

Talks between enviro justice groups, regulators on emissions law break down

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Negotiations between California air regulators and environmental justice groups on a possible compromise remedy to a recent court decision that froze the state's climate change law have ended without an agreement, an attorney involved in the talks said.

Alegria De La Cruz, an attorney at the Center on Race, Poverty and the Environment, revealed in an interview late yesterday that talks with the California Air Resources Board on the proposed remedy had ground to a halt.

"Sadly, we couldn't reach agreement," she said, following an afternoon meeting with ARB attorneys. "There's no reason to meet again."

The talks stem from a court decision issued last week by San Francisco County Superior Court Judge Ernest Goldsmith that sent the proposed implementation plan for the law, A.B. 32, back to the air board. In a 36-page ruling, Goldsmith said ARB had abused its authority by not doing enough work on alternatives to cap and trade and had failed to comply with the California Environmental Quality Act.

At the heart of the ruling is a challenge to the cap-and-trade system, which would apply to 85 percent of emitters by 2020 and enact the largest U.S. carbon market to date. Though ARB plans to appeal, in the short term, the ruling means the agency will have to submit a more thorough analysis of alternatives to cap and trade, including a carbon tax and direct regulation of emitters.

The first order of business following the decision is a proposed writ that is currently being drafted by ARB and those who filed the lawsuit in the environmental justice community. Goldsmith directed plaintiffs and defendants in the case to come up with a proposed remedy, after which the judge will decide how to proceed and will issue a final court order.

The groups could seek any number of solutions, ranging from an outright rejection of cap and trade to a concession that might see revenues from credit sales directed to low-income communities.

De La Cruz would not comment further on her side's likely proposal for Goldsmith, though she did hint that her clients would not accept cap-and-trade enactment in any form. "I represent my clients," she said, "and that's their position."

As for a comment from ARB chief Mary Nichols that the court ruling amounts to little more than a procedural hurdle, De La Cruz said the agency had failed to take the judge's decision seriously.

"They need to do some work," she said. "They can't just view this as jumping through a hoop."

She added: "The ball is in CARB's court. I think this is going to require the agency to do some very hard thinking."

The air board didn't respond to a request seeking comment.

Traders react

Closely watching the process are carbon traders with a financial stake in seeing a cap-and-trade market launched in California. Two prominent traders say they have faith in Nichols and her insistence that the state's climate change law will be implemented on time next year.

Kedin Kilgore, head of U.S. emissions trading at Barclays Capital, and Josh Margolis, CEO of CantorCO2e in San Francisco, both said they expect the air board under Nichols to quickly put the current freeze of the law behind it.

"Nobody knows the lay of the land better than Mary," said Margolis, who quoted Nichols directly. "We are inclined to give her deference when she says, 'The lawsuit is not a factor in terms of delay. It's just part of what you have to go through to implement a program.'"

Kilgore agreed. "To paraphrase Samuel Clemens ... the reports of A.B. 32's death are greatly exaggerated."

Like Nichols, Margolis appears to view the ruling as a bump in the road that has not affected his firm's preparation for a live market, which is scheduled to start Jan. 1, 2012, following an anticipated final vote on the cap-and-trade rule in October.

"We are busier than ever. We are long both buyers and sellers," he said. "What is changing is the clearing price. Many of our clients believe that this uncertainty, the possibility of a delay, has already been priced into the product."

Nor do Margolis or Kilgore think it wise to start planning for a delay. They both believe California facilities with compliance obligations should be actively piecing together a portfolio of credits and operational cuts, not watching the news.

"Anticipating a delay as a compliance risk management strategy is a shortsighted response," Kilgore said, "and I don't believe regulated entities are betting on a delay."

Margolis echoed that sentiment. "Chances are that those who base their decisions on the latest headline are likely either going to get lucky or they are going to get burned," he said.

Legal maze awaits

Even so, those close to the legal and regulatory side of the equation have hesitated to predict whether the air board will be able to navigate the justice system with enough wiggle room to approve cap and trade in October. If the rule is not cleared by then, a year after it passed the board as a draft regulation, state law requires the agency to go back to square one and start over.

Malcolm Weiss, an environmental attorney at Hunton & Williams in Los Angeles who represents industrial clients in energy and manufacturing, admitted the agency has its work cut out for it to meet the deadline. And he's not sure the agency will get there.

"There are so many moving parts, it's really hard to tell at this point," he said.

But if the environmental justice groups hold to their hard line, the air board will likely appeal to a higher court, which could then stay the Goldsmith ruling and allow the agency to proceed with its work to finalize components of cap and trade. Weiss says a stay is likely, as "courts like the status quo."

"The question then becomes, what happens to the lower court order?" Weiss said. "From what I can tell, it looks like it would be stayed."

The environmental justice groups, which claim cap and trade would hurt low-income communities, could then ask the appellate court to enjoin the agency from further implementation. A ruling on that request, Weiss said, would likely determine whether ARB can make its deadline.

"There are four or five steps in there," he said. "I don't think anybody really knows how this whole thing plays out."