



**WILDFLOWER**  
**E N E R G Y**

Wildflower Energy LP  
333 S. Grand Ave., Suite 1570  
Los Angeles, CA 90071  
Tel: (213) 473-0080  
Fax: (213) 620-1170

September 27, 2011

Clerk of the Board  
California Air Resources Board  
1001 I Street  
Sacramento, California 95814

Subject: Comments of Wildflower Energy LP on the September 12, 2011 Revisions to the  
Cap-and-trade Regulation

Dear Clerk:

Wildflower Energy LP ("Wildflower") submits the following comments in response to the California Air Resources Board ("CARB") September 12, 2011 Notice of Availability of Modified Text for the Proposed California Cap on Greenhouse Gas Emissions and Market-Based Compliance Mechanisms Regulation, Including Compliance Offset Protocols ("cap-and-trade" or "regulation").

Wildflower is very concerned that the regulation does not address, much less resolve, the circumstances of generators locked into long-term contracts executed before AB 32 was signed into law. Because these long-term contracts were entered into prior to AB 32, these contracts do not provide for recovery or allow for a pass through of greenhouse gas ("GHG") compliance costs. As discussed below, CARB must take steps to specifically address these contracts in order to fulfill CARB's emission reduction objectives in an equitable manner. One of the fundamental assumptions of the cap-and-trade regulation is that generators and marketers will pass their GHG compliance costs onto the utilities. This assumption is not applicable to this special situation of pre-AB 32 long-term contracts.

Wildflower is the owner of Larkspur Energy and Indigo Generation, two natural gas-fired power plants operating in Southern California (hereinafter "facilities"). On January 17, 2001, Governor Gray Davis proclaimed a State of Emergency to exist due to the energy shortage in the State of California. Subsequently, on February 8, 2001 and on March 7, 2001, Governor Davis issued Executive Orders D-26-01 and D-28-01, requiring the Energy Commission to invoke the emergency siting procedures in Public Resources Code section 25705 to expedite the licensing of all new renewable and peaking power plants that could be available for service no later than September 30, 2001. In these orders, Governor Davis declared that all reasonable conservation, allocation, and service restriction measures will not alleviate this energy supply emergency and that new generation was needed to avert an immediate threat to public health and safety. Larkspur was the first facility licensed under this emergency siting process and Indigo was similarly licensed under this process. At that time, the State strongly encouraged execution of



long-term power purchase agreements for these emergency facilities, in order to avoid some of the spot-market fluctuations that exacerbated the energy crisis. Wildflower's facilities entered into long-term tolling contract with a third-party power marketer through 2021 which does not provide any mechanism for cost recovery of GHG gas compliance costs. The marketer that purchases power under this contract has declined to renegotiate to address these substantial and previously unforeseen GHG costs. Consequently, Wildflower has no ability to recoup the GHG compliance costs starting July 2012, when the first cap-and-trade auction occurs.

Failure to timely address pre-AB 32 long-term contracts undermines the equity and integrity of CARB's cap-and-trade program. One of the assumptions underlying the cap-and-trade is that generators and marketers will pass their compliance costs onto the utilities. Appendix A of the regulation notes that "*a central principle of the allowance allocation to the electricity sector is the incorporation of customer cost burden. Cost burden is expected to result from emissions costs associated with fossil, QF, and non-emitting resources priced at market being passed from generators and marketers to utility customers.*"<sup>1</sup> However, in the case of Wildflower selling to a marketer, the utility will purchase power at a market price that includes a GHG cost assumption, but the marketer will never actually incur the costs of GHG compliance because Wildflower's facilities could not pass on their GHG compliance costs. This potentially gives arise to a (much abhorred) windfall profit opportunity for the marketer.

Further, the fundamental emission reduction goals of the cap-and-trade will be thwarted if CARB does not address these pre-AB 32 long-term contracts. Some of these contracts, including Wildflower's agreements, are structures where the purchasing entity can effectively call on the generator to run (full dispatch control). These contracts will be the only resources where the purchaser does not face a GHG compliance cost. Consequently, the purchaser will have an incentive to run the resource more often, irrespective of its GHG emissions profile. This result has the potential for disrupting the most efficient use of California's resources, and will tend to increase overall GHG emissions levels.

The need to address pre-AB 32 long-term contracts is clear, and yet there is no recognition of the issue in the September 12<sup>th</sup> version of the regulation. Moreover, the counter-parties to these contracts currently have no incentive to renegotiate the terms of these agreements.

Wildflower requests that CARB specifically acknowledge the need to timely address the pre-AB 32 long-term contract issue in the resolutions for adoption of the cap-and-trade regulation. A draft Board Resolution is attached to this letter as Attachment 1. Additionally, Wildflower requests that CARB direct staff to continue to evaluate and work with affected generators towards the successful resolution of these concerns.

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<sup>1</sup> See Proposed Cap-and-trade Regulation, Appendix A at p. 5.



Wildflower provides three proposals with suggested amendments to the regulation to address the pre-AB 32 long-term contract issue in Attachment 2. Wildflower welcomes the opportunity to provide additional input to staff on specific ways in which these issues may be resolved.

Sincerely,

A handwritten signature in blue ink, which appears to read "Bo Buchynsky". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Bo Buchynsky  
Senior Vice President, Wildflower Energy, LP.



## ATTACHMENT 1

### **Wildflower Proposed Board Resolution Addressing pre-AB 32 Long Term Contracts**

*WHEREAS some electricity generators and combined heat and power facilities entered into long-term contracts before the enactment of AB 32, which do not provide any mechanism for pass-through of costs associated with greenhouse gas emissions.*

*WHEREAS without further consideration from CARB of pre-AB 32 long-term contracts that do not allow for pass-through of costs associated with greenhouse gas emissions, parties that do not bare greenhouse costs compliance costs under these contracts will not have an incentive to renegotiate the contracts to provide pass-through of greenhouse gas costs.*

*NOW THEREFORE staff will work with interested stakeholders to ensure proper treatment under the regulation of any electricity generators or combined heat and power facilities with pre-AB 32 long-term contracts that do not allow for pass-through of costs associated with greenhouse gas emissions.*



## ATTACHMENT 2

### **Wildflower's Proposals for Cap-and-trade Regulation Amendments to Address Pre-AB 32 long-term Contracts with no Available Mechanism for Pass-Through of GHG Costs.**

**Proposal 1: Require the creation of a beneficial holding relationship when parties to a pre-AB 32 long term contract without GHG cost recovery do not renegotiate the agreement.**

*Add Subsection 95834(d):*

*(d) In the event there is a Long-Term Contract for the sale of electricity at wholesale which: i) does not directly or indirectly provide or refer to GHG costs either explicitly or through a) a CPUC approved contract or, b) a CPUC authorized pricing basis that includes GHG costs; ii) was fully executed before the final approval of AB 32 (September 27, 2006); and, iii) has not been renegotiated as of January 1, 2012 to address GHG costs, then, a beneficial holding relationship is deemed to exist pursuant to section 95834(a) without further action. The purchasing party to the Long-Term Contract shall purchase and hold allowances for the eventual transfer to the other party to the Long-Term Contract for the sole purpose of supplying the second entity with compliance instruments to cover emissions resulting from satisfaction of the Long-Term Contract.*

**Proposal 2: Provide a narrowly tailored exemption for generators that are operating under a pre-AB 32 long term contract without GHG cost recovery.**

*Add Sub-Section 95852.2(d):*

*(d) The operators of existing combined heat and power and generation facilities that operate under a contractual arrangement executed before September 27, 2006, does not provide or refer to either explicitly or through a) a CPUC approved contract or, b) a CPUC authorized pricing basis that includes GHG costs; ii) was fully executed before the final approval of AB 32 (September 27, 2006); and, iii) has not been renegotiated as of January 1, 2012 to address GHG costs.*



**Proposal 3: Provide free allocation of allowances.**

*Add Sub-Section 95870(f):*

*(f) Allocation for the purpose of assistance to generators and combined heat power facilities with no means of GHG cost recovery. The Executive Director shall transfer allowances necessary to cover the operation of the generators or combined heat and power facilities that meet the following qualifications: the operators of existing combined heat and power and generation facilities that operate under a contractual arrangement executed before September 27, 2006, does not provide or refer to either explicitly or through a) a CPUC approved contract or, b) a CPUC authorized pricing basis that includes GHG costs; ii) was fully executed before the final approval of AB 32 (September 27, 2006); and, iii) has not been renegotiated as of January 1, 2012 to address GHG costs.*