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Dr. Steven Cliff
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California Air Resource Board
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Via Email: scliff@arb.ca.gov

Subject: Comments of Waste Management and Wheelabrator Technologies, Inc. on 2013 Proposed Regulation Amendments to Cap & Trade Regulations as pertains to Legacy Contracts

Submitted via website:
http://www.arb.ca.gov/lispub/comm/bcsubform.php?listname=capandtrade13&comm_period=A

Dear Dr. Cliff:

I. Introduction

On behalf of Waste Management (WM) and its subsidiary Wheelabrator Technologies, we appreciate the opportunity to provide the following comments on amendments to the Cap & Trade Regulation (the "C&T" or the "Regulation") released on September 4, 2013. WM's comments focus on proposed Section 95894, "Allocation to Legacy Contract Generators for Transition Assistance", and associated definitions of "Legacy Contract" and "Legacy Contract Emissions."

In summary and as discussed more fully in our comments below, Section 95894 and the associated definitions should be clarified.

- Clarification is needed to ensure that non-standard Qualifying Facilities (QFs) executed prior to 2006 without cost recovery provisions in their Power Purchase Agreements (PPAs) are afforded transitional assistance that is fair and equitable as compared to other generators subject to the C&T program. Generators who hold non-standard legacy contracts should be allotted allowances equal to the facility's actual emissions.

- Furthermore, the language of Section 95894 and associated definitions should be revised to make clear that non-standard PPAs held by a small number of QFs were not

addressed in CPUC Decision number D.10-12-035 and are therefore eligible for assistance.

- Finally, the transitional assistance formula in Section 95894 should be revised to account for actual emissions for two compliance periods, or through 2017. If the ARB does not provide transitional assistance during the second triennial compliance period, then it should allow a legacy contract generator a limited exemption from Section 95853(a) (Calculation of a Covered Entity's Triennial Compliance Obligation) if the Legacy Contract Generator's emissions are below 25,000 MTCO2(e) for the entire second triennial compliance period.

Below, we provide suggested revisions to the September 4th amendments.

II. The ARB Should Clarify Definitions Appropriate for Section 95894 To Make Plain That Transitional Assistance Is Available To Non-Standard Qualifying Facility Contracts.

The proposed definition for "Legacy Contracts" includes contracts entered into between a QF and an Investment Owned Utility (IOU).[1] We concur and support this proposal.

However, we believe some changes are needed to make clear the ARB's intent to provide transitional assistance to legacy contract holders who have no means of cost recovery.

1. First and foremost, we propose that the regulation include a definition of "Non-Standard QF Contract" to differentiate these contracts from standard offer contracts with standard short run avoided cost (SRAC) pricing provisions. A provision in the regulation granting specific definition for Non-Standard QF Contracts allows the ARB to clearly differentiate and treat differently the small group of generators with Non-Standard QF Contracts. We recommend the "Non-Standard QF Contract" definition provided below.

2. We are concerned with certain language in the definition of "Legacy Contract." The definition states "legacy contracts exclude contracts that ***give rise to*** a Legacy PPA Amendment …" [emphasis added]. We are concerned that the phrase "give rise to" is vague and open to misinterpretation. To correct this ambiguity, we recommend that the definition of "Legacy Contract" be changed to specifically include generators with Non-Standard QF Contracts that did not execute a Legacy PPA Amendment.

3. The regulation should include a definition of "Legacy PPA Amendment", as provided below, to make the meaning clear throughout the regulation.

[1] The Proposed Definition states that "'Legacy Contract' means a written contract or tolling agreement, originally executed prior to September 1, 2006, *governing the sale of electricity* …. at a price, determined by either a fixed price or price formula, that does not provide for recovery of the costs associated with compliance with the regulation …"

4. We recommend changes in the definition of "Legacy Contract Emissions" with regard to the sentence "Legacy contract emissions do not include emissions ***that are included in the calculations of cost*** under the CPUC's Qualifying Facilities and Combined Heat and Power Program Settlement …" [emphasis added]

We have provided the following specific language changes to the regulation. Please be aware that **bolded underlined** type indicates additions to language and language to be deleted is depicted with ~~strikethrough type~~:

"Non-Standard QF Contract" means a contract that does not include standard pricing based on short-run avoided costs, but includes non-standard pricing provisions negotiated bilaterally between the parties to the contract.

"Legacy PPA Amendment" means the pro forma standard amendment that was offered, under the Combined Heat and Power Program Settlement adopted by the California Public Utilities Commission (CPUC) by Decision number D-10-12-035, to combined heat and power qualifying facility (QF) generators that had existing QF contracts.

"Legacy Contract" means a written contract or tolling agreement, originally executed prior to September 1, 2006, governing the sale of electricity and/or Legacy Contract Qualified Thermal Output at a price, determined by either a fixed price or price formula, that does not allow for recovery of the costs associated with compliance with this regulation; the originally executed contract or agreement must have remained in effect and must not have been amended since September 1, 2006 to change or affect the terms governing the California greenhouse gas emissions responsibility, price or amount of electricity or Legacy Qualified Thermal Output sold, or the expiration date. For purposes of this regulation, legacy contracts exclude contracts that give rise to a Legacy PPA Amendment~~, as defined in the Combined Heat and Power Program Settlement pursuant to CPUC Decision number D-10-12-035, with a privately owned utility as defined in the Public Utilities Code section 216 (referred to as an Investor Owned Utility or IOU),~~ **but does not exclude generators with Non-Standard QF Contracts that did not execute a Legacy PPA Amendment.** A legacy contract does not apply to opt-in covered entities.

"Legacy Contract Emissions" means the emissions calculated, based on a positive or qualified positive emissions data verification statement issued pursuant to MRR, by the Legacy Contract Generator, that are a result of either electricity and/or Qualified Thermal Output sold to a Legacy Contract Counterparty, and calculated pursuant to section 95894 of this regulation. ~~Legacy contract emissions do not include emissions that are included in the calculation of cost under the CPUC's Qualifying Facilities and Combined Heat and Power Program Settlement pursuant to CPUC Decision number D-10-12-035.~~

III. The ARB Should Revise Section 95894 (d) (2) To Allocate Allowances Through The First Two Compliance Periods Of A Legacy Contract.

We strongly urge the ARB to continue with its allocation to Non-Standard QF Legacy Contract-holders for an additional compliance period, from 2015-2017, to provide sufficient time for renegotiation or, in the case in which a customer continues to refuse to renegotiate, time to retrofit or readjust operations for the inevitable high cost of compliance. By providing allowances to legacy contract holders for two compliance periods, the ARB limits the risk of these facilities shutting down and at the same time secures essential generation for the short term. The additional three years of recovery will give generators time to align operations to the substantial and inevitable hit to a facility's bottom line.

Moreover, extending the coverage for Legacy Contract Generators is consistent with the Board's direction to provide "transitional assistance." In the industrial sector, the ARB proposes to provide "transitional assistance" based on 100% allocation for the first two triennial compliance periods. As explained in the Initial Statement of Reasons for the September 4, 2013 Amendments:

> Staff proposed delaying the reduction in the assistance factor by one compliance period. The assistance factor will be maintained at 100% for all leakage risk classifications for the second compliance period if the proposed amendments are adopted... Shifting the assistance factor decline by one compliance period does not change the program cap or its annual decline. Staff proposed making this change in order to ensure consumers are not negatively impacted by the Program *while providing time for industry to transition to lower-carbon production methods.*

Similarly, Legacy Contract Generators need additional time to renegotiate their contracts or otherwise adjust to the program in order to avoid risks of shutting down and negatively impacting electricity markets, particularly in Southern California. The ARB should treat the transitional assistance for Legacy Contract Generators consistently with how it has structured transitional assistance for industrial sources, and provide complete coverage through the first two triennial compliance periods.

If the ARB does not provide transitional assistance through the second compliance period, then it should allow Legacy Contract Generators to reduce their emissions below 25,000 MTC02(e) for the entire second triennial compliance period and thereby avoid an emissions obligation for this period. As currently structured, Section 95853(a) would apply a compliance obligation to the second triennial compliance period even if emissions are below 25,000 MTCO2(e) each year in the second compliance period. A limited exemption from this provision is necessary to avoid the risks of Legacy Contract Generators shutting down during the second compliance period. This proposal would provide Legacy Contract Generators with greater flexibility in meeting the program's requirements and fulfills the Board's direction to provide "transitional assistance" to Legacy Contract Generators. To implement this recommendation, the ARB should revise Section 95853(a) as follows:

§ 95853. Calculation of Covered Entity's Triennial Compliance Obligation.

(a) A covered entity that exceeds the threshold in section 95812 in any of the three data years preceding the start of a compliance period is a covered entity for the entire compliance period. The covered entity's triennial compliance obligation in this situation is calculated as the total of the emissions with a compliance obligation that received a positive or qualified positive emissions data verification statement, or were assigned emissions pursuant to section 95131of MRR from all data years of the compliance period.
(f) **Withstanding section 95853 (a) A covered entity that receives transitional assistance pursuant to Section 95894 for the first compliance period will not be subject to a triennial compliance obligation in the second compliance period if its emissions levels do not exceed the threshold specified in section 95812 in any of three data years during the second triennial compliance period.**

IV. Equity, Fairness and Public Policy is Best Served by Granting Transitional Assistance.

As the ARB is aware, there is a small set of qualifying CHP facilities with Non-Standard Qualifying Facility (QF) contracts that are in need of a means to allow recovery of C&T compliance costs. Wheelabrator's Norwalk Energy (Norwalk) power plant is one such CHP facility. Facilities like Norwalk have Non-Standard QF Contracts that were entered into long before the legislature considered, or the public was in any way aware of, a potential C&T program in California.

These Non-Standard QF Contracts were bilaterally negotiated by the CHP facilities and the IOUs as far back as the 1980's, and included non-standard performance obligations in exchange for non-standard short run avoided cost (SRAC) pricing provisions. The existence of these non-standard performance obligations negates the ability to accept the standard legacy amendment under the CHP Program Settlement. These non-standard CHP facilities were financed and are operated based upon the non-standard pricing terms. These facilities also entered into obligations under additional agreements with third parties, including the State of California, based upon the non-standard pricing terms. Importantly, the Non-Standard QF Contracts do not address recovery of C&T compliance costs.

As part of the CHP Program Settlement, CHP facilities with *standard* legacy QF contracts were offered an amendment (the Legacy Amendment). The Legacy Amendment included short-run avoided cost (SRAC) pricing options for QFs paid under standard SRAC pricing, which under the legacy contacts are adjusted, from time to time, by the CPUC. Integrated into each standard SRAC pricing option were differing levels of recovery of C&T compliance costs.

Because Non-Standard QF Contract holders have non-standard SRAC pricing terms, not subject to adjustment by the CPUC from time to time, they were not in a position to execute the Legacy Amendment as a means of recovering C&T compliance costs. Executing a Legacy Amendment would have required Non-Standard Legacy QFs to forfeit their non-standard pricing terms that were the result of negotiations that required the CHP facility to forego certain benefits. In the case of Norwalk, accepting a Legacy Amendment would mean the facility operates at a loss.

In essence, the Legacy Amendment offered no means of recovery of C&T compliance costs for CHP facilities with Non-Standard QF Contract pricing. Non-Standard QF Contracts are not "addressed" by the CHP Program Settlement. Therefore, the regulatory amendments must be clarified to account for the unique circumstances of Non-Standard QF Contracts.

V. Conclusion

Ideally, recovery of the costs associated with a new regulation would be clearly established in the contract. Unfortunately, this has not been the case. Utilities had been given time to renegotiate contracts with small generators like Norwalk Energy, but inherent in that opportunity is an assumption that both parties are equal in their contract negotiating position. That is not the case. Utilities hold a significantly more powerful position in contract renegotiations with small generators that have no other viable energy customer than the utility with which they have an executed contract while the utility has an array of other generation options.

We appreciate ARB's proposal to provide recovery by assigning allowances to the Norwalk facility and other similarly situated power plants without cost recovery. We believe our proposed amended language is essential to make clear the ARB's intent and reach the goal of enforcing a fair and effective program that lowers the emissions of greenhouse gases into our atmosphere.

Thank you for this opportunity to provide initial comments. We look forward to working with you to resolve this important issue.

Sincerely,

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