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California Air Resources Board
1001 "I" St, Sacramento, CA, 95814

Re: January 25, 2013 Workshop and staff proposal on Public Information Sharing in California's Cap-and-Trade Program

Please accept this set of comments from Environmental Defense Fund related the January 25, 2013 workshop and staff proposal on Public Information Sharing in California's Cap-and-Trade Program. We appreciate the staff's willingness and efforts to engage in a public dialogue about California's landmark cap-and-trade regulation and look forward to your consideration of our comments on the issues presented.

In general, the invitation for comments is identified below. This letter addresses each separately.

Staff proposals: To modify the current regulation or agency practice so that CARB will make public:

- Annual allocation details for POUs covered by the program
- Annual compliance obligation by each entity registered on CITSS entity – posted annually on the ARB website
- List of all entity names registered on CITSS – updated monthly on the ARB website
- List of all names of individual persons associated with Voluntarily Associated Entities (VAE) registered on CITSS where that VAE is registered as an individual person – updated monthly on the ARB website
- Compliance account balances for all regulated entities under the program – updated monthly until CITSS is able to process it automatically, then weekly
- Identification of all retired compliance instruments – both vintage and quantity - published annually by entity in the Permanent Retirement Registry on ARB's website after compliance deadlines
- Publish issued offset quantity by offset project and vintage - updated monthly on ARB's website
- Quantity and vintage, by project, of invalidated offsets - updated monthly on ARB's website

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Without a doubt, public disclosure of data associated with compliance of environmental regulations is an important part of a comprehensive overall regulatory framework. Through access to data, both at the facility and sector level, members of the public can play an important role in inspiring reduced pollution, ensuring wide-spread compliance, and supporting enforcement efforts against non-compliant entities. In addition, through open access to data, organizations like Environmental Defense Fund are better able to understand and explain the performance of complex environmental regulations – thus playing an important role in protecting the public interest and the interests of our hundreds of thousands of members nationwide.

Following on the prior paragraph, as a default position, EDF supports the general efforts of the California Air Resources Board to expand the transparency and public access to information in the cap-and-trade regulation. However, in a market based system like cap-and-trade, factors like the scope and breadth of market participation, degree of market liquidity, and possibility of collusion between market participants can impact overall market certainty and the corresponding overall environmental performance. So, to the extent that the CARB's proposals change the timing and extent of information made public, such decisions can also impact the cap-and-trade operations and potentially result in changes to overall environmental performance. Accordingly, we offer these comments on the staff proposal.

- **Annual allocation details for POUs covered by the program**

EDF agrees that the annual allocation details for covered POU's should be aligned with the information disclosure provisions for other utilities. Namely, if the three main IOU's have their annual allocation details made public, so too should the POU's. Unlike regulated non-utility businesses, the POU's are not at significant risk for competition by other entities in their sector.

- **Annual compliance obligation by each entity registered on CITSS entity – posted annually on the ARB website**

EDF agrees with the staff proposal that the annual compliance obligation for each CITSS registered entity should be made public. Although the release of mandatory reporting data can satisfy this role, the complexity of the yearly proportional surrender requirements make it difficult for unsophisticated members of the public to track program performance. Accordingly, explicit disclosure of the compliance obligation will make it easier for members of the public to understand and track program performance and overall compliance.

- **List of all entity names registered on CITSS – updated monthly on the ARB website**

EDF agrees with the staff proposal that all entity names registered on CITSS should be made public. By allowing anyone to see in near real-time who is registered to participate in

the cap-and-trade program, CARB can create a richer view of the overall health of the cap-and-trade system. As of the date of the first compliance auction, not all registered entities with compliance burdens had created CITSS accounts, leading to some speculation on those entities market readiness. By listing such entities, market watchers can track the success of efforts by CARB to educate and enroll market participants in CITSS as well as provide an important ongoing progress report on the breadth of the CITSS system.

- **List of all names of individual persons associated with Voluntarily Associated Entities (VAE) registered on CITSS where that VAE is registered as an individual person – updated monthly on the ARB website**

EDF agrees with the staff proposal that VAE information should become public when the VAE is registered as an individual person. By increasing the ability of the public and other market participants to understand who is participating in CITSS when the VAE name is used as proxy for an actual person, the staff proposal will limit the potential for questionable market activity. Although this would result in a change from the current rule that disallows release of CITSS information at the user level, this slight modification creates little if any additional requirements or confidentiality concerns at the user level.

- **Compliance account balances for all regulated entities under the program – updated monthly until CITSS is able to process it automatically, then weekly**

Probably more so than any of the other staff proposals, and deservedly so, publishing the amount of credits in an individual entity's compliance account prior to the surrender of credits for compliance has engendered a large amount of discussion and dialogue amongst interested parties. At the heart of this issue appears to be three main questions. We respond to each below before making a recommendation:

1) What is the intent of the regulation as written at Section 95921(d)(4)?[1]

The text of § 95921(d)(4) is read as the following:

> *"Protection of Confidential Information. The Executive Officer will ensure that the accounts administrator releases information on the quantity and serial numbers of compliance instruments contained in compliance accounts in a timely manner."*

In common usage, "timely" means: coming early or at the right time.[2] However, based on a review of the regulation, the word "timely" is a term without a specific regulatory definition. Furthermore, the word "timely" is used in multiple contexts and applications –

[1] Many references to section related to "Conduct of Trade" by CARB and commenters have labeled it as §95921(e)(4). Furthermore, the regulation listed on CARB's website as dated September 1, 2012 has this section as §95921(e)(4). However, the "FINAL REGULATION ORDER" as returned by the California Office of Administrative law shows this section at §95921(d)(4). For the purposes of this letter, we therefore refer to the operative section as §95921(d)(4).

[2] http://www.merriam-webster.com/dictionary/timely

such as in §95921 and also in provisions that regulated entities must surrender compliance allowances in a timely manner – meaning by a date certain.[3] Furthermore, though §95921 appears in the Initial Statement of Reasons (ISOR), a specific discussion of §§95921(d) and (e) are not included.

With respect to the Final Statement of Reasons (FSOR), the disclosure of compliance account information is discussed as follows:

> *"Regular releases of holdings of individual firms may reveal commercially sensitive information on trade strategies that could increase the vulnerability of a participant or of the market as a whole to manipulation. We expect that market participants will have a variety of options to buy or sell allowances, through bilateral transactions, transactions through an intermediary, and exchange transactions in both spot and derivatives markets, as well as auctions. In addition, an entity's holdings are not necessarily indicative of its willingness or ability to sell compliance instruments.*
>
> *Because compliance instruments cannot be removed from a compliance account except to retire them, the number in compliance accounts is important information to the market on the available supply for trading. Further, information on an entity's compliance with the requirements of an environmental regulation benefits the public interest."*

Accordingly, although there is discussion of disclosure of compliance account information in the FSOR, there does not appear to be a large body of written information to evaluate the originally intended use of the word "timely" in this context. Therefore, in our estimation, the word "timely" should be read in the context of §95921(d) as a whole, which is of course titled: protection of confidential information.

On first read, the intent of §95921(d) in total appears to create a restriction on what information can be disclosed to the public. However, where such information is identified explicitly, as in §95921d(3), the regulation clear that information is confidential no matter when it is released. §95921(d)(4) on the other hand is not about **what** information is public, but rather, **when** information becomes. Therefore, it must follow that an analysis of §95921(d)(4) should ask, is there a point in time where information on compliance account balances, if divulged, would not have the characteristics of confidential information? If so, then this is the point in time after which timeliness is best judged and information disclosed. EDF believes the discussion in part 2 immediately below responds to this point.

2) What impact would making this information public have on individual entities?

In general, EDF understands the arguments of regulated businesses seeking to avoid the public disclosure of compliance account information to be based on two distinct premises. First, businesses want to avoid the disclosure of information that will reduce their ability to

[3] §94856 Timely Surrender of Compliance Instruments by a Covered Entity

negotiate the most favorable terms in trades or purchases for compliance credits. Second, businesses want to avoid the disclosure of information that will enable competitors and members of the public to calculate confidential business information on operations and throughput. EDF responds to each of these claims as follows:

With respect to retaining bargaining power and retaining favorable negotiating positions:

EDF agrees with CARB that most, if not all regulated entities will have a sufficient variety of options to buy or sell allowances (i.e. bilateral transactions; transactions through an intermediary; exchange transactions in both spot and derivatives markets; and auctions) in order to retain sufficient bargaining power for favorable purchasing terms. The fact that all regulated entities holding accounts are not public supports this.

However, one issue for consideration is whether the different ability of utilities and non-utilities to freely enter into contracts for future delivery of compliance credits has the effect of placing some regulated entities in a different market position than others if the staff proposal moves forward. Within the CPUC decision in the Long Term Procurement Planning Proceeding, some restrictions do exist on the ability of utilities to participate in secondary markets for offsets, meaning they have fewer options to secure compliance credits than non-utilities. EDF did not see a discussion of the effect of this difference in the staff proposal, and recommends further analysis before the proposal moves ahead.

With respect to avoiding the release of information that may be used to calculate confidential business information on operations and throughput:

In the workshop, it was identified that disclosing compliance account balances prior to the time for surrender may provide information on business practices sufficient to pre-calculate surrender obligations, and by extension allowance allocations. Through reverse engineering, this was stated as allowing sophisticated reverse engineering of reported business conditions such as throughput.

EDF does not have the capacity to comment on this aspect in detail, however, we recommend a detailed response to this issue by developed prior to adopting the staff proposal.

3) What impact would posting this information have on the overall market?

In general, making market information available for public review is a positive step towards ensuring public confidence in the operations of cap-and-trade. In general, public confidence, and confidence by the investment and regulated communities can yield

increased market participation and fluidity – in turn yielding greater overall program performance (faster and cheaper reductions).

On the other hand, to the extent that increased market information creates the potential for individual companies' emissions and market positions to be known, it may become possible, under certain circumstances, for companies to more easily collude to monopolistically set prices. Accordingly, in these situations it may be better for information to become aggregated so individual companies could not be identified.

At this point, EDF does not have the capacity to comment on this aspect in detail, though we recognize that CARB has publically stated that it has a working dialogue with the Commodities and Futures Trading Commission. Accordingly, EDF recommends CARB evaluate the proposal in open discussion with the CFTC and report back to stakeholders prior to moving ahead with the proposal.

- **Identification of all retired compliance instruments – both vintage and quantity - published annually by entity in the Permanent Retirement Registry on ARB's website after compliance deadlines**

EDF agrees with the staff proposal to disclose the identity of compliance instruments that are retired for compliance or for other purposes. By making surrendered credit vintages and quantities available to the public, interested parties can determine whether and how individual entities are meeting surrender requirements on a year by year basis, as well as track the extent to which banking has been utilized to assist with compliance.

In addition to vintage and quantity information, tracking and making available the serial number of credits that are surrendered for compliance must continue to be a part of the overall public disclosure package. Confidence that credits usable for cap-and-trade compliance are valid and have not been used to meet compliance requirements more than once is one of the most important assurances market participants need when deciding to purchase a credit. That said, double counting, or double selling credits that undermines market certainty can be prevented by effectively tracking the surrender of compliance instruments and making that tracking available publically – via serial number.

- **Publish issued offset quantity by offset project and vintage - updated monthly on ARB's website, and Publish issued offset quantity and vintage, by project, of invalidated offsets - updated monthly on ARB's website**

EDF agrees with the staff proposals to disclose expanded information on offset credit generation and invalidation at the project level. By increasing the overall amount of available information in the market for offsets, CARB can help support the public understanding of the health and breadth of the offsets portion of the program, as well as track the amount of credits coming into the system both by year and project type.

As to the issue of credit invalidation, first and foremost EDF has a high degree of confidence that the safeguards and processes employed by CARB ensure the highest quality of offsets in the AB 32 program. Accordingly, through the use of scientifically-grounded standardized protocols, active public outreach, third party verification, buffer pools for sequestration projects, (just to name a few), we believe the amount of credit invalidation that will occur in the AB 32 offsets market will be quite low. That said, it is not surprising that credits issued under different protocols are fetching different prices in the secondary market – a fact most likely based on the degree of risk that would be purchasers of offsets credits ascribe to the possibility of invalidating credits from individual project types.

By moving forward with the proposal and publishing actual invalidation information, CARB can help the AB 32 offsets market can shift towards decision making based on hard data, rather than guess or conjecture. Such information not only will provide more certainty and clarity for investors, but, as we believe, will also allow the public to see the effect of high quality protocols with stringent oversight – namely very low (if any) credit invalidation.

As always, we appreciate the opportunity to comment on the staff proposal, and look forward to productive dialogue. Please feel free to contact me with questions or comments at toconnor@edf.org or at (916) 549 - 8423.

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