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**VIA ELECTRIC SUBMISSION**

October 14, 2013

The Honorable Mary D. Nichols, Chairman  
California Air Resources Board  
1001 "P" Street  
Sacramento, CA 95814

**Subject: Comments on CARB's September 2013 Proposed Regulation Order  
Regarding Amendments to the California Cap-and-Trade Regulation**

Dear Madam Chairman:

We appreciate the opportunity to provide these comments regarding the California Air Resources Board ("CARB") Proposed Regulation Order<sup>1</sup> to amend certain provisions of CARB's Cap-and-Trade Regulation (the "Regulation").<sup>2</sup>

**I. Introduction**

CARB staff has undertaken significant efforts over the past many months to address several important aspects of the Regulation. In particular, CARB staff has worked closely with numerous stakeholders to address the legacy contracts issue,<sup>3</sup> which threatens the continued viability of highly efficient electricity producing and combined heat and power ("CHP") facilities in California. While we continue to communicate with CARB staff and Members of the Board regarding this issue, at the date of this writing, neither CARB staff nor the Board has provided any further response on this matter since the Proposed Regulation Order was noticed on September 4, 2013. Thus, we are not providing further comments on the legacy contracts issue until CARB provides stakeholders with a response. Separately, as described below, we encourage CARB staff to modify or clarify certain disclosure requirements under the Regulation, which could result in violations of the attorney-client privilege and attorneys' ethical duty of confidentiality.

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<sup>1</sup> See CARB Staff Report: Initial Statement of Reasons, Appendix E, Proposed Regulation Order, *available at* <http://www.arb.ca.gov/regact/2013/capandtrade13/capandtrade13isorappe.pdf>.

<sup>2</sup> Tit. 17, Cal. Code Reg. §§ 95800 *et seq.*, referred to herein as the "Regulation".

<sup>3</sup> Legacy contracts are those that do not allow for a pass-through of the cost to purchase greenhouse gas ("GHG") emission allowances to meet generators' compliance obligation under the Regulation.

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## II. Disclosure Requirements Should Be Modified Or Clarified To Ensure Protection Of The Attorney-Client Privilege And Duty of Confidentiality

### A. Clarification Is Necessary Regarding An Entity's Obligation To Provide A Description of Work Performed by A Consultant or Advisor

An entity registering to participate in the Cap-and-Trade Program must provide detailed information for individuals serving as a Cap-and-Trade Consultant or Advisor.<sup>4</sup> Specifically, an entity employing a Cap-and-Trade Consultant or Advisor must provide, among other things, “a brief *description of the work performed* . . . to the extent disclosure of such a description *does not violate any other rules under which the Consultant or Advisor may be required to observe*.”<sup>5</sup> In the Proposed Regulation Order, “Cap-and-Trade Consultant or Advisor” is broadly defined as “a person or entity that is not an employee of an entity registered in the cap-and-trade, but is paid for information or advice related to the Cap-and-Trade Program specifically for the entity registered in the Cap-and-Trade Program.”<sup>6</sup> On its face, a “Cap-and-Trade Consultant or Advisor” would include attorneys retained by entities to provide legal and other advice regarding the Cap-and-Trade Program.

We note that the provision that the disclosure must not violate any rules that the Consultant or Advisor is required to observe is newly proposed language that did not appear in CARB staff's July 2013 Draft Amendments.<sup>7</sup> Presumably, this provision is intended to address stakeholders' concerns that section 95923 would require entities to disclose documents or information protected by the attorney-client privilege. While CARB staff's modified section 95923(b)(2) is an improvement in this regard, it does not specifically exclude disclosure of information that would violate the attorney-client privilege. We believe that such a modification to the Proposed Draft Order is necessary in light of the essential function that the attorney-client privilege serves in the American legal system.

The attorney-client privilege broadly protects confidential communications made between attorneys and their clients,<sup>8</sup> and “has been a hallmark of Anglo-American jurisprudence for almost

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<sup>4</sup> Proposed Regulation Order, § 95830(c)(1)(J) (requiring entities to provide information set forth in section 95923).

<sup>5</sup> Proposed Regulation Order, § 95923(b)(2).

<sup>6</sup> Proposed Regulation Order, § 95923(a) (emphasis added).

<sup>7</sup> See CARB, “DISCUSSION DRAFT JULY 2013,” available at [http://www.arb.ca.gov/cc/capandtrade/meetings/071813/ct\\_reg\\_2013\\_discussion\\_draft.pdf](http://www.arb.ca.gov/cc/capandtrade/meetings/071813/ct_reg_2013_discussion_draft.pdf)

<sup>8</sup> *Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal. 4th 725, 739-40 (holding that no content of an attorney-client privileged communication is discoverable).

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400 years.”<sup>9</sup> Expressly protected by California statute,<sup>10</sup> the attorney-client privilege is critical to “safeguard[ing] the confidential relationship between clients and their attorneys so as to promote full and open discussion of the facts and tactics surrounding individual legal matters.”<sup>11</sup> Indeed, by protecting confidentiality and encouraging open and complete communication between clients and lawyers, the attorney-client privilege ensures that attorneys can provide clients with candid advice and effective representation. The privilege undoubtedly provides an essential legal safeguard that the Regulation should not compromise. Thus, we encourage CARB staff to modify the Draft Regulation Order to make expressly clear that any “description of the work performed” required by section 95923(b)(2) does not include any information protected by or subject to the attorney-client privilege.

**B. Auction Advisor Disclosure Requirements Should Be Modified To Safeguard The Attorney-Client Privilege And Avoid Violation of Duty of Confidentiality**

Section 95914 requires an entity participating in an auction who has “retained the services of an advisor regarding auction bidding strategy” to: (1) inform CARB staff of (a) the identity of the advisor, (b) the advisor’s employer, and (c) the advisor’s contact information; and (2) provide CARB staff an attestation of the completeness of such disclosure. In addition, however, such an auction advisor must provide CARB staff, in writing, at least 15 days before the auction:

1. Names of the entities participating in the Cap-and-Trade Program that are being advised;
2. *Description of advisory services being performed;* and
3. Assurance under penalty of perjury that advisor is not transferring to or otherwise sharing information with other auction participants.<sup>12</sup>

Under the Proposed Regulation Order, if an auction participant retained an attorney to advise it regarding some aspect of the auction bidding process, section 95914(c)(3)(D) would require

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<sup>9</sup> *Mitchell v. Superior Court* (1984) 37 Cal.3d 591, 599.

<sup>10</sup> See Cal. Evid. Code § 954 (providing that the client “has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer if the privilege is claimed by: (a) The holder of the privilege; (b) A person who is authorized to claim the privilege by the holder of the privilege; or (c) The person who was the lawyer at the time of the confidential communication, but such person may not claim the privilege if there is no holder of the privilege in existence or if he is otherwise instructed by a person authorized to permit disclosure.”)

<sup>11</sup> *OXY Resources Cal. LLC v. Superior Court* (2004) 115 Cal. App. 4th 874, 901.

<sup>12</sup> Proposed Regulation Order, § 95914(c)(3)(D).



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the attorney (not the entity) to provide a description of the advisory services performed for such an entity. In doing so, however, the attorney would violate the attorney-client privilege and the separate duty of confidentiality required by the California Rules of Professional Conduct.<sup>13</sup>

As discussed above, the attorney-client privilege protects confidential communications between clients and lawyers. The right to assert the privilege belongs to the client.<sup>14</sup> However, “the attorney is professionally obligated to claim it on behalf of his client’s behalf whenever the opportunity arises unless he has been instructed otherwise by the client.”<sup>15</sup> The essential importance of such protection is further evidenced by courts’ inability to compel any waiver of the attorney client privilege.<sup>16</sup> Given the significance of the privilege in the American legal system, an attorney who willfully violates the attorney-client privilege may face disqualification from practicing law and incur other sanctions.<sup>17</sup> As written, section 95914(c)(3)(D) would require the attorney, not the client-holder of the privilege, to disclose privileged communications to CARB.

In addition, attorneys are subject to a separate ethical duty of confidentiality, which is even broader than the attorney-client privilege. The duty of confidentiality extends to cover all of the information gained within the scope of the attorney-client professional relationship that the client has requested be kept secret, or the disclosure of which could be harmful or embarrassing to the client.<sup>18</sup> Significantly, a lawyer must “maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.”<sup>19</sup> While the attorney-client privilege applies in judicial and other proceedings in which an attorney may be called as a witness or otherwise be compelled to produce evidence concerning a client, the duty of confidentiality prevents an attorney from revealing a client’s confidential information—even when not confronted with such compulsion.<sup>20</sup> Like the attorney-client privilege, the duty of confidentiality “contributes to the trust

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<sup>13</sup> See California Rules of Professional Conduct, Rule 3-100 (Confidential Information of a Client).

<sup>14</sup> *OXY Resources Cal. LLC*, 115 Cal. App. 4th at 901; Cal. Evid. Code § 954.

<sup>15</sup> *Glade v. Superior Court* (1978) 76 Cal. App. 3d 738, 743 (emphasis added).

<sup>16</sup> *Shannon v. Superior Court* (1990) 217 Cal. App. 3d 986, 995.

<sup>17</sup> See, e.g., *Snider v. Superior Court* (2003) 113 Cal. App. 4th 1187, 1212; *Gomez v. Vernon*, 255 F.3d 1118, 1133-34 (9th Cir. 2001); see also Cal. Bus. & Prof. Code § 6068(o)(3).

<sup>18</sup> See Cal. State Bar Formal Op. No. 2003-161.

<sup>19</sup> Cal. Bus. & Prof. Code § 6068(e)(1).

<sup>20</sup> See California Rules of Professional Conduct, Rule 3-100, Discussion [2] (Confidential Information of a Client); *Goldstein v. Lees* (1975) 46 Cal. App. 3d 614, 621 n.5.

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that is the hallmark of the client-lawyer relationship,” ensuring full and frank communication between client and lawyer, and enabling the lawyer to provide effective counsel to the client.<sup>21</sup> The disclosure requirements contemplated by section 95914(c)(3)(D), however, would require an attorney to violate this duty.

Absent an express exclusion of attorneys from this provision, to avoid running afoul of such disclosure requirements, outside counsel may be forced to refrain from providing any advice to entities regarding the auction bidding process and potentially other related aspects of the Cap-and-Trade Program. As a result, section 95914(c)(3)(D) could have a “chilling effect” on attorneys’ ability to advise clients in this regard, which would severely limit the ability of clients to receive complete legal and other advice in such matters. To avoid undermining the attorney-client relationship in this regard, we encourage CARB staff to expressly exclude attorneys from the disclosure requirements in section 95914(c)(3)(D). While CARB staff included this provision “to provide ARB with greater oversight of advisors,”<sup>22</sup> we believe such modification to the Regulation will not undermine or affect CARB staff’s ability to maintain such regulatory oversight. In light of these considerations, we encourage CARB staff to make every effort to protect the attorney-client privilege and to ensure that attorneys are not required to disclose privileged or client confidential information under the Regulation.

Finally, we note that the auction advisor described in section 95914 would appear to satisfy the definition of “Cap-and-Trade Consultant or Advisor” in section 95923, described above. Thus, for consistency and clarity, it appears that references to “advisor” in section 95914 should be changed to “Cap-and-Trade Consultant or Advisor”.

### III. Conclusion

As stated in the introduction, we are not commenting in this letter on the legacy contracts issue, but will provide such comments following any response from CARB staff or the Board at a date closer to the October 24-25, 2013 Board hearing. In the meantime, we encourage staff to provide complete relief to legacy contract generators through the end of their respective contracts.

Separately, we request that CARB staff modify or clarify certain disclosure requirements under the Regulation to ensure protection of the attorney-client privilege and to avoid any potential requirement for attorneys to breach their ethical duty of confidentiality to their clients. Absent such

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<sup>21</sup> California Rules of Professional Conduct, Rule 3-100, Discussion [2] (Confidential Information of a Client).

<sup>22</sup> See CARB Staff Report: Initial Statement of Reasons, Proposed Amendments to the California Cap on Greenhouse Gas Emissions and Market-Based Compliance Mechanisms, at 189, *available at* <http://www.arb.ca.gov/regact/2013/capandtrade13/capandtrade13isor.pdf>.

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modifications, outside attorneys may be forced to refrain from providing any advice to clients in order to avoid the risk of sanctions, or even disbarment.

Consistent with these comments, included as Exhibit A to this comment letter are amendments to the Proposed Regulation Order that we encourage CARB to adopt.<sup>23</sup>

Respectfully submitted,

*Peter H. Weiner*

Peter H. Weiner

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<sup>23</sup> Recommended insertions are shown in underlined text and deletions are shown in ~~strikethrough~~.

**CARB September 2013 Proposed Regulation Order Regarding Amendments To The California  
Cap-and-Trade Regulation**

**Exhibit A: Recommended Amendments To Protect Attorney-Client Privilege And  
Duty of Confidentiality**

**§ 95914. Auction Participation and Limitations**

\* \* \* \*

(c) Non-disclosure of Bidding Information

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- (3) If an entity participating in an auction has retained the services of ~~an advisor~~ a Cap-and-Trade Consultant or Advisor regarding auction bidding strategy, then:

\* \* \* \*

- (C) Any entity that has retained the services of ~~an advisor~~ a Cap-and-Trade Consultant or Advisor must inform ARB of the advisor's retention and identify the advisor, the advisor's employer, the advisor's contact information, and provide an attestation by the Primary Account Representative of the entity retaining the advisor of the completeness of the disclosure; and
- (D) The advisor must provide to the Executive Officer in writing at least 15 days prior to an auction, the following information:
1. Names of the entities participating in the Cap-and-Trade Program that are being advised;
  2. Description of advisory services being performed without compromising the confidentiality of the attorney-client relationship or any duty of confidentiality afforded by rule, regulation, case law or statute under which the Consultant or Advisor may be required to observe; and

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**§ 95923. Disclosure of Cap-and-Trade Consultants and Advisors**

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- (b) An entity employing Cap-and-Trade Consultants or Advisors defined per 95923(a) must disclose the following information for each Cap-and-Trade Consultant or Advisor, unless already disclosed pursuant to section 95914(c)(3):

\* \* \* \*

- (2) A brief description of the work performed by the Consultant or Advisor, to include information sufficient to explain the entity's evaluation of the measures contained in section 95923(a) used to determine the Consultant or Advisor relationship, without compromising the confidentiality of the attorney-client relationship or any duty of confidentiality afforded by rule, regulation, case law or statute to the extent disclosure of such a description does not violate any other rules under to which the entity is entitled or the Consultant or Advisor may be required to observe.