

Against a backdrop of [complex Sacramento politics](#) on the future of California's climate regulation, the state's Air Resources Board last week issued an [initial draft](#) of regulations that would, among other things, extend the cap-and-trade program beyond 2020. Does ARB currently have the authority to do that?

Yes, probably. But it's complicated enough to leave room for disagreement.

Here's one version of the pro-authority argument. As I have [noted before](#), AB 32's climate mandates don't end in 2020. The statute requires California to reduce its statewide greenhouse gas emissions back to 1990 levels by 2020 and thereafter establishes the 1990 limit as a permanent ceiling on emissions—but not a floor. AB 32 calls for the statewide 1990 limit to remain in effect indefinitely and to “be used to maintain *and continue* reductions in emissions of greenhouse gases beyond 2020.” AB 32 § 38551(b) (emphasis added). It also calls for ARB to achieve “the maximum technologically feasible and cost effective greenhouse gas emission reductions,” year after year. § 38560. Sometimes that second mandate is framed as being in service of reaching the 1990 limit, but sometimes it seems to live independently in the statute. *Id.*

The California Court of Appeal has agreed that the 1990 limit does not constrain the reductions that ARB may strive for, holding that ARB's initial scoping plan aimed at reaching the 1990 emissions level is “neither designed to limit nor do[es it] have the effect of limiting emissions reductions if greater reductions can be achieved.” *Assoc. of Irrigated Residents v. Cal. Air Resources Bd.*, 206 Cal.App.4<sup>th</sup> 1487, 1496 (2012). In other words, ARB may push for greater reductions—lower than the statewide emissions ceiling—if and when doing so is, in its considerable discretion, technologically feasible and cost-effective. The agency has been given wide berth in determining what reductions would meet those criteria. And Governors Brown and Schwarzenegger have both, through executive orders, directed ARB to exercise its authority aggressively, to reach significant 2030 and 2050 GHG reduction goals.

So—it's clear that ARB must continue to place significant controls on GHG emissions even after 2020, to fulfill its statutory mandates and ensure we don't backslide.

It's not as clear, however, whether ARB may use cap and trade as one of its regulatory tools, post-2020. Check out AB 32's original grant of authority to create a cap-and-trade program:

In furtherance of achieving the statewide greenhouse gas emissions limit, by January 1, 2011, the state board may adopt a regulation that establishes a system

of market-based declining annual aggregate emission limits for sources or categories of sources that emit greenhouse gas emissions, *applicable from January 1, 2012, to December 31, 2020*, inclusive, that the state board determines will achieve the maximum technologically feasible and cost-effective reductions in greenhouse gas emissions, in the aggregate, from those sources or categories of sources.

§ 38562(c) (emphasis added). This passage authorizes a cap-and-trade program through 2020 and, by implication, perhaps not beyond that year. [Some observers](#) read this and conclude that ARB cannot employ cap and trade after 2020. I don't read the statute so definitively; after all, the provision is structured as a grant of authority, not as a limit on authority. It is written permissively (the "board may adopt") and contains no restrictive words (no "only until," for example). It is silent on ARB's power beyond 2020. Neither this passage nor any other in AB 32 explicitly says that ARB lacks authority to implement cap and trade after 2020. And even if this provision is read to prohibit a cap-and-trade program with a *declining cap* after 2020, a program aimed at keeping us within the 1990 limit after 2020 may be fair game if the cap is steady.

Given these ambiguities, I'm not sure how a court would interpret ARB's authority here. But it's certainly not unfounded for ARB to give it a go.

Notably, if cap and trade is not available as a regulatory tool post-2020, ARB's mandate to control emissions doesn't disappear; its toolbox just shrinks. ARB would have to depend more on other regulatory tools, likely more costly ones, to keep emissions in check. The magnitude of the effect on total costs would depend on how much of the regulatory work cap and trade is projected to do, versus other, complementary measures also used by California to control emissions (like the state's renewable portfolio standard and energy efficiency requirements).

In the coming weeks, we should learn more about ARB's thoughts on the comparative costs of a post-2020 regulatory regime with, and without, cap and trade, when ARB releases its full Staff Report for the post-2020 draft regulation. That report will append an analysis of alternatives to continuing the cap-and-trade program, including a scenario that relies on facility-specific regulations instead of cap and trade to achieve emissions reductions. Stay tuned.