A California superior court has issued a proposed decision, not yet final, holding that ARB failed to comply with the California Environmental Quality Act (CEQA) in its adoption of the Scoping Plan that is guiding its implementation of AB 32, California's landmark climate change law. The ruling proposes to set aside ARB's CEQA documentation and to enjoin "any implementation of the Scoping Plan" until ARB corrects the CEQA violation. Among other things, such a ruling would presumably affect the roll-out of California's first-in-the-nation carbon cap and trade program, which is slated to take effect in January 2012.

Though the tentative ruling was signed on Jan. 21 and served on parties last week, not much has been written about it. Under California Rule of Court 3.1590(g), the parties appear to have 15 days from service to lodge objections to the proposed ruling. The ruling comes in a case brought by community groups, environmental justice organizations, and individuals opposed to ARB's scoping plan and, in particular, to the cap and trade program. Among the plaintiffs are members of the Environmental Justice Advisory Committee, which advised ARB on the creation of the Scoping Plan and made its objections to the plan plain from the start.

The plaintiffs brought claims that the Scoping Plan violated AB32's own terms, such as the requirement to achieve "maximum technologically feasible and cost effective reductions" in greenhouse gases, which, in plaintiffs' view, means ARB should have done more than simply aim to achieve the 1990 emissions cap also required by the law. Plaintiffs also brought claims that ARB failed to comply with CEQA in its adoption of the Scoping Plan, by, among other things, failing to discuss alternatives in a way that gave "the public [any] indication as to why ARB chose the Scoping Plan over the other alternatives." [p. 29 of linked opinion]

Key holdings in the proposed ruling include:

-A decision in the state's favor on all the claims for direct violations of AB32. The court applied the 'arbitrary and capricious' standard of review for these claims and largely deferred to ARB's discretion in deciding them, holding that "[a]s the agency with technical expertise and the responsibility for the protection of California's air resources, ARB has substantial discretion to determine the mix of measures needed to 'facilitate' the achievement of greenhouse gas reductions." [p.11 of linked opinion]

-On the CEQA claims, a decision that ARB's analysis of impacts was sufficiently detailed for a programmatic-level review [pp.22-27]

-A decision that ARB's discussion of alternatives to the mix of measures proposed in the Scoping Plan was inadequate, concluding that "ARB's analysis provides no evidence to

support its chosen approach." [p. 30]

-A decision that ARB improperly approved the Scoping Plan prior to completing its required CEQA review [pp. 31-33]. The court treated a resolution adopted by ARB at a hearing in Dec. 2008 as initiating the Board's approval of the Scoping Plan, many months before the finalization of its CEQA review.

As I note, this decision is not yet final. If it stands, ARB will have its hands full responding. New CEQA analysis will be necessary, and during its preparation ARB will likely have to halt implementation of Scoping Plan measures. A question I will raise but not definitively answer is whether certain GHG reduction programs included within the Scoping Plan, but authorized by laws and programs other than AB 32 (like, for example, California's clean car standards), will be permitted to continue despite the injunction. If yes (and this seems like the far better argument), such measures account for about 49% of the reductions in GHG projected to be achieved under the plan by 2020.

More analysis to come, I'm sure…