



# CALPINE CORPORATION

1215 K Street  
Suite 2210  
Sacramento, CA 95814  
916.491.3366

April 4, 2014

*By Electronic Submission:*

[http://www.arb.ca.gov/lispub/comm/bcsubform.php?listname=capandtrade13&comm\\_period=1](http://www.arb.ca.gov/lispub/comm/bcsubform.php?listname=capandtrade13&comm_period=1)

Hon. Mary D. Nichols, Chairman  
California Air Resources Board  
1001 I Street  
Sacramento, CA 95814

Re: Comments on 15-Day Changes to Proposed Amendments to the Cap-and-Trade Regulation

Dear Madam Chairman:

Calpine Corporation (hereinafter, “Calpine”) appreciates the opportunity to provide these written comments in response to the California Air Resources Board’s (“CARB” or the “Board”) 15-day notice<sup>1</sup> of modifications to the Proposed Amendments to the California Cap on Greenhouse Gas Emissions and Market-Based Compliance Mechanisms Regulation (Cal. Code Reg. tit. 17, §§ 95800 *et seq.*, “Cap-and-Trade Regulation” or “Regulation”) and related regulatory text<sup>2</sup> (hereinafter, “15-Day Changes”).

## I. INTRODUCTION AND SUMMARY

Calpine has been a longtime supporter of CARB’s efforts to develop and implement an economy-wide greenhouse gas (“GHG”) mitigation program. We have actively participated in the development of the Cap-and-Trade Regulation, offering our input throughout the regulatory process on how CARB could best create a strong and workable program.

CARB staff has continued to work to resolve remaining issues from the 45-Day Proposed Amendments to the Cap-and-Trade Regulation (“45-Day Proposed Amendments”),<sup>3</sup> as directed

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<sup>1</sup> Notice of Public Availability of Modified Text and Availability of Additional Documents and Information (Mar. 21, 2014), *available at*:

<http://www.arb.ca.gov/regact/2013/capandtrade13/capandtrade15daynotice.pdf>.

<sup>2</sup> Attachment 1, Modified Regulation Order, *available at*:

<http://www.arb.ca.gov/regact/2013/capandtrade13/capandtrade15dayattach1.pdf>.

<sup>3</sup> *Available at*: <http://www.arb.ca.gov/regact/2013/capandtrade13/capandtrade13isorappe.pdf>.

by the Board in Resolution 13-44.<sup>4</sup> Calpine appreciates staff's efforts in this respect and, in particular, its efforts to address a number of concerns identified in our comments on both the 45-Day Proposed Amendments<sup>5</sup> and the January 2014 Discussion Draft for the 15-Day Proposed Amendments ("Discussion Draft")<sup>6</sup>. Some of these concerns addressed significant policy issues, such as the situation faced by legacy contract generators who have not been able to renegotiate their contracts to address GHG costs, while others involved details on auction participation and compliance instrument holding that, although seemingly narrow in focus, are critical to ensure a functional and robust market. In our view, the resolution to each of these concerns provided by the 15-Day Changes should support the development of a functional and robust market. Accordingly, we strongly support the 15-Day Changes and urge that staff proceed to finalize them as soon as possible.

## II. DISCUSSION

### A. The 15-Day Changes Fairly And Equitably Resolve The Concerns of Legacy Contract Generators

Calpine strongly supports CARB's approach to resolving the long-standing issue of how best to provide appropriate relief to electricity generators subject to legacy contracts entered into prior to the enactment of Assembly Bill ("AB") 32 that do not allow for recovery of GHG compliance costs for electricity and/or thermal energy delivered pursuant to the contract.

Calpine has consistently advocated for a fair resolution of the legacy contract issue<sup>7</sup> and has, whenever possible, renegotiated pre-AB 32 contracts to address GHG costs. Despite Calpine's good faith efforts to bring our counterparties to the negotiating table, we have not been able to renegotiate four remaining legacy contracts to allow for the pass-through of compliance costs associated with deliveries of electricity and/ or steam from our combined heat and power ("CHP") facilities.

The 15-Day Changes fairly and appropriately resolve this issue: Where a legacy contract counterparty will receive an allocation for industrial assistance, but will not experience an increase in its steam or electricity costs due to the existence of the legacy contract, the emissions

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<sup>4</sup> CARB, Resolution 13-44 (Oct. 25, 2013), *available at*: <http://www.arb.ca.gov/regact/2013/capandtrade13/res13-44.pdf>.

<sup>5</sup> Letter to Hon. Mary D. Nichols, Chairman, from Cassandra Gough, re: Comments on Proposed Amendments to the Cap-and-Trade Regulation (Oct. 23, 2013), *available at*: <http://www.arb.ca.gov/lists/com-attach/109-capandtrade13-VjVWMVY7AyAKZQdp.pdf> (hereinafter, "October 2013 Comments").

<sup>6</sup> Letter to Hon. Mary D. Nichols, Chairman, from Cassandra Gough, re: Comments on Discussion Draft of Proposed 15-Day Amendments to the Cap-and-Trade Regulation (Feb. 14, 2014), *available at*: <http://www.arb.ca.gov/lists/com-attach/35-discussion-draft-ws-AWJXPgZqAD5SMVQ6.pdf> (hereinafter, "February 2014 Comments")

<sup>7</sup> *See, e.g.*, October 2013 Comments, at 3-6; February 2014 Comments, at 4.

attributable to generation of steam and/or power pursuant to that contract should be deducted from the counterparty's allocation and provided to the generator instead. Calpine therefore believes the Proposed Amendments appropriately balance the interest in incentivizing renegotiation of contracts, with the reality that some industrial counterparties have little to no interest in renegotiating their existing contracts to share in the burden imposed by the Cap-and-Trade compliance obligation. Calpine also appreciates CARB's additional proposed amendment to section 95870(g) to clarify that legacy contract allocations will be provided through 2017.<sup>8</sup>

**B. CARB Should Assure That The Proposed Amendments' Increase In The Auction Purchase Limit Becomes Effective Prior To The Last Auction For 2014**

Calpine strongly supports the 15-Day Changes' proposal to increase the auction purchase limit. Under the existing Regulation, the current vintage auction purchase limit for covered entities is 15% of the allowances offered for auction at each auction occurring in 2013 and 2014. The Proposed Amendments would increase the current vintage auction purchase limit applicable to covered entities to 20% for the last auction in 2014.<sup>9</sup> Calpine appreciates this proposal and urges CARB to finalize the Proposed Amendments at the earliest opportunity to assure the increase in the auction purchase limit becomes effective in advance of critical dates pertaining the November 19, 2014 auction (*i.e.*, the auction notice date, auction application deadline and bid guarantee posting deadline).

**C. While The 15-Day Changes Address The Most Serious Concerns Regarding The Prohibition On Holding Allowances "On Behalf Of" Another Entity, CARB Should Provide Clear Guidance That This Prohibition Does Not Apply To Common Power Sales Contracts**

Section 95921(f)(1) of the Cap-and-Trade Regulation currently prohibits an entity from acquiring and holding allowances in its own holding account on behalf of another entity. As Calpine suggested when this section was initially proposed,<sup>10</sup> this provision could be interpreted to prohibit an entity from ever acquiring allowances on behalf of another entity, including under

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<sup>8</sup> Calpine notes that, in the 15-Day Changes, CARB has made one substantive change to the formulae for allocation of allowances to legacy contract generators: for those contracts with an industrial party receiving allowances, the legacy contract generator will be subject to the industrial counterparty's "industrial assistance factor." See 15-Day Changes § 95894(c). While this may result in some legacy contract generators receiving smaller allocations even though their respective industrial counterparties will experience no increase in their energy costs due to the effect of the legacy contract, Calpine does not object to this change.

<sup>9</sup> 15-Day Changes § 95911(d)(4)(A).

<sup>10</sup> Letter to Hon. Mary D. Nichols, Chairman, from Kassandra Gough, re: Comments on Proposed Amendments to the California Cap on Greenhouse Gas Emissions and Market-Based Compliance Mechanisms, at 7 (June 21, 2012), available at: [http://www.arb.ca.gov/lists/capandtrade2012/9-6-21-2012\\_calpine\\_comments\\_re\\_cap-and-trade.pdf](http://www.arb.ca.gov/lists/capandtrade2012/9-6-21-2012_calpine_comments_re_cap-and-trade.pdf).

common arrangements between utilities and power suppliers to account for the compliance obligation associated with dispatch pursuant to a power or steam sale contract. CARB subsequently published guidance that clarified that the prohibition was not intended to apply to such arrangements between utilities and their contractual counterparties.<sup>11</sup>

The 45-Day Proposed Amendments, however, would have complicated things by requiring that lawful contracts “only specify a date to deliver a specified quantity of allowances and [] include no terms applying to allowances residing in another entity’s account.”<sup>12</sup> In so doing, the 45-Day Proposed Amendments could have been interpreted to outlaw many standard form contracts used by investor owned utilities (“IOUs”) to account for GHG allowance costs. The 15-Day Changes delete this requirement and instead provide that “[p]rovisions specifying a date to deliver a specified quantity of compliance instruments, or specifying a procedure to determine a quantity of compliance instruments for delivery and/or a delivery date, do not violate the prohibition.”<sup>13</sup> This should address the concern that many common utility-generator contracts might run afoul of the 45-Day Proposed Amendments because they include many other terms governing the parties’ respective obligation with respect to procurement and transfer of allowances, beyond merely the quantity of allowances to be delivered and date of delivery.

While Calpine appreciates CARB’s proposed revisions to section 95921(f)(1)(B) and believes they should resolve uncertainty as to the legality of common utility-generator contractual arrangements, we would urge CARB to clarify its intention in this respect in the Final Statement of Reasons for the Proposed Amendments or in stand-alone guidance.

**D. The Revisions To The Limited Exemption From The Holding Limit Should Avoid Inadvertent Violations Of The Holding Limit That Might Have Occurred When The Proposed Amendments Go Into Effect**

The Cap-and-Trade Regulation contains a limited exemption from the holding limit, which is the number of allowances exempt from the holding limit calculation after they are transferred by a covered entity to its compliance account.<sup>14</sup> The 45-Day Proposed Amendments would have replaced the existing provisions with a new provision that would only begin calculating the

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<sup>11</sup> CARB, Regulatory Guidance Document, § 5.7.1, at 40 (December 2012), *available at*: <http://www.arb.ca.gov/cc/capandtrade/guidance/chapter5.pdf>. CARB stated it “views these [utility-counterparty] contracts as essentially no different than forward contracts and, accordingly, they will not be barred by the Regulation, so long as the contract does not (1) give the ultimate recipient control of compliance instruments while they are still in the account of the entity from which they will be received, and (2) does not recognize any ownership interest by the ultimate recipient in the compliance instruments while they are still in such entity’s account.” *Id.*

<sup>12</sup> 45-Day Proposed Amendments § 95921(f)(1)(B).

<sup>13</sup> 15-Day Changes § 95921(f)(1)(B).

<sup>14</sup> Cap-and-Trade Regulation § 95920(d)(2)(A).

limited exemption on October 1, 2014 (based on emissions in the 2012, 2013 and 2014 emissions data reports receiving a positive or qualified verification statement).<sup>15</sup>

The problem with the Proposed Amendments was that, assuming they should go into effect on any date prior to October 1, 2014, covered entities would have no limited exemption as of that date and could unwittingly be thrown into noncompliance with the holding limit. Section 95920(d)(2)(B) of the 15-Day Changes cures this problem and should assure thereby assure that no such inadvertent violations of the holding limit occur. Calpine appreciates CARB staff's work to close this potential and unintended gap in the limited exemption.

**E. The 15-Day Changes Should Successfully Avoid Disqualification of Covered Entities From Participation In The Auction Due To Unforeseeable Changes, Including Changes In Personnel Or Corporate Structure Unrelated To Participation In The Cap-and-Trade Program**

Calpine applauds CARB staff's elimination of provisions within the Proposed Amendments that would have potentially barred an entity from auction participation for changes occurring within 15 days *after* the auction or for changes in personnel occurring in the thirty day-period prior to the auction.<sup>16</sup> Calpine also appreciates CARB staff's revisions so that changes in unregistered corporate associations may no longer disqualify an entity from auction participation; only those changes in corporate structure involving other registered entities may disqualify an entity from auction participation under the 15-Day Changes.<sup>17</sup> Calpine believes these changes reflect a sensible resolution and should be adopted as part of the final rulemaking package.

Section 95912(d)(4) of the Regulation currently requires every auction participant to complete an auction participation application at least 30 days prior to each auction.<sup>18</sup> The 45-Day Proposed Amendments would have expanded the list of information that must be provided under section 95912(d)(4) and added a new provision whereby "[a]n entity with any changes to the auction application information listed in subsection 95912(d)(4) or account application information listed in section 95830 within 30 days prior to an auction, or an entity whose auction application information or account application information listed in section 95830 will change 15 days after an auction, may be denied participation in the auction."<sup>19</sup> In turn, the account application information listed in section 95830 would have been expanded by the 45-Day Proposed Amendments to include, among other things, disclosure of the "[n]ames and contact information for all persons employed by the entity in a capacity giving them access to information on

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<sup>15</sup> 45-Day Proposed Amendments § 95920(d)(2)(B).

<sup>16</sup> 15-Day Changes § 95912(d)(5).

<sup>17</sup> *Id.*

<sup>18</sup> Cap-and-Trade Regulation § 95912(d)(4).

<sup>19</sup> 45-Day Proposed Amendments § 95912(d)(5).

compliance instrument transactions or holdings, or involving them in decisions on compliance instrument transactions or holdings.”<sup>20</sup>

These proposed changes were problematic in three main respects. First, it was unclear how changes occurring in the 15 days *after* the auction could bar participation in the auction, once the auction had already occurred and the results have been certified by the auction administrator. Second, given the many individuals who may have access to information on Cap-and-Trade account balances in large companies and the probability that any one of them might be replaced in the thirty days before or fifteen days after an auction, it was highly likely that many of the largest auction participants would be susceptible to disqualification. Third, given the complex corporate structures of some auction participants, it made no sense to bar participation due to changes in corporate associations involving entities which were not also registered in the Cap-and-Trade Program.

The 15-Day Changes cure these problems and reflect a sensible approach that balances the interest in assuring the integrity of the auction results with the practical realities of running a large organization participating in the Cap-and-Trade Program. By only allowing changes in other registered entities to affect one’s participation and no longer allowing changes in personnel to result in disqualification, the 15-Day Changes focus on those changes in corporate structure or personnel that might affect calculation of holding limits and auction purchase limits. Calpine appreciates and fully supports these changes.

**F. It Is Appropriate To Require Retirement Of Instruments To Meet The Annual Compliance Obligation And To Apply The Quantitative Usage Limit To The Annual Obligation As Well, So Long As Failure To Use The Entire 8% Allotment At An Annual Compliance Obligation Does Not Reduce The Total Number Of Offset Credits That Can Be Used To Meet The Triennial Obligation**

The Regulation does not currently indicate in what order compliance instruments will be retired from covered entities’ compliance accounts into CARB’s Retirement Account. The Proposed Amendments would mandate such a retirement order and, in so doing, create the risk of entities placing too many offset credits into their compliance accounts prior to an annual compliance obligation becoming due; if the number of offset credits surrendered should ultimately exceed the quantitative usage limit at the end of the compliance period, the excess offset credits would possibly be “lost” and of no value to the entity, which could diminish the cost-containment role offset credits are supposed to play in the Cap-and-Trade Program.

To avoid the risk of over-surrendering offset credits, CARB initially proposed in the 45-Day Proposed Amendments that, rather than retiring compliance instruments, CARB would determine whether a covered entity has fulfilled its annual compliance obligation simply “by

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<sup>20</sup> *Id.* § 95830(c)(1)(I).

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evaluating the number and types of compliance instruments in the Compliance Account.”<sup>21</sup> In the 15-Day Changes, CARB has now proposed to retain the existing Regulation’s retirement of compliance instruments at the annual compliance obligation and, to avoid the risk of over-surrendering offsets at such time, to also apply the quantitative usage limitation to the annual compliance obligation.<sup>22</sup>

Calpine strongly supports the proposal to retain the annual compliance obligation; members of the public can only reasonably expect that compliance instruments will be retired when “used” to satisfy a compliance obligation. With respect to application of the quantitative usage limit to the annual obligation, Calpine believes this is a sound approach, so long as it is true – as we believe is reflected by the 15-Day Changes – that surrendering less than 8% offset credits at any annual obligation does not reduce covered entities’ ability to surrender offset credits for up to 8% of their total compliance obligation in a compliance period, as authorized by the existing Regulation.<sup>23</sup>

### III. CONCLUSION

Calpine appreciates CARB staff’s commendable work in resolving several important issues that will better assure a strong and workable Cap-and-Trade Program. We urge staff to move quickly to finalize these changes in the Cap-and-Trade Regulation and offer our continued support for the Program’s successful implementation and achievement of California’s GHG reduction goals.

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Please feel free to contact me with any questions or concerns regarding these comments. Thank you for the opportunity to submit these comments.

Sincerely,

/S/

Kassandra Gough  
Director, Government and Legislative Affairs

cc: Richard Corey, Executive Officer  
Edie Chang, Deputy Executive Officer  
Steven S. Cliff, Ph.D., Assistant Division Chief, Stationary Source Division  
Sean Donovan, Staff, Cap-and-Trade Program Monitoring

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<sup>21</sup> 45-Day Proposed Amendments § 95856(g)(1).

<sup>22</sup> 15-Day Changes § 95856(g)(1)(A), § 95856(h)(1)(A).

<sup>23</sup> See Cap-and-Trade Regulation § 95854(b).

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Ray Olsson, Lead Staff, Office of Climate Change  
Rajinder Sahota, Manager, Program Monitoring Section, Climate Change Program  
Evaluation Branch  
Elizabeth Scheele, Manager, Program Development Section, Climate Change Program  
Evaluation Branch  
Holly Geneva Stout, Esq., Senior Staff Counsel, Office of Legal Affairs  
Jakub Zielkiewicz, Staff, Cap-and-Trade Program Monitoring