

Citizens Climate Lobby and Our Children's Earth Foundation

v.

California Air Resources Board, et al.

San Francisco County Superior Court

Argued on December 17, 2012

Patrick W. Dennis

GIBSON DUNN

Brussels • Century City • Dallas • Denver • Dubai • London • Los Angeles • Munich • New York • Orange County
Palo Alto • Paris • San Francisco • São Paulo • Singapore • Washington, D.C.

Parties

- Petitioners
 - Citizens Climate Lobby
 - Our Children’s Earth Foundation
- Respondent
 - California Air Resources Board
- Respondent–Interveners
 - Climate Action Reserve (CAR)
 - Business Coalition (mainly power companies)
 - Environmental Defense Fund
- Amicus - The Nature Conservancy

Petitioners' Allegations

- Principal Allegation – CARB's offset protocols do not meet the definition of "additionality" as that term is used in the California Health & Safety Code.
- Subsidiary allegation – CARB's recognition of offsets from so-called "early action" protocols do not meet the definition of "additionality."
- The proper standard of review should be de novo and the court should determine if any project seeking offset status might not be "additional."

Principal Arguments

- “Additionality” is a statutory requirement that means CARB must be able to ensure that any reduction qualifying for an offset would not otherwise have occurred, but for the offset market mechanism.
- Each of the four offset protocols adopted by CARB (livestock digesters, urban forests, US forests, and ODS destruction) may, or will, allow some non-additional reductions to be counted as offsets.
- Performance standard offsets are to be disfavored because they allow non-additional reductions.

Statement of Decision

- Court adopted a bifurcated standard of review with de novo for the statutory authority, but abuse of discretion for the detailed regulatory development.
- CARB’s definition of “additionality” (not attacked by petitioners) was consistent with the grant of statutory authority. CARB’s endorsement of performance standard offsets was appropriate.
- CARB’s definition of “additionality” allows each offset protocol under attack to meet the abuse of discretion standard of review.

CONCLUSION

- The Statement of Decision is final but the Court has not yet signed order, so the time for an appeal has not begun to run.
- Petitioners have suggested that they will appeal.
- CARB's view has been that an appeal would likely be heard relatively soon, i.e. less than the normal 18 month + turnaround for routine civil appeals.
- In the meantime, CARB's cap and trade program and the rest of its GHG regulatory package are in effect and offsets are now being registered.