁷ CAL. HEALTH & SAFETY § 38560.5 (West 2010).

¹⁸ CARB, *supra* note 15.

¹⁹ Cardosi, *supra* note 6, at 407.

²⁰ *Id.* at 407-08.

²¹ Kirk Tracy, Note, *Rocky Mountain Farmers Union v. Goldstene: Low Carbon Fuel Standards, Lifecycle Greenhouse Gases, and California's Continued Struggle To Lead the Way*, 24 TUL. ENVTL. L.J. 173, 174 (2010).

²² *Id.*

²³ *Id.*

Goldstene,²⁴ “[p]laintiffs allege[d] that the LCFS conflicts with and is preempted by federal law, including the Energy Independence and Security Act of 2007 (“EISA”)²⁵, in violation of the Supremacy Clause, U.S. Const. Article VI, para. 2, and interferes with the regulation of interstate commerce, in violation of the Commerce Clause, U.S. Const., Art. I, sec. 8, cl. 3.”²⁶ The EISA and the GWSA both address the issue of reducing lifecycle GHG emissions; however, the EISA has an additional purpose in seeking to reduce the nation’s dependence on foreign energy.²⁷

The Energy Policy Act of 2005 modified Section 211 of the Clean Air Act by establishing a national renewable fuel standard program (RFS),²⁸ which required blending renewable fuel into gasoline. The EISA modified the RFS creating a second renewable fuel standard program (RFS2), which requires EPA to evaluate lifecycle GHG emissions for fuels and set performance thresholds.²⁹ Certain corn ethanol biorefineries were exempted from the regulations by Section 211(o) to further the purpose of reducing energy dependence on foreign oil since the existing infrastructure of ethanol was unable to meet these standards.³⁰ The exemption covered biorefineries that were either in production or had completed construction at the time the provision was enacted.³¹

The plaintiffs argued that the LCFS is in direct conflict with the exemption and that the regulations frustrate the goals of Section 211(o), which is intended to provide energy security by favoring domestic sources of fuel³² and that principles of federal preemption should prevail.³³

²⁴ *Rocky Mountain Farmers Union v. Goldstene*, 719 F.Supp.2d 1170, 1174 (E.D. Cal. 2010).

²⁵ 42 U.S.C. § 7545(o) (2006).

²⁶ *Rocky Mountain Farmers Union*, 719 F.Supp.2d at 1173.

²⁷ Tracy, *supra* note 21, at 173.

²⁸ 42 U.S.C. § 7545(o).

²⁹ *Rocky Mountain Farmers Union*, 719 F.Supp.2d at 1174.

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 1175.

³³ Tracy, *supra* note 21, at 174.

In addition, the plaintiffs alleged that the LCFS violates the Commerce Clause by discriminating against fuels from outside California and regulates fuel that is an article of interstate and foreign commerce.³⁴ CARB relies on the argument that Congress “explicitly conferr[ed] on California the authority to regulate fuels sold in California but manufactured both inside and outside of California,” and that as a result “Congress directly authorized California to regulate a significant aspect of interstate commerce . . . what would otherwise be a Commerce Clause violation.”³⁵

At issue in *Rocky Mountain Farmers Union* was the special treatment that California receives under Section 211(c) of the Clean Air Act, which provides the state power to set stricter emission standards than those of the federal government through a number of exemptions from preemption³⁶ and also provides the state power to place certain restrictions on fuel additives.³⁷ However, the court held that the state’s exemption “is inapplicable to the LCFS standard, and therefore does not authorize it, because it does not control a component of a fuel or a fuel additive and does not address motor vehicle emissions.”³⁸ CARB’s motion to dismiss was denied based on the tenuous holding that the LCFS is preempted by federal law. However, the opinion rested not on an express preemption, but a conflict of objectives between federal and state statutes. This issue may be further tested as federal regulation of GHG emissions further occupies the field.³⁹

The Second Obstacle: Considering Alternatives in the Scoping Plan

³⁴ Tracy, *supra* note 21, at 174.

³⁵ *Rocky Mountain Farmers Union*, 719 F.Supp.2d at 1195.

³⁶ Tracy, *supra* note 21, at 175.

³⁷ *Rocky Mountain Farmers Union*, 719 F.Supp.2d at 1176.

³⁸ *Id.* at 1191.

³⁹ Tracy, *supra* note 21, at 174.

The GWSA directed CARB to prepare and approve a scoping plan that would evaluate methods for achieving the “maximum technologically feasible and cost-effective reductions” in GHG emissions.⁴⁰ The Climate Change Scoping Plan (“Scoping Plan”) is the state’s framework for implementing the GWSA and was published by CARB in December 2008 as required by the GWSA.⁴¹ A focal piece of the approved Scoping Plan is the cap and trade program that was modeled after the EPA’s model for acid rain reduction through emissions trading as well as other state’s emission trading initiatives.⁴²

However, implementation of the Scoping Plan hit an obstacle when various parties brought suit alleging that CARB’s plan violates the California Environmental Quality Act (CEQA).⁴³ In *Association of Irrigated Residents v. CARB*,⁴⁴ the petitioners challenged CARB’s implementation of the Scoping Plan, asserting that CARB failed to meet the mandatory statutory requirements of CEQA by 1) excluding whole sectors of the economy from GHG emissions controls and including a cap and trade program without determining whether potential reduction measures achieved maximum technologically feasible and cost effective reductions, 2) failing to adequately evaluate the total cost and total benefits to the environment, economy, and public health before adopting the Scoping Plan, and 3) failing to consider all relevant information regarding GHG emission reduction programs throughout the US prior to recommending cap and trade regulatory approach.⁴⁵

⁴⁰ CAL. HEALTH & SAFETY § 38561 (West 2010).

⁴¹ Cardosi, *supra* note 6, at 409.

⁴² *Id.* at 402.

⁴³ David Wagner, *Implementation of California’s Global Warming Solutions Act Hits a Setback*, ENVIRONMENTAL LAW RESOURCE (Mar. 25, 2011), <http://www.environmentallawresource.com/2011/03/articles/climate-change/implementation-of-californias-global-warming-solutions-act-hits-a-setback/>.

⁴⁴ *Association of Irrigated Residents v. California Air Resources Board*, *Tentative Decision*, No. CPF-09-509562 (Jan. 24, 2011)

⁴⁵ *Id.*

A March 2011 ruling by San Francisco Superior Court Judge Ernest Goldsmith, “granted a Petition for Writ of Mandate challenging the Scoping Plan, primarily due to the agency’s failure to adequately consider alternatives to its adopted cap and trade program.”⁴⁶ The court found that CARB abused its discretion by approving the Scoping Plan when the record lacked evidence to support that action and that CARB failed to adequately assess public comments that raised significant issues.⁴⁷ CARB was ordered to set aside its approval of the CEQA environmental review document that assessed the Scoping Plan and was prohibited from implementation until the Scoping Plan complies with the alternatives analysis requirements of CEQA.⁴⁸ Once CARB has addressed the issues raised and provides adequate notice to the public, the Court will allow the Scoping Plan implementation to resume.⁴⁹ Even though the obstacle this creates is significant, it is likely only temporary.

As litigation on the issue continues, CARB has moved forward in pursuing another course of action.⁵⁰ In June 2011, CARB initiated a notice and comment period for a revised and supplemental Scoping Plan analysis as well as holding public hearings.⁵¹ CARB also announced its intention to continue moving forward with its cap and trade program on a voluntary basis starting in January 2012, but holding off on implementation of mandated participation and compliance until January 2013.⁵² Finally, on October 20, 2011, CARB adopted the landmark cap-and-trade provisions outlined in the GWSA by a unanimous vote.⁵³

⁴⁶ Wagner, *supra* note 43.

⁴⁷ Whitney Hodges, *June Proves to Be a Busy Month For ARB and Its Proposed Cap-and-Trade Program*, NATIONAL LAW REVIEW FORUM (July 6, 2011), <http://www.natlawreview.com/article/june-proves-to-be-busy-month-arb-and-its-proposed-cap-and-trade-program>.

⁴⁸ *Id.*

⁴⁹ Wagner, *supra* note 43.

⁵⁰ Hodges, *supra* note 47.

⁵¹ *Id.*

⁵² *Id.*

⁵³ Julie Cart, *California Becomes First State to Adopt Cap-and-Trade Program*, L.A. TIMES (Oct. 21, 2011), <http://www.latimes.com/news/local/la-me-cap-trade-20111021,0,1125437.story>.

Despite the obstacles along the way, California continues to surge forward seeking ways to implement GHG emission reduction strategies and pursue its goals of a green economy and cleaner air for its citizens. California's actions serve as a laboratory of democracy that the global community is watching as the outcome will help to shape the policies of other states and the nation. Only in hindsight will it be clear whether the LCFS and cap and trade strategies being pursued can withstand legal challenges to implementation and produce the intended results of lower GHG emissions curbing global climate change.