

# PAUL HASTINGS

1(415) 856-7010  
peterweiner@paulhastings.com

January 20, 2017

## VIA ELECTRONIC SUBMISSION<sup>1</sup>

Clerk of the Board  
California Air Resources Board  
1001 I Street  
Sacramento, CA 95812

Re: Comments of Crockett Cogeneration on the Proposed Amendments to the Cap-and-Trade Regulation

Dear Chair Nichols and Members of the California Air Resources Board:

On behalf of Crockett Cogeneration (“Crockett”), I submit the following comments on the California Air Resources Board’s proposed amendments to the Cap-and-Trade Regulation, as well as suggested modifications to the text of the amendments as proposed. An earlier version of these comments was submitted to the Board on behalf of Crockett on November 4, 2016 for consideration and inclusion in the record for the proposed amendments to the Cap-and-Trade Regulation.<sup>2</sup> Crockett subsequently presented its views at the Board’s November 17, 2016 meeting, where the Board directed Staff to evaluate options for considering Crockett’s comments.<sup>3</sup> These comments and proposed textual modifications are submitted today in connection with the Board’s November 17 directions. Crockett would like to thank the Members of the Board as well as Staff for their consideration and for their continued efforts to improve the Cap-and-Trade Regulation.

### **Background: Legacy Contracts and the Proposed Amendments**

When the Cap-and-Trade Regulation was initially implemented, the Board provided allowances to investor owned utilities (“IOUs”) and various other covered entities, subject to a declining cap. It became apparent that some “legacy contracts” (now defined in 17 CCR § 95802(a)(204)) were not covered by the Board’s original allocation of allowances, and that there were inequities with regard to legacy contract treatment. Legacy contract holders appeared before the Board to plead their case, and the Board directed Staff to consider and act upon these concerns. Accordingly, Staff proposed in 2013 and the Board in 2014 adopted provisions to assist legacy contract holders.

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<sup>1</sup> Submitted at: [https://arb.ca.gov/lispub/comm/bcsubform.php?listname=capandtrade16&comm\\_period=1](https://arb.ca.gov/lispub/comm/bcsubform.php?listname=capandtrade16&comm_period=1).

<sup>2</sup> These comments were also submitted for consideration following the Cap-and-Trade Program Workshop held on October 21, 2016. See Comments of Crockett Cogeneration (Nov. 4, 2016), [https://www.arb.ca.gov/lispub/comm2/bccomdisp.php?listname=ct-amendments-ws&comment\\_num=21&virt\\_num=20](https://www.arb.ca.gov/lispub/comm2/bccomdisp.php?listname=ct-amendments-ws&comment_num=21&virt_num=20). They are also now included in the record within Attachment E: Public Workshop Materials, as part of the Board’s December 21, 2016 Notice of Availability of Modified Text and Availability of Documents and/or Information. See Attachment E, at 155-157, <https://www.arb.ca.gov/regact/2016/capandtrade16/attache.pdf>.

<sup>3</sup> Transcript of Meeting of the State of California Air Resources Board, at 334-337 (Nov. 17, 2016), <https://www.arb.ca.gov/board/mt/2016/mt111716.pdf>.

Clerk of the Board  
January 20, 2017  
Page 2

Legacy contract holders with IOUs or industrial counterparties lent themselves to a solution in which allowances were transferred from one party to another. However, for legacy contracts without an industrial counterparty – with several diverse and unique examples – it became necessary to allocate allowances based on previous emissions. The Board chose 2012 as that reference year. The Board also conditioned assistance on proof that the legacy contract holders continue to try to negotiate with their counterparties to absorb the cost of allowances. In some cases this proved possible, in other cases it continues to prove impossible.

In 2014, the Board decided that for legacy contracts with an industrial counterparty, transition assistance would be provided for the life of the contract. 17 CCR § 95870(g)(2). However, for those without an industrial counterparty, the Board limited transition assistance to the end of the second compliance period *Id.* § 95870(g)(1). At the time of its decision, the Board understood that there was only one legacy contract without an industrial counterparty that extended beyond 2017 – Crockett – whose contract extends until 2026. The Board urged Crockett to continue to negotiate with its counterparty, C&H Sugar, and to return to the Board later if it could not do so.<sup>4</sup> No promises were made to extend the transition assistance period, but the door remained open for conversation.

On August 2, 2016, the Board issued its Notice of Public Hearing to consider proposed amendments to the Cap-and-Trade Regulation. On December 21, 2016, it subsequently issued a Notice of Availability of Modified Text and Availability of Documents and/or Information. Among the amendments as currently drafted, Staff proposes to delete provisions pertaining to transition assistance for legacy contract generators without an industrial counterparty. For the reasons detailed below, Crockett proposes that the relevant provisions be retained and modified to extend assistance for the life of the contract.

### **Basis for Extension of Relief**

Crockett is equitably as entitled to transition assistance as any other legacy contract generator that is provided that assistance for the life of its contract. Crockett provides steam (heat) to C&H Sugar. C&H Sugar uses the steam provided by Crockett to first produce all the electrical energy required for operation of the refinery and second to supply all the thermal processes required to refine the sugar and produce its products. The steam sales contract does not provide for any pass-through for the type of costs created by the Cap-and-Trade Regulation. C&H, were it to have emissions of its own, would readily qualify as an energy-intensive trade-exposed (“EITE”) industrial entity covered under the Regulation. It is the only cane sugar refiner west of the Mississippi, and competes nationally and internationally based on price. As a result, C&H has been unwilling to shoulder any of the load of compliance costs, including the cost of joining the system and reporting.

Given Crockett’s continued inability to re-negotiate its contract with its counterparty, we ask for the Board’s consideration of the fairness of extending transition assistance for the life of Crockett’s contract (2026), subject to all of the same conditions that have been heretofore required for such assistance. Consistent with this letter, Crockett respectfully requests that Staff incorporate the changes included in Exhibit A to the amendments as currently proposed. Crockett would be pleased to work with Staff and the Board to further refine the specific changes requested.

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<sup>4</sup> C&H Sugar is not considered an industrial counterparty because it does not have sufficient emissions to be subject to reporting under the MRR or to the Cap-and-Trade Regulation.

**PAUL**  

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**HASTINGS**

Clerk of the Board  
January 20, 2017  
Page 3

Thank you for your consideration. Please contact me if you have any questions at 415-856-7010.

Sincerely,



Peter H. Weiner,  
for PAUL HASTINGS LLP

cc: Rajinder Sahota, Branch Chief, Cap-and-Trade Program (rsahota@arb.ca.gov)

## EXHIBIT A

### Recommended Modifications

Section 95802(a)(206). As proposed by Staff, the language relating to generators without an industrial counterparty would be deleted. Crockett proposes that the existing definition be retained in full, as is, with Staff's proposed deletions retained (**bold underline**):

"Legacy Contract Emissions" means the covered emissions calculated, based on a positive or qualified positive emissions data verification statement issued pursuant to MRR, by the legacy contract generator with an industrial counterparty, **or from a legacy contract generator without an industrial counterparty**, that are a result of either electricity and/or legacy contract qualified thermal output sold to a legacy contract counterparty, and calculated pursuant to section 95894 of this regulation.

Section 95802(a)(208). As proposed by Staff, this provision would be deleted entirely. Crockett proposes that it instead be retained entirely:

"Legacy Contract Generator without an Industrial Counterparty" means a covered entity that generates and sells electricity, thermal energy, or both, subject to a legacy contract, and does not also sell electricity or thermal energy under the legacy contract to a covered entity eligible for allowance allocation pursuant to section 95891.

Section 95870(g)(1). Staff proposed to delete Section 95870(g)(1) in full. Crockett proposes that this provision be retained in full, with the following modifications:

Allowances will be allocated to legacy contract generators without an industrial counterparty ~~for budget years 2013 through 2017 for transition assistance~~ pursuant to section 95894 for the term of the contract. The Executive Officer will transfer allowance allocations into each eligible generator's annual allocation holding account by October 24 of each calendar year for eligible legacy contract emissions pursuant to the methodology set forth in section 95894 ~~each year through 2017~~.

Alternatively, Staff could identify parties "without an industrial counterparty" in current Section 95870(g)(2), as (g)(1) and (g)(2) would be largely duplicative under Crockett's proposal.

New Section 95871(f). Staff proposes to add this provision to address allocation to legacy contract generators post-2020. Crockett proposes the following amendment to capture generators without an industrial counterparty:

Allocation to Legacy Contract Generators. Allowances will be allocated to legacy contract generators with an industrial counterparty and without an industrial counterparty pursuant to section 95894 for the term of the contract. The Executive Officer will transfer allowance allocations into each eligible generator's annual allocation holding account by October 24 of each calendar year during the term of the contract for eligible legacy contract emissions pursuant to the methodology set forth in section 95894 beginning in 2020 for allocation from the 2021 annual allowance budget.

Section 95890(e). As proposed by Staff, the language relating to generators without an industrial counterparty would be deleted. Crockett proposes that Staff's proposed deletions be retained (**bold underline**):

Eligibility Requirements for Legacy Contract Generators. A legacy contract generator with an industrial counterparty that has demonstrated its eligibility to the satisfaction of the Executive Officer pursuant to section 95894 of this regulation shall be eligible for direct allocation of allowances if it has complied with the requirements of MRR and has obtained a positive or a qualified positive emissions data verification statement pursuant to MRR. **A legacy contract generator without an industrial counterparty that has demonstrated its eligibility to the satisfaction of the Executive Officer pursuant to section 95894 of this regulation shall be eligible for direct allocation of allowances if it has complied with the requirements of MRR and has obtained a positive or a qualified positive emissions data verification statement pursuant to MRR.**

Section 95894(a). As proposed by Staff, the language relating to generators without an industrial counterparty would be deleted. Crockett proposes that language be retained (**bold underline**), rather than deleted, from the excerpted portion of Section 95894(a), below:

Demonstration of Eligibility. Opt-in covered entities are not eligible for transition assistance due to legacy contract emissions. To be eligible to receive a direct allocation of allowances under this section, the primary or alternate account representative of a legacy contract generator with an industrial counterparty **or legacy contract generator without an industrial counterparty** shall submit the following in writing via certified mail to the Executive Officer by . . . .

Section 95894(a)(1)(A)-(B). As proposed by Staff, these provisions would be modified to delete Section 95894(a)(1)(B). Because this section is relevant to the allocation methodology for generators without an industrial counterparty under Section 95894(d), Crockett proposes that the following language be retained (**bold underline**) rather than deleted as proposed by Staff:

(A) Previous data year's legacy contract emissions, pursuant to section 95894(c); **and (B) 2012 data year's legacy contract emissions, pursuant to section 95894(d)**

Section 95894(a)(3)(C). As proposed by Staff, the language relating to generators without an industrial counterparty would be deleted. Crockett proposes that language be retained (**bold underline**), rather than deleted, from the excerpted portion of Section 95894(a)(3)(C), below:

The operator of the legacy contract generator with an industrial counterparty **or the legacy contract generator without an industrial counterparty** made a good faith effort . . . .

Section 95894(b). As proposed by Staff, the reference to Section 95894(d) would be deleted. This provision relates to allocations for generators without an industrial counterparty. Crockett proposes that this reference be retained.

Section 95894(d). As proposed by Staff, Section 95894(d) would be deleted entirely. Crockett proposes that relevant portions be retained and modified to extend assistance for the life of the contract. Specifically, Crockett proposes that Section 95894(d) be retained and modified as follows:

(d) Allocation to Legacy Contract Generators without an Industrial Counterparty. For legacy contracts not covered in 95894(c), the following ~~formulae~~ equation shall apply:

(1) ~~For stand-alone generation facilities that are legacy contract generators without an industrial counterparty:~~

$$TrueUp_{2015} = (EE_{t,c} * c_{2013}) + (EE_{t,c} * c_{2014}) + (EE_{t,c} * c_{2015})$$

Where:

~~“TrueUp<sub>2015</sub>” is the amount of true up allowances allocated from budget year 2015 and allowed to be used for compliance for budget years 2013 and 2014 and subsequent years, pursuant to sections 95856(h)(1)(D) and 95856(h)(2)(D);~~

~~“EEm<sub>16</sub>,” is the emissions reported, in MTCO<sub>2e</sub>, associated with electricity sold under the legacy contract in 2012; and~~

~~“c<sub>2013</sub>,” “c<sub>2014</sub>,” and “c<sub>2015</sub>” are the cap adjustment factors for budget years 2013, 2014, and 2015, respectively, as specified under the “Cap Adjustment Factor (c) for All Other Direct Allocation” column in Table 9-2.~~

For budget years 2016 and 2017 the following equation applies:

$$A_t = (EEm_{16} * c_t)$$

Where:

~~“A<sub>t</sub>” is the amount of California GHG allowances directly allocated to the legacy contract generator without an industrial counterparty for legacy contract emissions from budget year “t.” This value shall only be calculated if the entity meets the eligibility requirements, pursuant to section 95894(a) and 95894(b), and is covered under the Cap and Trade Program during the second compliance period.~~

~~EEm<sub>16</sub>,” is the emissions reported, in MTCO<sub>2e</sub>, associated with electricity sold under the legacy contract in 2012; and~~

~~“c<sub>t</sub>” is the adjustment factor for budget year “t,” as specified under the “Cap Adjustment Factor (c) for All Other Direct Allocation” column in Table 9-2.~~

~~(2) For legacy contract generators without an industrial counterparty not covered in 95894(c) or 95894(d)(1):~~

$$TrueUp_{2015} = \frac{((Q_{16} * B_s + E_{16} * B_e) * c_{2013}) + ((Q_{16} * B_s + E_{16} * B_e) * c_{2014})}{((Q_{16} * B_s + E_{16} * B_e) * c_{2015})}$$

Where:

~~“TrueUp<sub>2015</sub>” is the amount of true up allowances allocated from budget year 2015 and allowed to be used for compliance for budget years 2013 and 2014 and subsequent years pursuant to sections 95856(h)(1)(D) and 95856(h)(2)(D);~~

~~“Q<sub>16</sub>” is the legacy contract qualified thermal output in MMBtu sold under a legacy contract in data year 2012, as reported to MRR;~~

~~“E<sub>16</sub>” is the electricity, in MWh, sold under the legacy contract in data year 2012;~~

~~“B<sub>e</sub>” is the emissions efficiency benchmark per unit of electricity sold or provided to off-site end users, 0.431 California GHG Allowances/MWh;~~

~~“B<sub>s</sub>” is the emissions efficiency benchmark per unit of legacy contract qualified thermal output, 0.06244 California GHG Allowances/MMBtu thermal; and~~

~~“C<sub>2013</sub>,” “C<sub>2014</sub>,” and “C<sub>2015</sub>” are the cap adjustment factors for budget years 2013, 2014, and 2015, respectively, as specified under the “Cap Adjustment Factor (c) for All Other Direct Allocation” column in table 9-2.~~

~~For budget years 2016 and 2017, the following equation applies:~~

$$A_t = ((Q_{lc} * B_s + E_{lc} * B_e) * c_t)$$

Where:

“A<sub>t</sub>” is the amount of California GHG allowances directly allocated to the legacy contract generator without an industrial counterparty, for legacy contract emissions from budget year “t.” This value shall only be calculated if the entity meets the eligibility requirements, pursuant to section 95894(a) and 95894(b), and is covered under the Cap-and-Trade Program during ~~the second compliance period~~ budget year “t”;

“Q<sub>lc</sub>” is the legacy contract qualified thermal output in MMBtu sold under a legacy contract in data year 2012, as reported to MRR;

“E<sub>lc</sub>” is the electricity, in MWh, sold under the legacy contract in data year 2012;

“B<sub>e</sub>” is the emissions efficiency benchmark per unit of electricity sold or provided to off-site end users, 0.431 California GHG Allowances/MWh;

“B<sub>s</sub>” is the emissions efficiency benchmark per unit of legacy contract qualified thermal output, 0.06244 California GHG Allowances/MMBtu thermal; and

“c<sub>t</sub>” is the cap adjustment factor for budget year “t” as specified under the “Cap Adjustment Factor (c) for All Other Direct Allocation” column in ~~Table~~ Table 9-2.

Section 95894(e). As proposed by Staff, the language relating to generators without an industrial counterparty would be deleted, and the Section would be re-lettered as “(d)” to account for Staff’s proposed deletion of Section 95894(d) in full. Crockett proposes that Staff’s proposed deletions be retained (**bold underline**):

Data Sources. In determining the appropriate values for section 95894(c) **and 95894(d)**, the Executive Officer may employ all available data reported to ARB under MRR and all other relevant data, including invoices, that demonstrate the amount of electricity and legacy contract qualified thermal output sold or provided for off-site use does not include a carbon cost in the budget year for which it is seeking an allocation. If necessary, the Executive Officer will solicit additional data to establish a representative allocation. The operator of the legacy contract generator with an industrial counterparty **and the operator of a legacy contract generator without an industrial counterparty**, must provide the additional data upon request by the Executive Officer.

Section 95894(f). As proposed by Staff, the language relating to generators without an industrial counterparty would be deleted, and the Section would be re-lettered as “(e)” to account for Staff’s proposed deletion of Section 95894(d) in full. Crockett proposes that Staff’s proposed deletions be retained (**bold underline**):

Contract Expiration or Generator Closure. Once a legacy contract expires or the legacy contract generator with an industrial counterparty **or legacy contract generator without an industrial counterparty** closes operations, the generator will no longer be eligible for free allocation pursuant to 95890(e), and allocation will be prorated for the time in which the contract was eligible.