Legal authority after 2030

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Introduction

This chapter is intended to introduce different views about the California Air Resources Board's legal authority to implement the cap-and-trade program after 2030. The goal is to describe some of the relevant legal issues, rather than authoritatively interpret the law or endorse a particular interpretation of the law. While nothing contained in this chapter should be construed as legal advice nor be cited as any form of legal authority, the Committee hopes to surface some of the policy-relevant questions being discussed in legal circles to make them more approachable to policymakers and program stakeholders.[1] The Committee recommends that policymakers at CARB and in the Legislature take steps to clarify the post-2030 future of the program.

In preparing this chapter, the Committee benefited from the presentations of two legal experts who joined one of our public meetings. For their helpful insights we gratefully acknowledge Professor Cara Horowitz, the Co-Executive Director of the Emmett Institute on Climate Change and the Environment at UCLA's School of Law, and Kevin Poloncarz, the co-chair of Covington & Burling LLP's Environmental and Energy practice group. What follows exclusively reflects the views of the Committee, however, and does not purport to represent the views of Professor Horowitz, Mr. Poloncarz, or anyone else who provided public comments.

CARB's legal authority to implement the cap-and-trade program depends both on the Board's current statutory framework and a set of state constitutional issues. We begin with a review of the statutory considerations, then turn to the constitutional issues. All statutory code references (e.g., "Section 38562") are to the California Health and Safety Code.

Explicit statutory authority

Under the provisions of Assembly Bill 398 (Stat. 2017, Ch. 135), which passed the Legislature with a two-thirds supermajority vote, CARB has explicit legal authority to operate the cap-and-trade program through the end of 2030. Section 38562(c) provides that:

> " The state board may adopt a regulation that establishes a system of market-based declining annual aggregate emissions limits for sources or categories of sources that emit greenhouse gases, applicable from January 1, 2012, to December 31, 2030, inclusive, that the state board determines will achieve the maximum technologically feasible and cost-

[1] The Committee notes that only one of its members (Danny Cullenward) is licensed to practice law in California, which precludes the Committee's ability to form an independent expert legal perspective. Among other omissions, this chapter does not discuss judicial standards of review nor comprehensively identify case law relevant to statutory interpretation or state constitutional matters.

effective reductions in greenhouse gas emissions, in the aggregate, from those sources or categories of sources. [….] ”

Because CARB's legal authority through 2030 is clear, this chapter explores (1) whether implicit statutory authority supports the post-2030 operation of the cap-and-trade program, and (2) whether the state constitution might constrain the implementation of a post-2030 program.

Based on an initial analysis, neither question appears to have an objective answer. A range of potential policy responses span what our guest speakers helpfully referred to as a "spectrum of legal risks." Some would likely present novel legal questions. In light of this complexity, the Committee suggests that policymakers would benefit from additional, detailed legal analysis.

Implicit statutory authority

Although CARB's explicit authority under Section 38652(c) of the Health and Safety Code extends only through 2030, this observation does not establish on its own the concern that CARB might lack legal authority under other statutory provisions. For convenience, this chapter refers to these other possible sources of statutory authority as "implicit" statutory authority, which might separately authorize the cap-and-trade program after 2030. To the best of the Committee's knowledge, courts have not yet addressed whether any implicit post-2030 authority exists. The discussion that follows attempts to chart some possible arguments for and against the existence of such authority, which requires a close reading of complex statutory provisions.

One important argument in favor of implicit authority is that CARB already enjoys broad authority to develop "rules and regulations … to achieve the maximum technologically feasible and cost-effective greenhouse gas emission reductions" under Section 38560. Similarly, Section 38570 provides that CARB may include "market-based compliance measures" in regulations adopted under Section 38562, without limiting this authority to Section 38562(c).[2] In turn, Section 38562(b) requires that certain regulations, including those adopted under Section 38560, achieve various standards "to the extent feasible and in furtherance of achieving the statewide greenhouse gas emissions limit[.]"[3]

Section 38562(b)'s reference to "the statewide greenhouse gas limit" suggests that the authority to adopt "market-based compliance mechanisms" may already extend to applications in service of California's post-2030 statutory climate goals. Evaluating whether this is the case is not entirely straightforward, however, because the broader statutory framework is ambiguous as to

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[2] Although the explicit authority for cap-and-trade in Section 38562(c) does not use this precise term, its formal statutory definition includes nearly identical language. The only difference is the use of "limitations" as opposed to "limits," which is likely an artifact of imprecise drafting that has no plausible difference in meaning. *Compare* Health and Safety Code § 38505(k)(1) (defining "market-based compliance mechanism" to include a "system of market-based declining annual aggregate emissions limitations for sources or categories of sources that emit greenhouse gases") *with id*. at § 38562(c) (authorizing a "system of market-based declining annual aggregate emissions limits for sources or categories of sources that emit greenhouse gases" through 2030).

[3] Specifically, these requirements apply to regulations adopted pursuant to Part 4 and Part 5 of Division 25.5 of the Health and Safety Code, which begin with Sections 38560 and 38570, respectively.

whether the "statewide greenhouse gas limit" refers exclusively to the 2020 emissions limit initially established by Assembly Bill 32 in 2006 or more generally to the legislatively codified targets for 2020, 2030, and 2045 across Division 25.5 of the Health and Safety Code.[4]

If the phrase "statewide greenhouse gas limit" encompasses the 2045 statutory direction found in Section 38562.2(c), then an argument can be made that a post-2030 "market-based compliance mechanism" — such as the cap-and-trade program — is also authorized under a combination of Sections 38560, 38562(b), and 38570.[5] Such an argument might also find support in Section 38562(g), which authorizes CARB to "revise regulations adopted pursuant to [Section 38562] and adopt additional regulations to further the provisions of [Division 25.5]." Because Assembly Bill 1279 (Stat. 2022, Ch. 337) codified 2045 climate targets in Section 38652.2, which is part of Division 25.5, policies that help implement the 2045 targets would arguably "further the provisions" of Division 25.5 as Section 38562(g) contemplates.

Another potential argument in support of implicit authority concerns Section 38551, which provides that "the greenhouse gas emissions limit shall remain in effect unless otherwise amended or repealed" and that the Legislature intends that the limit "continue in existence and be used to maintain and continue reductions in emissions of greenhouse gases beyond 2020." In effect, this provision indicates that the 2020 emissions limit is intended to be perpetual and to deepen over time, although the precise relationship between the emission reductions to be "continue[d]" after 2020 and the legislative targets subsequently codified for 2030 and 2045 may be unclear.[6] If the cap-and-trade program is necessary to support the ongoing maintenance of the 2020 emissions limit, then perhaps Section 38551 provides authority that extends beyond 2020; however, if that authority is only supposed to support the 2020 emissions limit, then there could be additional legal risks if the program's emissions budgets are designed around other policy goals that do not directly modify the 2020 emissions limit.

Although these and other arguments in favor of implicit authority can be offered, the lack of explicit post-2030 authority for the cap-and-trade program is worth considering in light of potential legal challenges. This is particularly relevant because of the difference in how the Legislature granted authority to CARB with respect to market-based compliance mechanisms in

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4 The statutory framework is arguably not a model of clear draftsmanship on this point, as emission reduction targets for 2020, 2030, and 2045 are codified with distinct language and in different locations across Division 25.5 of the Health and Safety Code. *Compare* Health and Safety Code § 38550 (defining a "statewide greenhouse gas emissions limit" for 2020) (added by Assembly Bill 32 (Stat. 2006, Ch. 488)) *with id*. at § 38566 (requiring "rules and regulations to achieve the maximum technologically feasible and cost-effective greenhouse gas reductions authorized by [Division 25.5]" that reduce emissions to "at least 40 percent below the [2020] statewide greenhouse gas emissions limit" by 2030) (added by Senate Bill 32 (Stat. 2016, Ch. 249)) *and id*. at § 38562.2(c) (declaring that it is the "policy of the state" to achieve net-zero emissions by 2045 and to reduce 2045 emissions to "at least 85 percent below the [2020] statewide greenhouse gas emissions limit established pursuant to Section 38550") (added by Assembly Bill 1279 (Stat. 2022, Ch. 337)).

5 As discussed below, this argument also anticipates concerns about Proposition 26 because Assembly Bill 398 re-authorized Section 38562 with a two-thirds supermajority vote, which suggests that any implicit authority in Section 38562 would be insulated from a Proposition 26 legal challenge.

6 *See* discussion *supra* note 4 and accompanying text.

Section 38562(c) and the broader authorities delegated to pursue non-market measures in other provisions in Assembly Bill 32 and subsequent legislation. Simply put, the only explicit authority for the cap-and-trade program is found in Section 38562(c), where it is time-delimited — originally with an expiration at the end of 2020 pursuant to Assembly Bill 32, and now extended through 2030 pursuant to Assembly Bill 398. In contrast, CARB's other climate policy authorities under Assembly Bill 32 and subsequent legislation are delegated without temporal limitation. Those authorities also include provisions like Section 38551 that affirmatively indicate that its statutory targets and non-market authorities do not automatically expire.

Based on this pattern, a reviewing court might infer that the Legislature intended to differentiate the duration of the authority it delegated to CARB to implement the cap-and-trade program under Section 38562(c), and thus conclude that implicit theories of legal authority are not applicable or persuasive. That the Legislature already acted once to extend the program's authority via Assembly Bill 398 could also confirm a skeptic's concerns, as it would have been a simple matter of drafting to provide a perpetual grant of authority instead of the time-delimited explicit extension through the end of 2030 that was chosen.

State constitutional considerations

In addition to questions about explicit and implicit statutory authority, state constitutional considerations also bear on the operation of a post-2030 cap-and-trade program. The primary issue is whether a given legal authority is considered a "tax" or something else, with two separate legal regimes controlling the answer depending on when the authorizing statute became law. In both cases, authorities deemed "taxes" require a two-thirds supermajority vote in the legislature, whereas other matters can generally be authorized by a simple majority.

The two legal regimes originate with citizen ballot initiatives, Proposition 13 in 1978 and Proposition 26 in 2010. Both initiatives amended the state constitution to require a two-thirds supermajority legislative vote for new taxes, as codified in Article XIII A § 3 of the California Constitution. Because Proposition 13 did not define the key term "tax," however, a long line of state court cases has interpreted this issue and identified a number of exemptions.[7]

Partly in response to judicial exemptions to Proposition 13, Proposition 26 added Article XIII A § 3(b), which defines a "tax" as "any levy, charge, or exaction of any kind imposed by the State," with only five limited exemptions. Article XIII A § 3(a) indicates that a two-thirds supermajority vote is triggered whenever "[a]ny change in state statute … results in any taxpayer paying a higher tax." In addition, Article XIII A § 3(d) provides that:

> " The State bears the burden of proving by a preponderance of the evidence that a levy, charge, or other exaction is not a tax, that the amount is no more than necessary to cover the reasonable costs of the governmental activity, and that the manner in which those costs

[7] Andy Coghlan and Danny Cullenward, *State Constitutional Limitations on the Future of California's Carbon Market*, 37 Energy Law Journal 219, 224-31 (2016) (describing the history of Propositions 13 and 26, as well as their application to pre- and post-2010 statutory authority).

are allocated to a payor bear a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity. "

A statutory provision is subject to analysis under the newer terms of Proposition 26 if it was passed on or after January 1, 2010, whereas statutes passed earlier than this cut-off date and after Proposition 13 took effect in the late 1970s are subject to the terms of Proposition 13. As a result, authority from 2006's Assembly Bill 32 is subject to the considerations of Proposition 13, whereas all of the authority from major climate legislation passed since 2010 — including Senate Bill 32 and Assembly Bills 398 and 1279 — are subject to analysis under Proposition 26.

Implications for existing implicit authority

Because Assembly Bill 398 passed with a supermajority vote, any of the authorities it provides would appear valid under the current requirements of Article XIII A § 3 of the California Constitution, whether or not they constitute a "tax." This could potentially include any implicit legal authority derived from Section 38562, which was reauthorized in Assembly Bill 398.[8]

In contrast, any implicit authority that derives from Assembly Bill 32 would be subject to a Proposition 13 analysis to determine whether it constitutes an impermissible "tax." In fact, CARB's decision to auction allowances as part of its cap-and-trade program was challenged as a violation of Proposition 13 because the program's original authorizing statute, Assembly Bill 32, is the product of a simple majority vote. In *California Chamber of Commerce v. CARB*, a California Court of Appeal panel decided that the auction of cap-and-trade allowances is neither a "tax" nor a "fee," as those terms are understood in the context of Proposition 13, and upheld CARB's allowance auctions as a "voluntary purchase of a valuable commodity."[9]

A complete discussion of potential state constitutional constraints under pre-2010 statutory authority is beyond the scope of this chapter and could involve significant policy consequences and complicated case law that are not fully addressed here.

Implications for new explicit authority

If policymakers decide that it is either necessary or preferable to create new legislative authority, they will also need to consider whether to do so via a simple majority or two-thirds supermajority legislative vote. Because Proposition 26's requirements are relatively recent and its specific

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8 *See* discussion supra note 5 and accompanying text.

9 *California Chamber of Commerce v. CARB* (2017) 10 Cal.App.5th 604, 614; *see also id.* at 652-72 (Justice Hull's dissenting opinion). In the interest of full disclosure, please note that IEMAC Chair Dallas Burtraw filed an amicus brief in support of CARB and Professor Horowitz represented another amicus party in support of CARB in this matter. For additional context, prior to the *California Chamber of Commerce* decision, much of the legal discussion related to CARB's pre-Assembly Bill 398 authority concerned the permissibility of "regulatory fees" under a different Proposition 13 case known as *Sinclair Paint*. *Sinclair Paint Co. v. State Board of Equalization* (1997) 15 Cal.4th 866; *see also* Cara Horowitz et al. (2012), *Spending California's Auction Revenue: Understanding the* Sinclair Paint *Risk Spectrum*, UCLA School of Law.

application to the cap-and-trade program could easily raise legal questions of first impression, the necessary analysis is complicated and goes well beyond the summary offered here.

One important caveat is in order. While precedent from cases that decided matters under Proposition 13 might inform future litigation, Proposition 26 fundamentally changed the older Article XIII A § 3 text. Specifically, it added a broad and explicit definition of the key term "tax" (paragraph (b)); enumerated a limited list of exemptions (paragraphs (b)(1) through (b)(5)); and required the government to bear the burden of proof in demonstrating that non-tax measures meet substantive standards (paragraph (d)). Because none of these elements were present under Proposition 13, policymakers should not rely on Proposition 13 case law as a straightforward proxy for how similar issues are likely to be resolved under Proposition 26.

The only simple thing that can be said is that new legislation passed by a two-thirds supermajority vote would eliminate legal risks associated with Proposition 26. In contrast, new legislation that is authorized on a simple majority basis would likely raise novel legal questions and/or require substantial policy changes to the current cap-and-trade program.

Simple majority legislation would need to authorize activity that is not a "tax" under Article XIII A § 3(b) of the California Constitution, such that the government could meet its burden of proof with respect to the requirements of § 3(d). A number of such ideas have been discussed, although it bears repeating that the legal risks associated with these concepts are nuanced and could present legal questions of first impression. For example:

- Some legal scholars have suggested that cap-and-trade allowances are similar to access charges or use charges associated with the use of state property, a line of thinking that might justify one of the enumerated Proposition 26 exemptions.[10]
- A carbon price imposed on emitters might be justified under another Proposition 26 exemption for penalties that punish legal violations.[11]

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[10] California Constitution, Article XIII A § 3(b)(4) (exempting from the definition of "tax" any "charge imposed for entrance to or use of state property, or the purchase, rental, or lease of state property, except charges governed by Section 15 of Article XI."); Dave Owen, *Auctions, Taxes, and Air*, 65 UCLA Law Review Discourse 64 (2017) (arguing that cap-and-trade allowance auctions should be considered regulatory charges for the use of public resources, rather than taxes); *but see Zolly v. City of Oakland* (2022) 13 Cal.5th 780, 784 (finding that the City of Oakland failed to show that fees charged to waste haulers for the use of certain public resources satisfied a Proposition 26 exemption related to the use of government property). Although *Zolly* concerned the authority of a local government to impose taxes under Article XIII C of the California Constitution, the relevant provisions are "similar, though not identical" to those under Article XIII A. 13 Cal.5th at 786; *compare* California Constitution, Article XIII C § 1(e)(4) ("A charge imposed for entrance to or use of local government property, or the purchase, rental, or lease of local government property.") *with id*. at Article XIII A § 3(b)(4) ("A charge imposed for entrance to or use of state property, or the purchase, rental, or lease of state property, except charges governed by Section 15 of Article XI.").

[11] Cullenward and Coghlan, *supra* note 7 at 252-54 (describing a legal theory for justifying a carbon price as a penalty under Article XIII A § 3(b)(5)). In a special legislative session called by Governor Newsom in November 2022, Senator Nancy Skinner introduced a bill, SB1X-2, that would similarly impose a penalty on oil refiners whose profits exceed certain margins. The Office of Legislative

- Professor Horowitz also suggested that policymakers could consider freely allocating all allowances, or allocate all allowances to a third-party entity that auctions the allowances and manages the associated revenues, either of which might fall outside Proposition 26's definition of a "tax."[12] Separate from any legal considerations, these constructs would eliminate revenue coming into the Greenhouse Gas Reduction Fund and raise substantial policy considerations about the distribution of program costs and benefits.

- The *California Chamber of Commerce* decision upholding cap-and-trade allowance auctions under Proposition 13 might support a related exemption to Proposition 26's definition of "tax" in which the payor receives a "specific benefit … or privilege," but would require additional analysis to determine if private allowance values "exceed the reasonable costs to the State" associated with "conferring the benefit or granting the privilege" to the successful bidder.[13]

Conclusion

Analyzing whether the California Air Resources Board has implicit authority to continue the cap-and-trade program after 2030 requires a careful reading of complex statutory language and may also be subject to nuanced constitutional considerations. Proposition 13 created and Proposition 26 modified Article XIII A § 3 of the California Constitution, which governs whether statutory authority constitutes a "tax" and therefore requires a two-thirds legislative vote. Statutes that were passed prior to 2010 are subject to analysis under the older Proposition 13 constitutional text and case law, whereas statutes passed in 2010 or later are subject to analysis under the current text of the state constitution under Proposition 26. Because the relevant constitutional text was substantially changed by the passage of Proposition 26, it is important to carefully consider the current text and not rely exclusively on case law that interprets the older, substantially more flexible standards under Proposition 13.

If policymakers determine that new statutory authority would be necessary or otherwise useful to resolve potential legal uncertainty — as they did before, with the passage of Assembly Bill 398 in 2017 — then they will need to determine whether such authority requires a simple majority or two-thirds supermajority vote under the terms of Proposition 26. A supermajority vote might present political challenges but would fully resolve any legal considerations associated with Proposition 26. In contrast, various legal theories about how simply majority extensions of CARB's explicit cap-and-trade authority might be justified under one or more of the exemptions to the state constitution's definition of a "tax" likely would present novel legal questions that are beyond the scope of this chapter.

Counsel designated the bill as requiring only a simple majority vote, which is not a dispositive legal authority but nevertheless indicates a possible legislative strategy.

12 *See also* Cullenward and Coghlan, *supra* note 7 at 249-52 (discussing similar ideas).

13 *Compare California Chamber of Commerce*, 10 Cal.App.5th at 614 (describing the allowance auctions as the "voluntary purchase of a valuable commodity" and therefore not a "tax" under the terms of Proposition 13) *with* California Constitution, Article XIII A § 3(b)(1) (exempting from the Proposition 26 definition of a "tax" any "charge imposed for a specific benefit conferred or privilege granted directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the State of conferring the benefit or granting the privilege to the payor.").