

Legal Proceedings Impacting the Power Sector

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October 13, 2016

Legal Uncertainty

- US EPA Clean Power Plan
- California allowance auctions
- California authority to extend cap-and-trade program post-2020

Clean Power Plan

CPP Background

- The Clean Power Plan (“**CPP**”) regulates CO2 emissions from existing fossil fuel-fired power plants.
 - EPA promulgated the final version of the CPP on October 23, 2015
- Petitions filed on the same day challenging the CPP in the U.S. Court of Appeals for the D.C. Circuit

Existing Electric Generation Units	2027	2030
Fossil Fuel-Fired Steam Generating Units	1,534	1,305
Stationary Combustion Turbines	832	771

The Petitions – Broad Arguments

1. No legal authority under Section 111(d) of the Clean Air Act
 - Power plants are already regulated under Section 112
 - Section 111(d) does not allow EPA to restructure the energy sector or require “generation shifting”
2. Abrogation of authority delegated to the States and coercion to carry out federal energy policy
3. Too many changes between the original proposed final rule
4. EPA should not be able to consider third-party factors (such as renewable energy technology outside the fence line) to set a standard for emission reductions at coal-fired power plants
5. EPA has not adequately demonstrated that the CPP is the Best System of Emissions Reduction

Seeking a Stay in the D.C. Circuit

- The D.C. Circuit denied the petition for a stay on January 21, 2016
 - The D.C. Circuit very rarely stays a Clean Air Act rule – the last time was in respect of the Cross-State Air Pollution Rule
- The D.C. Circuit included only one sentence to explain its reason for denying the petition:

Petitioners have not satisfied the stringent requirements for a stay pending court review. See Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 20 (2008); D.C. Circuit Handbook of Practice and Internal Procedures 33 (2015).

Seeking a Stay in the Supreme Court

- Petitioners subsequently sought a stay from the Supreme Court in an application directed to Chief Justice Roberts.
- In an unprecedented action, the Supreme Court granted the stay on February 9, 2016 with five Justices voting in favor (including the late Justice Scalia)

The application for a stay submitted to The Chief Justice and by him referred to the Court is granted. The Environmental Protection Agency's "Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units" 80 Fed. Reg. 64,662 (October 23, 2015), is stayed pending disposition of the applicants' petitions for review in the United States Court of Appeals for the District of Columbia Circuit and disposition of the applicants' petition for a writ of certiorari, if such writ is sought. If a writ of certiorari is sought and the Court denies the petition, this order shall terminate automatically. If the Court grants the petition for a writ of certiorari, this order shall terminate when the Court enters its judgment.

Justice Ginsburg, Justice Breyer, Justice Sotomayor, and Justice Kagan would deny the application.

September 27 Oral Arguments

- U.S. Court of Appeals for the DC Circuit *en banc*
 - 6 Democrat-appointed judges
 - 4 Republican-appointed judges
- Decision expected Q4-2016 or Q1-2017
- “First impressions”
 - May be split along party lines
 - Judges did not seem convinced by Section 112 argument
 - Remand possible for EPA to revise its modelling (and adjust its targets)
 - Vacatur – high bar

Next Steps

- If Trump is elected
 - If EPA loses at the Court of Appeals, it may not go to the Supreme Court
 - If EPA wins, industry will appeal
- If Clinton is elected
 - Irrespective of who wins, the losing party will appeal
 - If EPA loses at the Supreme Court, EPA will pursue Section 115 or legislative solution
 - If EPA wins at the Supreme Court, the stay will be lifted and the rule will apply
- Decision expected Q2 2018
- January 20, 2017 inauguration
 - Supreme Court justice appointment

Auction Litigation

California Auction Litigation

- *California Chamber of Commerce v. California Air Resources Board* (Sacramento Superior Court Case No. 34-2012-80001313)
 - Filed November 13, 2012, the day before the first auction
 - Briefing is complete; hearing occurred on May 31, 2013
 - Plaintiffs claim that the auctions
 - Exceed the authority of ARB under AB32
 - Constitute an unconstitutional tax
- *Morning Star Packing Company v. California Air Resources Board* (Sacramento Superior Court Case No. 34-2012-80001464)
 - Substantially similar argument as *Cal. Chamber of Commerce*

Nov. 12, 2013 Superior Court Decision

- Agreed that auctions are within the scope of ARB's authority
 - Noted that “both auctions and free distribution were recognized methods of distributing allowances” at the time AB 32 was drafted
- Fee or tax?
 - Is it a fee? The primary purpose of the fee was to help achieve the cap-and-trade program's regulatory goals because auction proceeds will fund programs to further AB 32
 - Is it a permissible fee? The court concluded that a reasonable relationship exists between the Auction Proceeds and these emitters' collective responsibility for GHG emissions, and therefore the Auction Proceeds are valid as a regulatory fee
 - “close call”

Appeal Status

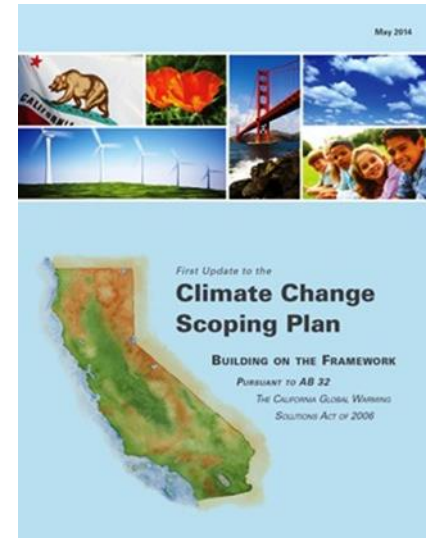
- Initial Briefing Completed May 2015
- Chamber's Request for Calendar Preference Granted April 7, 2016
- Court Directs Supplemental Briefing on 7 Questions April 8, 2016
 - Something for everyone
- Simultaneous Supplemental Briefs Filed May 23, 2016
- No Oral Argument Scheduled To Date
- Decision By Court Required 90 Days After Argument
- Potential California Supreme Court Review



Post-2020 Authority

Position of ARB and Governor's Office

- External Expressions of Confidence in Authority
- ARB Charging Forward
 - 2030 Scoping Plan
 - Extensions of Emission Reduction Measures through Cap-and-Trade Program and Low Carbon Fuel Standard
 - SLCP Reduction Strategy
- Governor Defiant in Face of SB 350 Defeat on 50% Reduction in Petroleum Use by 2030



Legislative Counsel's Analysis

- “[A]ny authority that the Governor or the ARB is entitled to exercise with respect to GHG reductions must emanate from a statutory enactment such as the Act [AB 32].”

Plain language of AB 32 (HSC § 38551)

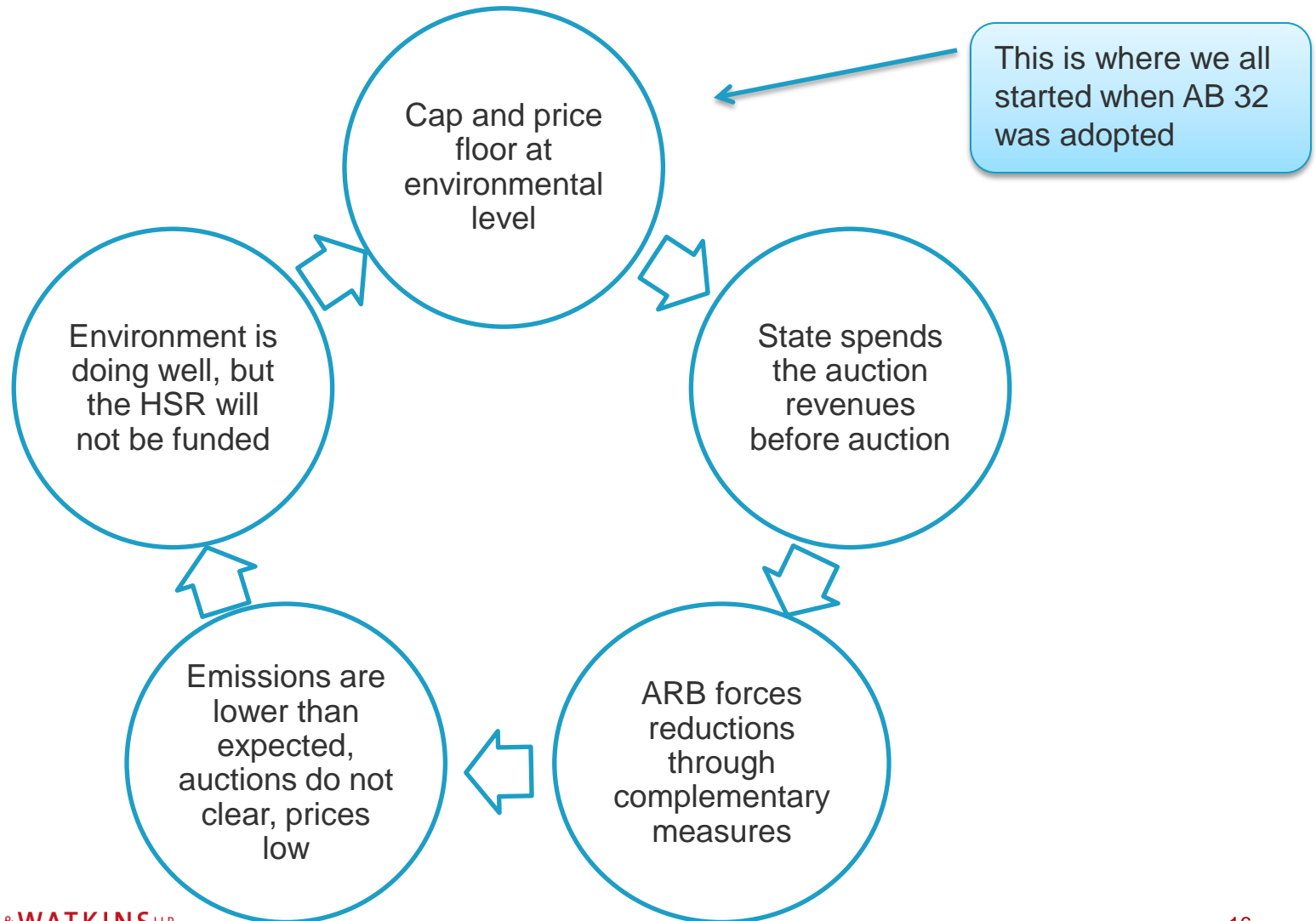
- (b) It is the intent of the Legislature that the statewide greenhouse gas emissions limit continue in existence and be used to maintain and continue reductions in emissions of greenhouse gases beyond 2020.
- (c) The state board shall make recommendations to the Governor and the Legislature on how to continue reductions of greenhouse gas emissions beyond 2020.

- Separation of Powers

- “We think the determination of a standard for the statewide GHG emissions limit is a fundamental policy decision that only the Legislature may make. Yet the argument that the act authorizes a lower emission limit after 2020 entails the consequence that the executive branch would have unfettered discretion in setting that limit.”



Cap-and-Trade Program Dynamics



Context For Future of Cap-and-Trade Program



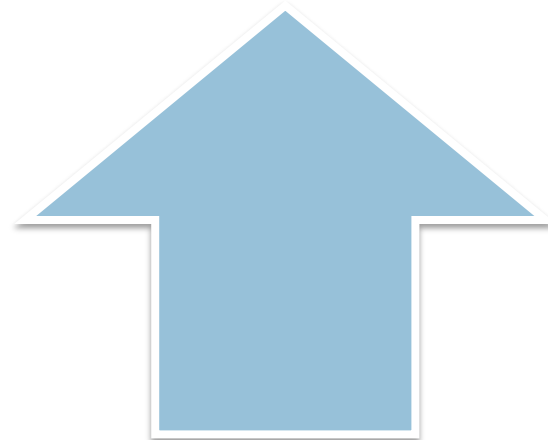
Pressure on Program

- Auction litigation
- Weight of LCFS on industry
- Long market, low prices, unsold allowances, decreased state revenues
- SB 350 Failure
- Authority to continue program post-2020?
- CPP stay



Effort to Support the Program

- Governor's "five pillars"
- EO B-30-15
- Update scoping plan
- Amend cap-and-trade
- SLCP strategy
- Oil and gas rule
- Freight strategy



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