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California's "Global Warming Solutions Act" Upheld By California Voters

Contributed by Robert S. Schuda, Partner, McKenna Long & Aldridge LLP

On November 2, 2010, voters in California went to the polls in part to decide on "Proposition 23,"¹ which would have suspended the implementation of California's "Global Warming Solutions Act" (discussed below) until the state unemployment rate – currently above 12 percent – dropped to 5.5 percent or below for four consecutive quarters.² According to the California Secretary of State's still-unofficial election results as of November 17, 2010, Proposition 23 was defeated by a margin of 61.6 percent (5,664,295 votes) opposed, to 38.4 percent (3,539,187 votes) in favor.³ As a result, the Global Warming Solutions Act will remain in effect.

The voters' decision to uphold the Act will have immediate and far ranging impacts on state and federal global warming policy. It will also impact utilities, businesses, and consumers in and out of California, including automakers, oil companies, appliance manufacturers, electricity generators, energy producers, oil and gas refiners, the transportation and goods movement sector, residential and commercial property uses, forestry, farming and agriculture, waste and recycling, and water producers.⁴ As a result, the vote on Proposition 23 was watched closely around the country.⁵

The Global Warming Solutions Act

Assembly Bill 32

In 2006, the California Legislature passed and Governor Schwarzenegger signed "AB 32," the Global Warming Solutions Act of 2006.⁶ AB 32 directs the California Air Resources Board ("ARB" or "Board") to implement regulations to reduce California's emissions of greenhouse gasses by 2020 to the levels of those emissions achieved in 1990. Reduction measures to meet the 2020 target are to be adopted by the start of 2011 for implementation in 2012.⁷

AB 32 required ARB to issue a "scoping plan" for achieving the maximum technologically feasible and cost-effective reductions in greenhouse gas (GHG) emissions from sources or categories of sources of (GHG)s in California by 2020.⁸ The Scoping Plan was approved by ARB on December 12, 2008 and contemplates emission reductions by regulation, market mechanisms and other actions.⁹ ARB was also required to identify the statewide level of (GHG) emissions in 1990 to serve as the emissions limit to be achieved by 2020. In December 2007, ARB approved the 2020 (GHG) emission limit of 427 million metric tons of carbon dioxide equivalent (CO₂E).¹⁰ ARB was further required to adopt a regulation requiring the mandatory reporting of (GHG) emissions, which it issued in December 2007.¹¹ ARB was also required to identify and adopt regulations for discrete early actions that could be enforceable on or before January 1, 2010. ARB adopted discrete early action measures including regulations affecting landfills, motor vehicle fuels, refrigerants in cars, tire pressure, port operations

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and other sources.¹² Regulations for additional measures are in development and, based on the voters' rejection of Proposition 23, will continue.

AB 32 established the following timeline:

- By January 1, 2009, ARB was required to adopt a plan for achieving emission reductions from significant sources of greenhouse gasses by regulations, market mechanisms and other actions.
- During 2009, ARB drafted rule language to implement its plan and held public workshops.
- By January 1, 2010, "early action" measures were to take effect.
- During 2010, ARB conducted workshops and public hearings to adopt greenhouse gas regulations including rules governing market mechanisms.
- By January 1, 2011 ARB is to complete its major rulemakings.
- By January 1, 2012 ARB's rules are to take effect and become legally enforceable.
- December 31, 2020 is the deadline for achieving AB 32's emissions cap.¹³

ARB's Scoping Plan

According to ARB, reducing (GHG) as emissions to 1990 levels will require cutting approximately 30 percent from emissions levels projected for 2020, or about 15 percent from today's emissions levels.¹⁴ To achieve these reductions, ARB's Scoping Plan calls for, among other measures, a "cap-and-trade" program to cover 85 percent of California's emissions including those from electricity generation, large industrial sources, transportation fuels, and residential and commercial use of natural gas; reductions in (GHG) emissions associated with the transportation sector; and energy efficiency measures.¹⁵

Legislative Analyst's Office Analysis of the Economic Impacts of AB 32

On March 4, 2010, the California Legislative Analyst's Office provided an analysis of the impact on jobs in California that would occur as a result of the implementation of AB 32 through the ARB Scoping Plan.¹⁶ The Legislative Analyst concluded:

"[W]e believe that the aggregate net jobs impact in the near term is likely to be negative, even after recognizing that many of the [Scoping Plan's] programs phase in over time. Reasons for this include the various economic dislocations, behavioral adjustments, investment requirements, and certain other factors that the [Scoping Plan] would entail. In the longer term, its net effect on jobs—potentially either positive or negative—is unknown and will depend on a variety of factors. In a relative sense, however, its effect on jobs in both the near term and longer term will probably be modest in comparison to the overall size of the state's economy. This, in part, reflects the relative role that energy-related inputs and costs play in our economy, as well as the [Scoping Plan's] specific measures. Certain individual businesses and households, however, would be seriously affected."¹⁷

The Legislative Analyst found that a cap-and-trade program would raise the near-term prices of electricity, gasoline, and certain other energy sources.¹⁸ Mandated improvements in vehicle fuel efficiency standards would increase the prices of cars, reduce their operating costs, and change the total amount and mix of spending on vehicles.¹⁹ In turn, this would affect employment in the vehicle production, sales, and servicing industries, and indirectly affect the demand for other goods and services and their associated employment levels.²⁰ On the other hand, mandated improvements in building and heating standards would reduce house-hold and business utility costs.²¹ Ultimately, the Legislative Analyst noted that:

"There are a great many uncertainties that inherently face anyone who attempts to make jobs-related estimates for the

[Scoping Plan including] [e]nergy-related technological changes that might occur over the forecast period, including higher- or lower-than-expected rates of return on energy efficiency investments[;] [c]hanges in federal policies regarding climate change, fuel standards, and other energy-related issues[;] [h]ow specifically a state cap-and-trade program is structured by the Legislature, including how any revenues collected might be used to support programs or reduce taxes in a way that could lead to job growth[;] [and] [d]ecisions by other states regarding their own climate-related policies, which can affect the cost-effectiveness of AB 32's [Scoping Plan] measures due to spillovers and leakages (such as a polluting firm relocating to another state from California)."²²

Proposition 23

Official Text

Proposition 23 qualified for the California ballot on June 22, 2010. The Text of Proposition 23 was as follows:

Initiative Measure to be Submitted to Voters

California Jobs Initiative

SECTION 1. STATEMENT OF FINDINGS

A. In 2006, the Legislature and Governor enacted a sweeping environmental law, AB 32. While protecting the environment is of utmost importance, we must balance such regulation with the ability to maintain jobs and protect our economy.

B. At the time the bill was signed, the unemployment rate in California was 4.8%. California's unemployment rate has since skyrocketed to more than 12%.

C. Numerous economic studies predict that complying with AB 32 will cost Californians billions of dollars with massive increases in the price of gasoline, electricity, food and water, further punishing California consumers and households.

D. California businesses cannot drive our economic recovery and create the jobs we need when faced with billions of dollars in new regulations and added costs; and

E. California families being hit with job losses, pay cuts and furloughs cannot afford to pay the increased prices that will be passed onto them as a result of this legislation right now.

SECTION 2. STATEMENT OF PURPOSE

A. The people desire to temporarily suspend the operation and implementation of AB 32 until the state's unemployment rate returns to the levels that existed at the time of its adoption.

SECTION 3. SUSPENSION OF AB 32

Division 25.6 (commencing with section 38600) of the Health and Safety Code is hereby added to read:

§38600(a) From and after the effective date of this measure, Division 25.5(commencing with section 38500) of the Health and Safety Code is suspended until such time as the unemployment rate in California is 5.5% or less for four consecutive calendar quarters.

(b) While suspended, no state agency shall propose, promulgate, or adopt any regulation implementing Division 25.5 (commencing with section 38500) and any regulation adopted prior to the effective date of this measure shall be void and

unenforceable until such time as the suspension is lifted.²³

The Attorney General's Summary and Legislative Analyst's Estimate of Proposition 23

The Official Title and Summary Prepared by the Attorney General noted that Proposition 23 would “[s]uspend[] State law that requires greenhouse gas emissions be reduced to 1990 levels by 2020, until California's unemployment drops to 5.5 percent or less for four consecutive quarters;” and that it would “[s]uspend[] [AB 32's] comprehensive greenhouse-gas-reduction program that includes increased renewable energy and cleaner fuel requirements, and mandatory emissions reporting and fee requirements for major emissions sources such as power plants and oil refineries.”²⁴

The Attorney General further noted the “Legislative Analyst's Estimate of Net State and Local Government Fiscal Impact” of Proposition 23. That estimate was summarized as: “[T]he suspension of AB 32 could result in a modest net increase in overall economic activity in the state. In this event, there would be an unknown but potentially significant net increase in state and local government revenues;” “[p]otential loss of a new source of state revenues from the auctioning of emission allowances by state government to certain businesses that would pay for these allowances, by suspending the future implementation of cap-and-trade regulations; and “[l]ower energy costs for state and local governments than otherwise.”²⁵

The Attorney General provided further analysis by the Legislative Analyst as follows:

“Global Warming and Greenhouse Gases. . .
As a populous state with a large industrial economy, California is the second largest emitter of [greenhouse gases] in the United States and one of the largest emitters of [greenhouse gases] in the world. Climate change is a global issue necessitating an international approach. Actions in California regarding [greenhouse gases] have been advocated on the basis that they will

contribute to a solution and may act as a catalyst to the undertaking of [greenhouse gas] mitigation policies elsewhere in our nation and in other countries.

* * *

The Economic Impact of Implementing the Scoping Plan. . . There is currently a significant ongoing debate about the impacts to the California economy from implementing the Scoping Plan. Economists, environmentalists, and policy makers have voiced differing views about how the Scoping Plan will affect the gross state product, personal income, prices, and jobs. . . First, because a number of the Scoping Plan measures have yet to be fully developed, the economic impacts will depend heavily on how the measures are designed in the public regulatory process. Second, because a number of the Scoping Plan measures are phased in over time, the full economic impacts of some measures would not be felt for several years. Third, the implementation of the Scoping Plan has the potential to create both positive and negative impacts on the economy. . . . Those studies that have looked at the economic impacts from a relatively broad perspective have, for the most part, found that there will be some modest reduction in California's gross state product, a comprehensive measure of economic activity for the state. These findings reflect how such things as more expensive energy, new investment requirements, and costs of regulatory compliance combine to increase the costs of producing materials, goods, and services that consumers and businesses buy.”²⁶

The Legislative Analyst concluded “that there would likely be both positive and negative impacts on the California economy if AB 32 were suspended.”²⁷ Potential positive impacts from the suspension of AB 32 were described to include reducing new compliance costs on business and lower energy

prices in 2020. Potential negative impacts on the California economy were described to include delayed investments in clean technologies and less research and development and job creation in the energy efficiency and clean energy sectors. "Considering both the potential positive and negative economic impacts of the proposition, we conclude that, on balance, economic activity in the state would likely be modestly higher if this proposition were enacted than otherwise."²⁸

Arguments of the Proponents and Opponents of Proposition 23

As put by the Los Angeles Times:

"Of course, the question of most concern to voters is whether AB 32 would worsen joblessness and slow the state's recovery. Supporters and opponents of Proposition 23 draw on studies that reach opposite conclusions; the yes side says AB 32 would cost the state 1 million jobs, while the no side says it has already led to the creation of 500,000. . . . The economic impact of AB 32 will depend on how it's implemented by regulators, as well as variables outside anyone's control or ability to forecast."²⁹

"Yes" on Proposition 23

Proponents of Proposition 23, "The California Jobs Initiative," claimed that the Proposition would protect jobs, preserve environmental protections already contained in state law, and avoid increases in energy costs. They argued that Proposition 23 would save over 1.1 million jobs, prevent an up to 60 percent increase in electricity rates, save \$3.7 billion a year in higher gasoline and diesel fuel prices, and prevent an up to 56 percent increase in natural gas rates.³⁰ They also argued that the implementation of AB 32 would increase the cost of a new home by \$50,000 by 2020, and that transportation fuel costs could increase up to 32 percent depending on how AB 32 is implemented. They further claimed that a state cap-and-trade program would increase energy prices, and reduce economic growth, household incomes, and

employment. They argued that Proposition 23 would not change California's existing environmental standards and that the threshold for reinstatement of the global warming plan, 5.5 percent statewide unemployment for four consecutive calendar quarters, has been met 10 times in the past decade and twenty times in the past twenty-one and a half years.³¹

"No" on Proposition 23

Opponents of Proposition 23, "Stop The Dirty Energy Proposition," argued that Proposition 23 would result in more air pollution and increased public health risks, jeopardize 500,000 jobs and \$10 billion in private investment in nearly 12,000 California clean energy businesses, and increase consumer energy costs by up to \$650 per year. They alleged that two Texas oil companies were primarily supporting Proposition 23 to impede competition from solar, wind and other alternative energy producers. They described AB 32 as a "clean air law." They claimed that AB 32 has put California in the forefront of the clean technology industry, sparked innovation and clean energy businesses, and created hundreds of thousands of California jobs. They also claimed that Proposition 23 would also increase household electricity costs in California by 33 percent, and that these costs would reduce economic output in California by more than \$80 billion and cost over a half million jobs by 2020.³²

Conclusion

Obviously, the accuracy of the claims of both the opponents and the proponents of Proposition 23 will be tested, now that the implementation of AB 32 will proceed. It is clear that the implementation of AB 32, and therefore the effects of the voters' rejection of Proposition 23, will impact every sector of the economy.³³ The continued implementation of ARB's Scoping Plan and the AB 32 regulations and the development of new regulations will affect California public agencies such as ports, airports, universities, cities, counties, water agencies and sanitation agencies, and private companies such as electric power generators, energy producers,

technology producers, refineries, breweries, wineries, glassmakers, forest products, biotech companies, food processors and other manufacturers in the state.³⁴ Such entities will want to continue to analyze and prepare for the effects of AB 32 and its implementation on their businesses.

Now that AB 32 remains in effect, regulatory activity related to global warming in California will continue. For example, activity on a proposed cap-and-trade regulation, the “low carbon fuel standard” regulation, and the proposed ARB regulation that would require privately and publicly owned utilities and others who sell electricity to obtain at least 33 percent of their supply from “renewable” sources, such as solar or wind power, by 2020, will continue. In addition, activities related to laws other than AB 32 will also continue, including new vehicle emission standards for cars and smaller trucks, homeowner installation of solar panels, land-use policies to promote less reliance on vehicle use, and certain building and appliance energy efficiency requirements.³⁵

Robert Schuda is a partner in McKenna Long & Aldridge’s Los Angeles office. He practices in the area of environmental counseling and litigation. Bob represents clients in matters involving air emissions, underground storage tanks, groundwater and soil remediation, environmental planning, and hazardous waste management.

1 California Secretary of State, Proposition 23, <http://www.voterguide.sos.ca.gov/propositions/23/>.

2 California Secretary of State, Proposition 23, Official Title and Summary Prepared by the Attorney General, <http://www.voterguide.sos.ca.gov/propositions/23/title-summary.htm> (“[S]ince 1970, California has had three periods (each about ten quarters long) when the unemployment rate was at or below 5.5 percent for four consecutive quarters or more. The unemployment rate in California for the first two quarters of 2010 was above 12 percent. Economic forecasts for the next five years have the state’s unemployment rate remaining above 8 percent.”); California Secretary of State, Proposition 23, Analysis by the Legislative Analyst, <http://www.voterguide.sos.ca.gov/propositions/23/analysis.htm>.

3 California Secretary of State, Semi-Official Election Results, State Ballot Measures - Statewide Results, available at <http://vote.sos.ca.gov/returns/ballot-measures/>.

4 California Environmental Protection Agency, Air Resources Board. *California’s Climate Plan Fact Sheet*, Updated January 27, 2010, available at http://www.arb.ca.gov/cc/facts/scoping_plan_fs.pdf.

5 Los Angeles Times, October 20, 2010, Section: LATEXtra, “Prop. 23 backers launch TV ad in L.A.” (stating that Proposition 23 “is the most closely watched environmental issue on the November ballot in the nation”).

6 Assembly Bill 32, 2005–2006 Leg. Sess., codified at Cal. Health & Safety Code § 38500 *et seq.*

7 California Environmental Protection Agency, Air Resources Board. *Assembly Bill 32: Global Warming Solutions Act*, available at <http://www.arb.ca.gov/cc/ab32/ab32.htm>.

8 *Id.*; Cal. Health & Safety Code § 38561.

9 California Environmental Protection Agency, Air Resources Board, *AB 32 Scoping Plan*, available at <http://www.arb.ca.gov/cc/scopingplan/scopingplan.htm>.

10 California Environmental Protection Agency, Air Resources Board. *Assembly Bill 32: Global Warming Solutions Act*, available at <http://www.arb.ca.gov/cc/ab32/ab32.htm>; Cal. Health & Safety Code § 38550.

11 *Id.*

12 California Environmental Protection Agency, Air Resources Board. *Assembly Bill 32: Global Warming Solutions Act*, <http://www.arb.ca.gov/cc/ab32/ab32.htm>; Cal. Health & Safety Code § 38560.5.

13 California Environmental Protection Agency, Air Resources Board. *Assembly Bill 32: Global Warming Solutions Act*, available at <http://www.arb.ca.gov/cc/ab32/ab32.htm>; Cal. Health & Safety Code § 38505(g).

14 California Environmental Protection Agency, Air Resources Board. *California’s Climate Plan Fact Sheet*, available at http://www.arb.ca.gov/cc/facts/scoping_plan_fs.pdf.

15 *Id.*

16 Legislative Analyst’s Office, Letter to the Hon. Dave Cogdill, Senator 14th District, March 4, 2010 at 1-2, copy available at <http://www.jobs2010ca.com/wp-content/uploads/LAO-Analysis-Impact-of-AB-32.pdf>.

17 *Id.* at 10.

18 *Id.* at 2.

19 *Id.* at 3.

20 *Id.*

21 *Id.*

22 *Id.* at 5.

23 <http://www.voterguide.sos.ca.gov/pdf/english/text-proposed-laws.pdf#prop23>.

24 California Secretary of State, Proposition 23, Analysis by the Legislative Analyst, <http://www.voterguide.sos.ca.gov/propositions/23/analysis.htm>.

25 *Id.*

26 *Id.*

27 *Id.*

28 *Id.*

29 *Id.*

30 <http://www.yeson23.com/>.

31 <http://www.yeson23.com/learn-more/fact-sheet/>.

32 <http://www.stopdirtyenergyprop.com/index.php>.

33 See *Coupal v. Bowen*, No. 34-2010-80000612 (Cal. Super. Ct. Aug. 3, 2010) at 4 (finding that three instances of the Attorney General’s initial summary of Proposition 23

were prejudicial and misleading, including characterizing affected entities under AB 32 only as “major polluters” when the measure touches every sector of the economy); see also Bloomberg Law Reports® - Sustainable Energy, *California Judge Orders Language Changes in Ballot Title and Label for Proposition 23 Initiative* (Aug. 19, 2010).

³⁴<http://www.yeson23.com/learn-more/fact-sheet/>.

³⁵*Supra* n.24.