The California Air Resources Board (CARB) is covering all its bases in responding to a judge's order that CARB violated the California Enviornmental Quality Act (CEQA) in adopting its scoping plan to implement AB 32 (the state's climate change legislation). As I reported last week, CARB has won an order from the appeals court allowing the state to go forward in implementing its challenged cap and trade program. But to hedge its bets, the staff of the California Air Resources Board (CARB) today released an analysis that is meant to bring CARB into compliance with the judge's ruling while supporting CARB's decision to adopt a cap and trade program.

The judge in *Association of Irritated Residents v. CARB* found that CARB violated CEQA by failing to adequately consider alternatives to a proposed cap and trade program. More particularly, the judge was especially critical of CARB for failing to consider in detail a carbon tax as an alternative to cap and trade. The judge wrote in his order that in its environmental documentation, the board devoted a "scant two paragraphs . . . to this important alternative." The report released today includes a much more thorough analysis section, 18 pages in length. Additionally, CARB's report more thoroughly analyzes other alternatives, including direct regulation and a combined strategy of all of the alternatives, including fees or taxes on the transportation, commercial and residential fuel sectors, a cap and trade program for electricity generators and large industrial sources, and some direct regulation.

The staff report concludes that a carbon tax or fee would face significant political and administrative obstacles because of California's limitations on tax and fee increases:

> In the case of a carbon fee, the uses of the revenues are restricted by state law [and thus could not be used, for example, to offset increases in energy costs to low income consumers]. The most challenging constraint for a tax approach owes to the requirement that taxes must be approved either by legislative supermajority or voter initiative. Such measures would require time and potentially substantial resources to pass, and may be politically infeasible.

The analysis also recognizes environmental benefits from a carbon tax, including improved air quality regionally because reductions in greenhouse gases result in reductions in conventional pollutants. But the staff report also raises concerns about leakage — the movement of greenhouse gas emitting activities out of the state, resulting in no net reduction in emissions — because "the cost of carbon in a fee or tax program would be set administratively, rather than by the market, resulting in the potential to be inconsistent with marketplace conditions." The report also cautions that whether a tax could achieve the greenhouse gas emissions that a cap and trade program would achieve is less clear because a tax does not limit the overall amount of greenhouse gases that covered entities can emit. It simply raises the price on those emissions.

The preparation of the supplemental environmental documentation is an important first step to bringing the state into compliance with Judge Goldsmith's order in *AIR v. CARB*. Presumably the next step is for the board to consider the new supplement and decide whether to proceed with cap and trade or change to a different alternative. The staff report at least implicitly appears to conclude that cap and trade is the alternative that will best achieve its stated environmental objectives: cap and trade has a high likelihood of achieving 19 out of 20 environmental objectives whereas a carbon tax has a high likelihood of achieving only 12 of 20 and direct regulation 15 of 20. Interestingly, the analysis also says that a combination of approaches — fees, cap and trade and direct regulation — has a high likelihood of achieving 18 of 20 objectives. Thus the supplemental environmental document provides the board with the legal basis for moving forward with cap and trade, but could also provide the board with an alternative approach that would mix cap and trade with fees and some direct regulation.