



# South Coast Air Quality Management District

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*Office of the Executive Officer  
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September 27, 2011

Mary Nichols, Chairman  
James Goldstene, Executive Officer  
California Air Resources Board  
1001 I Street  
Sacramento, CA 95812

Subject: South Coast Air Quality Management District (SCAQMD) staff comments on second proposed 15-day changes to California Cap on Greenhouse Gas Emissions and Market-Based Compliance Mechanisms

Dear Ms. Nichols and Mr. Goldstene:

The South Coast Air Quality Management District (SCAQMD) staff appreciates the opportunity to comment on the State's second proposed 15-day changes to the cap and trade program.

SCAQMD staff is committed to addressing climate change and supports the state's efforts to implement AB 32. Our previous comment letters submitted by SCAQMD and with CAPCOA have shared our 17 years of implementing RECLAIM, a multi-pollutant cap and trade program. We have learned first-hand how challenging and resource-intensive such a program can be, but at the same time how successful it can be, if designed properly and implemented effectively, to reduce emissions with greater flexibility and lower cost to industry.

SCAQMD's and CAPCOA's previous comment letters on draft versions of the Cap and Trade regulation outlined areas in which Air Districts should be allowed to participate with multiple roles. To date, several of the suggested changes allowing air districts to participate with multiple roles have not been accommodated, nor have discussions between CAPCOA and CARB occurred as directed in Resolution 10-42. We would still like to have discussions facilitated by CARB with CAPCOA to outline how Air Districts may participate and accommodate the implementation of the Cap and Trade program.

We again commend the changes made to resolve the previous conflict of interest requirements preventing Air Districts to act as verifiers within their own jurisdiction and support CARB staff for their work on the development of this regulation. However, once implemented, this program requires

extensive oversight by CARB not only to monitor emissions from many entities' intrinsic operations but also to provide oversight to other participants such as verifiers, project developers, registries, account holders, and brokers, whose motives are not solely for the benefit of this program. Having other public agencies such as air districts participate further will strengthen the intended results and co-benefits of this program while helping alleviate some of the oversight burden.

Many of the proposed amendments made within the second 15 day changes make this a stronger more enforceable regulation. Changes made within section 95921(g) requiring holders of clearing accounts to maintain transaction records for ten years and to provide transaction records within ten days of a request by the Executive Officer are helpful with transparency and related enforcement. In section 95986 the addition of performance requirements and non-offset related consulting conducted by registries helps again with transparency and conflict of interests.

Below are comments that again reiterate SCAQMD staff and CAPCOA requests to be allowed to perform multiple roles in this program and highlight areas in need of enforceability improvements. We appreciate the changes made to the regulation based on our previous comments and ask that the following comments be made.

#### **Ability to Perform Multiple Roles**

The proposed rules do not address the ability for air districts to perform multiple roles in the cap and trade program. Section 95986 (d)(3) still contains restrictions that an organization cannot perform multiple roles. As detailed in previous correspondence from CAPCOA, in the August 11, 2011 comment letter from SCAQMD and in briefing materials prepared by SCAQMD staff for Secretary Linda Adams (November 9, 2010) and Ms. Nichols (December 9, 2010), SCAQMD supports the previously requested language from CAPCOA. This language is included below:

Section 95989. California air pollution control districts or air quality management districts  
Notwithstanding any other provision of this regulation, California air pollution control districts  
or air quality management districts may be approved for multiple roles, including verification for  
mandatory reporting or offsets, holding compliance instruments, implementing offset projects  
that are verified by a third party and approved by CARB, and running a Registry, provided the  
appropriate training, certification, or approvals are obtained from CARB. Decisions on such  
approval requests will be provided in a timely fashion.

#### **Ability to Run a Registry**

SCAQMD may wish to run an offset registry, but this is currently precluded in Section 95986, which has a requirement that to be an Offset Project Registry, it must be the organization's primary business. Further, an organization that runs a registry cannot perform many other functions related to offsets, such as run projects or verify offsets. The above language will allow SCAQMD and other air districts to administer offset registries.

#### **Holding Compliance Instruments**

Section 95814 paragraph (b)(1) would prevent air districts serving as a verification body or as an offset verifier from holding compliance instruments. This should be allowed for air districts, as holding a small amount of compliance instruments may be needed for insurance purposes for verification services.

**Comments on 15-day Changes and General Enforcement:****Section 95850: General Requirements**

An emission violation is based on the reports submitted by the verification body and reporting entity. We recommend that the regulation, to the extent possible, prohibit the execution of indemnification agreements between the program participants and the verification/reporting agencies. In order to establish a foothold in the program, it is foreseeable that reporting agencies might offer or facilities might demand, indemnification agreements which will provide that, in the event that a violation is established through one of their reports, the reporting agency will bear the penalty. This will dilute the incentive for program participants to accurately report their emissions and may result in the concealment of information from the verification body.

**Section 95857: Untimely Surrender of Compliance Instruments by a Covered Entity**

Making up excess emissions at a 4:1 ratio is a good deterrent, however, the rules are structured so that this is not due until five days after the next auction or reserve sale conducted by CARB. This presumes that these will be the only mechanisms for market participants to obtain compliance instruments and may introduce unnecessary delays in obtaining the make-up compliance instruments. We suggest that the excess emissions be due in 30 days, and then appropriate additional enforcement action can be taken for delays.

**Section 95858: Compliance Obligation for Under-Reporting in a Previous Compliance Period**

In subdivision (a) we are very concerned that the provision of a five percent “free” under-reporting will introduce a potentially significant failure of the market to reach its required goals. The Mandatory Reporting rules also allow up to three percent of emissions (up to 20,000 MT CO<sub>2</sub>e) to be considered “de minimus” with less rigorous reporting requirements, which compounds this potential problem to potentially allow up to eight percent under reported emissions. For larger emitters these percentages can be a substantial amount of emissions.

In addition, the formula in the rule does not represent an adequate deterrent against under-reporting. Under-reported emissions should also be made up at a 4:1 ratio, if a shortfall occurred, regardless of whether it was from under-reporting or not surrendering enough compliance instruments to cover reported emissions. Six months is also too long to make up the shortfall. This should be shortened or left to CARB discretion considering the amount of emissions due. RECLAIM requires reconciliation within 30 days for quarterly reporting periods and 60 days for the annual period.

In subdivision (c) it is unclear why “subsequent” year compliance instruments are usable for correcting under-reporting, when they are not usable for the original obligation. This could encourage facilities to deliberately under-report emissions. At a minimum, we suggest that the “subsequent” years be limited to the year in which the under-reporting obligation is being satisfied.

In the latest revisions subdivision (d) was recently added in which a facility is not held responsible for under-reporting emissions if CARB has not taken action for inaccurate emission reporting after eight years. This usually is an adequate period of time for a regulatory agency to discover the violation, investigate and take appropriate enforcement action if necessary. However, three year compliance periods, along with a period of six months to make up under-reported emissions, may allow facilities to escape liability for what could be significant violations.

#### Section 96014: Violations

The provision was deleted that stated each day of violation is a separate offense under subpart (b), the new language specifies that a separate violation accrues every 45 days for an untimely surrender. This is a substantial reduction in the number of days for each violation and results in a dramatic reduction in the potential civil penalty available by statute. We strongly recommend reinstating the previous language which clearly establishes daily violations for each day of the compliance period.

Also we recommend reinstating subpart (c); the Health and Safety Code is based on actual days of violation, so this provision is of critical importance. If an enforcement action is taken to court, the extent to which actual days of violation can be established will be persuasive to a judge. Accordingly, in order to ensure adequate deterrent value in cases which may be based on negligent or intentional conduct, we recommend that the rule provide that a separate day of violation is established for each day of the applicable compliance period unless the program participant can establish compliance for each of those days. The violations continue until final compliance is achieved. This will provide an adequate number of days of violation to deter future misconduct at the facility and throughout the regulated community. We recognize that AB 32 allows CARB to develop a method of converting a violation of any rule adopted under AB 32 into "days of violation" (Health and Safety Code §38580(b)(3)), but we believe it is important to maintain the ability to seek a penalty for each day of violation.

Thank you for the opportunity to provide these comments. Please feel free to contact me if you have questions about this information or if SCAQMD staff can be of service.

Sincerely,

A handwritten signature in black ink, appearing to read "Barry R. Wallerstein", written in a cursive style.

Barry R. Wallerstein, D.Env.  
Executive Officer

cc: Ron Loveridge