The Governor and state legislative leaders announced a deal on a bill to extend the state's cap-and-trade program to control greenhouse gas emissions through 2030, along with companion legislation to increase emissions reductions for conventional pollutants from major stationary industrial sources (a key point for environmental justice groups). Some leading business groups have endorsed the plan; the Governor's office is optimistic it will get buy in from Republicans though so far the only public statements from Republican state legislators have indicated opposition; and many environmental justice leaders are unhappy with the deal. With the caveat that negotiations are ongoing and that the deal might change as a result, here are my thoughts on the current agreement.

The two bills are AB 398 and AB 617. AB 398 is the cap-and-trade component, and in many ways it builds on prior proposals for extending the state's program. If AB 398 passes with a two-thirds majority, it will eliminate the most important legal cloud hanging over the state's cap-and-trade program – whether it is a tax that requires a two-thirds majority under the state constitution and whether existing law authorizes its continuation beyond 2020. That's a major deal (as other commentators here on Legal Planet have noted) because a key factor to both the economics and politics of climate action is creating strong, consistent, long-term incentives for investments in clean energy.

AB 398 has some other good components. While it allows offsets (which have been controversial because of questions about their efficacy and whether they steer the benefits of greenhouse gas emissions reductions away from communities that differentially suffer from air quality problems), it lowers the cap for offsets below current law (which is 8% maximum) to between 4 to 6%. It also requires that the benefits of at least half of any offsets must be directly felt within California.

It allows for linking California's program with other jurisdictions – which helps spread effective climate policy beyond the borders of the state.

In addition, if AB 398 really does get significant buy-in from industry and some Republicans, that will reduce the risk of a referendum or initiative challenge to the bill – a risk that members of the state legislature might be particularly concerned with given the current debates over the recently enacted revenue bills for highway improvements.

I have some concerns too. I don't like the temporary (and most likely, eventually permanent) suspension of the fire prevention fee. One of the major reasons we have an escalating wildfire problem in California is increasing development in what is called the "wildland-urban interface," where residential development in forest areas puts increased pressure on firefighters to suppress fires. This produces long term harms for our forests and our health, as fire suppression only increases the risk of worse fires in the future. And it means that the owners of these homes benefit from public expenditures to protect them from fire risks they have contributed to.

The bill also extends significant tax breaks for manufacturers and research and development activities in the state, and expands them for electricity production. The reduction in revenue from these extended and expanded tax breaks, as well as suspension of the fire prevention fee, is paid for out of the revenues from the cap and trade program.

In addition to backfilling tax breaks, the bill also directs revenues from the cap-and-trade program to be used for reduction of greenhouse gas emissions and adaptation for climate change, though the bill language does not limit expenditures to those purposes. I liked the provision in SB 775 that would have directed revenues for per-capita rebates to California residents – such a system is great politics, but more importantly recognizes that low-income Californians (particularly those who live in rural areas and have to drive a lot) will bear a significant burden from any increases in gas prices. I'm not such a fan of major tax breaks for large industry.

Most controversially – and this is the provision that appears to be most problematic for many environmental justice groups – the bill preempts any local regulation (by local governments or regional air quality management districts) of greenhouse gas emissions by any stationary sources covered by the cap-and-trade system. These groups are concerned that this provision may sweep broadly and preempt efforts by local governments and air quality management districts to reduce conventional pollutants that incidentally also reduce greenhouse gas emissions. They may also be concerned that preemption reduces the leverage they have to reduce emissions more generally from these facilities, since an important tool will have been taken off the table.

I also don't like the preemption provision – in part because regulation can often be an extremely important complement to market-based mechanisms. It is important to note that the state air resources board can impose additional greenhouse gas regulations on stationary sources, except for oil refineries. (This last point makes clear how important the oil and gas industry was in the negotiations for this bill.)

The cap-and-trade program under AB 398 phases out in 2030. Again, I would much prefer a permanent program, which would eliminate the uncertainty once and for all. However, the legislation carefully ensures that all other elements of the state's greenhouse gas regulatory program continue on beyond 2030, and all of the compromises (the fire prevention fee suspension, the extension and expansion of the tax breaks, the preemption of local regulation) also phaseout in 2030. Thus, any leverage that got this bill enacted today would be present again in 2030. Overall, I'd be cautiously optimistic that in 13 years, if the state's climate policy efforts are successful, that we'd have much steeper reductions in greenhouse gas emissions under our belt, and much weaker opposition to extension then.

Despite my concerns, I'm in favor of the legislation, for one key reason. Many of the trades given away in this bill are intended to get enough industry and/or Republican support for a two-thirds vote in the legislature for the bill – to eliminate any constitutional challenges to the program and create legal certainty. The most controversial and potentially problematic of those trades is the preemption provision – which is a purely regulatory provision. Which means that – if that preemption provision turns out to be really problematic down the road in its implementation – there is nothing to stop a simple majority of the legislature from repealing it. In other words, the bill trades away regulatory changes that can be undone with a simple majority for support for a two-thirds vote that otherwise would be very challenging to obtain politically. That's a trade I'm willing to make.

One final point – if the Governor and state legislative leadership can't get significant Republican support for this deal, then they should move to trim away some of these compromises. I'd get rid of the suspension of the fire prevention fee first. I do think time is on the side of cap-and-trade program here, because the alternative (as industry well knows) is a much more costly regulatory program that doesn't have cap-and-trade in it. And ultimately, if needed, I do believe there may be plausible paths to extending cap-and-trade that don't require two-thirds votes in the state legislature, though they are more uncertain legally.