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## VIA ELECTRIC SUBMISSION

May 21, 2013

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

**Subject: Comments on CARB's May 1, 2013 Workshop Presentation Regarding Proposed Adjustments to the Cap-and-Trade Program's Treatment of Universities, 'But For' CHP, and Legacy Contracts**

Dear Mary:

We appreciate the opportunity to provide these comments regarding the California Air Resources Board ("CARB") workshop on amendments to the Cap-and-Trade Program.<sup>1</sup> We look forward to working with CARB staff to facilitate the necessary amendments to the Cap-and-Trade Regulation<sup>2</sup> to address these important issues in support of the state's goals set forth in AB 32.<sup>3</sup>

### I. Introduction and Summary

We commend CARB's commitment to address legacy contracts.<sup>4</sup> This summary of comments on the May 1, 2013 workshop presentation is discussed in more detail below. Our reference to options are to those presented at the workshop.

- Option One. We support Option One. As an output-based allocation, CARB should use Option One for determining the allocation of emission allowances for legacy contract generators. This option will provide an accurate allocation of allowances based on the actual amount of steam and electricity sold pursuant to a legacy contract. CARB should use invoices submitted to end users for determining the actual amount of steam and electricity sold pursuant

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<sup>1</sup> These comments address CARB's workshop presentation titled "Proposed Amendments to the Cap-and-Trade Program's Treatment of Universities, 'But For' CHP, and Legacy Contracts."

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

<sup>3</sup> Health & Safety Code, §§ 38500 *et seq.* (The Global Warming Solutions Act of 2006).

<sup>4</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 the generators' compliance obligation under the Regulation. In September 2012, the Board directed CARB staff to propose the necessary regulatory amendments to address legacy contracts in mid-2013. *See* Board Resolution 12-33 (September 20, 2012), at 3.

to a legacy contract. For any output not properly accounted for in prior years, it is necessary, as CARB notes, to include a true-up of emission allowances.

- Option Two. We oppose Option Two. Option Two will reward power plants that have historically produced more electricity or steam than they do currently.<sup>5</sup> Conversely, Option Two would effectively *penalize energy efficient facilities* that are expected to increase output in the future as a result of the Regulation's design to increase utilization of efficient energy sources. In addition, because CARB staff is not proposing any true-up for Option Two, this approach would result in a substantial shortfall in allowances to energy efficient facilities, contrary to the goals of the Regulation and AB 32.
- Option Three. Option Three may provide relief to legacy contract generators; however, given the limited details presented, more information is necessary in order for interested parties to fully consider this approach.
- Transfer of Ownership of Facility. Change of ownership of a facility subject to a legacy contract is not an appropriate basis to disqualify a legacy contract generator from receiving an allocation of allowances. CARB should completely eliminate change of ownership as a criterion for disqualifying a legacy contract generator from relief under its proposal.
- Timeline for Allocation of Allowances. In order to satisfy their annual compliance obligation for 2013, legacy contract generators will need to sell a portion of the 2015 vintage year allowances provided by CARB under its proposal. We encourage CARB to provide allowances to legacy contract generators as soon as possible to avoid any financial hardship to generators.
- Renegotiation of Contracts. CARB staff should not disqualify a legacy contract generator if its contract is amended for purposes unrelated to compliance with the Regulation.
- Attestation Regarding Legacy Contract: Any attestation requirement for legacy contract generators should be limited to an affirmation by the legacy contract generator that (i) the contract was originally executed prior to AB 32, (ii) it does not allow the facility to recover the cost of allowances, and (iii) the generator made a good faith effort but was unable to renegotiate the legacy contract.
- Recovery of GHG Costs from Natural Gas Suppliers: Because natural gas suppliers do not have a compliance obligation for fuel sales to covered entities (i.e., legacy contract generators), it is unclear whether legacy contract generators could recover the costs to satisfy their compliance obligation if such costs were captured at the natural gas supplier.

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<sup>5</sup> CARB Workshop Presentation, at 31 (May 1, 2013).

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## **II. The Option One Approach Should be Used To Determine The Emission Allowance Allocations To Legacy Contract Generators**

### **A. An Output-Based Allocation Approach Is Most Appropriate**

Under Option One, allowances would be allocated to legacy contract generators based on the amount of electricity and steam sold pursuant to a legacy contract. This approach is similar to the product output-based allocation calculation methodology provided in section 95891(b) of the Regulation. While CARB staff has not provided a complete equation to calculate the allowance allocation under Option One, this is the most appropriate of the three approaches CARB staff is considering because, had the contract provided for the pass-through of such costs, the end user would pay for such costs based on the amount of electricity or steam actually purchased from the generator. Thus, Option One provides an accurate and straightforward method for calculating the portion of electricity and steam sales from a legacy contract generator. Further, because Option One is not based on the historical fuel usage from a particular facility (as is the case with Option Two), this approach furthers goals of the Regulation by appropriately incentivizing procurement of electricity and steam from energy efficient facilities.

CARB proposes to include the same efficiency benchmarks for steam and electricity used in the energy-based allocation calculation methodology in section 95891(b) of the Regulation, and seeks input from stakeholders on the appropriateness of such benchmarks.<sup>6</sup> As described in the Final Statement of Reasons ("FSOR"), these benchmarks employ efficiency factors for heat and power sold in order to disincentivize the operation of inefficient facilities.<sup>7</sup> In light of the purpose of AB 32 and the application of these same benchmarks in the Regulation, it is appropriate for CARB staff to include such benchmarks in Option One.

### **B. Invoices Provide Complete And Accurate Output Data For Calculating Emission Allowances**

While not addressed in CARB staff's presentation, CARB staff should utilize the invoices for the sale of electricity and steam under legacy contracts for calculating the number of allowances allocated to legacy contract generators under Option One. Invoices for the sale of steam and electricity provide an accurate method for quantifying such legacy contract sales. As described below, to ensure that CARB staff utilizes the most accurate data, it would be appropriate for legacy contract generators to submit such invoices for the calendar year immediately prior to the year in which CARB staff makes the allowance allocation.

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<sup>6</sup> CARB Workshop Presentation, at 38.

<sup>7</sup> See FSOR, Response to Comment I-121, at 1574.

**C. The Most Current Data Available Should Be Utilized To Calculate Emission Allowances**

To help ensure that allowance allocations accurately reflect current operating output (and to avoid any shortfall to generators), CARB should use the data available (i.e., invoices) for the amount of electricity and steam sold in the prior year. We note that, under the energy-based allocation calculation methodology in section 95891(c) of the Regulation, the Mandatory Reporting Rule (“MRR”) data from 2008-2010 is utilized.<sup>8</sup> However, facility output varies based on changes in market demand, production capacity, and facility downtime and maintenance. If CARB staff is considering utilizing data from this same recessionary period, such an approach would almost certainly result in an under-allocation of allowances to legacy contract generators. In addition, the expected shortfall from using such historical data will be more pronounced for efficient facilities that experience increased demand as the annual GHG emissions cap declines, which will incentivize the dispatch of efficient facilities.

We therefore encourage CARB staff to calculate the allowance allocation based on sales invoices for the calendar year immediately prior to the year in which the allowance allocation is made. By using the most current data, legacy contract generators would incur substantially less costs to purchase allowances in advance of receiving a true-up (discussed below) in subsequent allowance allocations.

**D. The True-Up Is Critical To Ensuring That Generators Are Not Burdened With Any Shortfall**

As noted above, a shortfall in the allowance allocation will result if there is an increase in production or output of electricity or steam compared to prior years. This shortfall will be more pronounced for energy efficient facilities that are increasingly utilized as the declining GHG emission cap incentivizes increased dispatch from such facilities. Thus, in order to ensure that allowances are provided for all electricity and steam sold pursuant to a legacy contract, CARB staff should, as it proposes, include a true-up in its proposed Option One equation for allocating allowances.<sup>9</sup> Providing such a true-up is consistent with the product output-based allocation calculation methodology in section 95891(b) of the Regulation.

Further, CARB has advised stakeholders that 2013 and 2014 vintage allowances are not available to legacy contract generators. Under CARB staff’s proposal, to satisfy their 2013 and 2014 compliance obligations, legacy contract generators will be required to sell a portion of the 2015 vintage allowances allocated to them (or otherwise dedicate capital) in order to purchase 2013 and 2014 vintage allowances. The price difference among 2013, 2014 and 2015 vintage allowances could be significant, resulting in substantial financial hardship to legacy contract generators. Thus, we believe it is appropriate to include

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<sup>8</sup> See Tit. 17, Cal. Code Regs., §§ 95100 *et seq.*

<sup>9</sup> CARB Workshop Presentation, at 35.

a true-up for any differential between the price of 2013 and 2014 vintage allowances and the 2015 vintage allowances that CARB will allocate to legacy contract generators.

### III. Option Two Would Not Be An Appropriate Approach To Allocating Allowances

CARB's proposed Option Two is an energy-based allocation approach in which allowance allocations are based on the historical fuel consumption at a facility. Such an approach, however, is not appropriate for electricity and thermal generation, given that the Cap-and-Trade Program is designed to incentivize efficient energy use. As described in the FSOR, "the overall approach for the cap-and-trade regulation is to . . . create a price signal that will encourage investment in the most cost-effective emission-reduction projects."<sup>10</sup> In light of the Program's design, energy efficient facilities can expect an *increase* in demand. As noted above, under the energy-based allocation calculation methodology in section 95891(c) of the Regulation, CARB utilizes MRR data from 2008-2010. Thus, to the extent CARB staff intends to use historical fuel usage from this same time period, energy efficient facilities would incur a shortfall in the number of allowances needed to satisfy their compliance obligation due to the expected increase in demand as a result of the Regulation. Further, CARB's workshop presentation states that no true-up would be available to legacy contract generators under Option Two.<sup>11</sup>

As noted above, it is important to use the most current data available in calculating the emission allowances to be allocated to legacy contract generators. To the extent that the most current data is not used to calculate allowances, the expected shortfall under Option Two would be more pronounced, given the deep economic downturn that commenced in 2008. In addition, with varying market demands, operational changes, and facility shutdowns, such historical baselines would not provide an accurate estimate of current facility output. The FSOR suggests that CARB staff recognizes the inherent problems with this approach:

*The energy-based allocation methodology is not the ideal method, and is only used for a small number of facilities whose products currently pose challenges to the use of the product-based allocation methodology . . . If possible, we would like to work with facilities in the energy-based allocation methodology to develop product benchmarks and switch to the use of product-based allocation methodology for all facilities that are interested in expansion.*<sup>12</sup>

Given the almost certain shortfall and the inability to recover such losses through a true-up, Option Two would not provide the necessary relief to legacy contract generators. Indeed, the expected shortfall under this approach would effectively penalize the very facilities that the Regulation is designed

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<sup>10</sup> CARB FSOR, Response to Comment I-94, at 636.

<sup>11</sup> CARB Workshop Presentation, at 35.

<sup>12</sup> FSOR, Response to Comment C-8, at 1204 (emphasis added).

to promote. We therefore encourage CARB staff to not propose regulatory amendments using the allocation approach described in Option Two.

#### **IV. Option Three May Be A Viable Approach But More Information Is Necessary**

Under Option Three, CARB staff would allocate steam and electricity emissions in proportion to the steam and electricity produced at a particular facility. This approach may provide appropriate relief to legacy contract generators, but CARB staff has not provided complete details for this approach. For example, it appears that a combined heat and power (CHP) facility would receive allowances based on the total emissions attributable to steam subject to the benchmark for steam. However, it is unclear under CARB's example in Slide 34 how it calculated the 50,000 MTCO<sub>2e</sub> emissions attributable to steam "using [a] benchmark".<sup>13</sup> Also, it appears, but is unclear, under CARB's example that the allowances based on the emissions attributable to electricity generation would not be subject to a benchmark, as is the case with steam.<sup>14</sup>

Under the example used for Option Three, the number of allowances allocated will be based on the proportion of the electricity emissions that are attributable to legacy contracts. The proportion of such emissions, in turn, is based on the amount of electricity generated or sold by the facility. Thus, as described in our comments to Option One, it is necessary to use steam and electricity invoices for the data year immediately prior to the year in which the allowance allocation is made in determining the appropriate allocation. In addition, Option Three would need to include a true-up to account for any output not properly accounted for in prior years and any differential between the price of 2013 and 2014 vintage allowances and the 2015 vintage allowances that CARB will allocate to legacy contract generators. We also note that, unlike Options One and Two, there is no indication whether allowances allocated under Option Three would be reduced based on the declining emission cap under the Regulation. Given these limited details, CARB staff should provide more complete information regarding Option Three, so interested parties can better evaluate and provide comments on this approach.

#### **V. Transfer Of Ownership Of A Facility Is Not A Proper Criteria For Barring Eligibility**

CARB's presentation states that "[e]ligibility ceases when . . . the ownership of the facility is transferred or sold."<sup>15</sup> It is not clear from this language whether CARB intends to disqualify facilities that would otherwise be a legacy contract generator if the facility changed ownership (i) after AB 32 was

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<sup>13</sup> See CARB Workshop Presentation, at 34. While not described in Slide 34, it is possible that this would be calculated by multiplying the distributed emissions for thermal energy production reported by cogeneration facilities under the MRR by the steam efficiency benchmark in the Regulation. See Tit. 17, Cal. Code Regs. 95112(b)(4).

<sup>14</sup> CARB Workshop Presentation, at 34.

<sup>15</sup> CARB Workshop Presentation, at 25.

enacted but prior to the Board adopting these amendments (i.e., prior transfers), or (ii) after the Board adopts these regulatory amendments to address legacy contracts (i.e., future transfers). Both scenarios would impose harmful consequences. First, in the case of prior transfers, markets would be disrupted by the limited time period to make such transactions in advance of the Board's adoption of these regulatory amendments.

Second, in the case of future transfers, legacy contract generators would be burdened by having to incur a significant cost, as part of any potential change of ownership, to account for the increased cost to any new owner of the facility resulting from such disqualification. This restriction would directly reduce the resale value of an asset, unfairly burdening a potential seller and imposing a substantial burden upon commercial transactions and commerce in California. Such a scenario would severely impair the liquidity of such projects with no apparent rationale or policy justification. We also note that entities receiving allocations for industrial assistance under the Regulation are not subject to such a limitation.

Regardless of CARB's intended approach, change of ownership of a facility subject to a legacy contract is not a proper criterion for determining eligibility for relief. Ownership transfers for these types of facilities occur in a variety of contexts, such as stock transfers, mergers and acquisitions, asset purchases, and complex corporate structuring and financial transactions. Significantly, these types of matters often do not involve entities having direct ownership of the facility, and instead occur at parent companies, subsidiaries and other entities with varying degrees of ownership of the facility. Renegotiation of power purchase and energy services agreements are not the subject of such transactions.

We strongly urge CARB staff to eliminate this criterion entirely as a basis for barring eligibility for relief under CARB's proposal.

#### **VI. Allowances Should Be Provided As Soon As Possible After Regulatory Amendments Are Approved**

In September 2012, the Board directed CARB staff to "develop a methodology that provides transition assistance to covered entities that have a compliance obligation cost that cannot be reasonably recovered due to a legacy contract" and to "return to the Board with proposed regulatory amendments *in mid-2013*."<sup>16</sup> However, CARB staff intends to propose these regulatory amendments in September 2013 followed by a Board hearing in October 2013.<sup>17</sup> Depending on the Board's response to staff's proposed

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<sup>16</sup> CARB Resolution 12-33, at 3 (emphasis added).

<sup>17</sup> CARB's "Topics Subject to Potential Regulatory Amendments, California Cap-and-Trade Regulation (2013)," at 1.

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amendments to the Regulation, it is possible that the Board will not adopt the necessary amendments to address legacy contracts until early 2014.<sup>18</sup>

As CARB staff is aware, covered entities must surrender by November 1, 2014 allowances to satisfy their 2013 compliance obligation. It is our understanding that CARB staff likewise intends to allocate 2015 vintage allowances by November 1, 2014 covering allocations for the 2013, 2014 and 2015 compliance years. Given that legacy contract generators must satisfy their 2013 compliance obligation by the same date, we encourage CARB staff to provide allowances to legacy contract generators as soon as possible following the Board's adoption and OAL's approval of these regulatory amendments. If legacy contract generators do not receive the allocation of such allowances well in advance of November 1, 2014, they will be forced to dedicate substantial capital and resources in order to acquire 2013 vintage allowances to satisfy their 2013 compliance obligation.

#### **VII. Legacy Contract Generators Should Not Be Disqualified For Non-Material Changes to Legacy Contracts**

CARB staff's presentation states that legacy contract generators will be eligible for relief if the "[c]ontract remains in place and has not been renegotiated."<sup>19</sup> This proposed criterion is overly broad, as there are many instances in which contracts are renegotiated for matters unrelated to the cost of compliance with the Regulation. Including such a limitation on contract amendments would severely restrict contract renegotiations that occur in the normal course of business. However, we believe it would be appropriate for CARB staff to include a limitation on qualifying as a legacy contract generator if the contract is amended to change the terms governing the price of electricity or steam, or is modified to address the recovery of compliance costs under the Regulation.

#### **VIII. Any Attestation Requirement Should Be Limited To Relevant Matters**

CARB staff's presentation also indicates that legacy contract generators will be required to attest that the cost of compliance with the Regulation cannot be passed through to the end user.<sup>20</sup> An attestation requirement is appropriate, but we believe it should be limited to an affirmation by the legacy contract generator that (i) the contract was originally executed prior to AB 32, (ii) it does not allow the facility to recover the cost of allowances, and (iii) the generator made a good faith effort but was unable to renegotiate the legacy contract.

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<sup>18</sup> Following the Board's adoption, the amendments will not become effective until approved by the Office of Administrative Law ("OAL").

<sup>19</sup> CARB Workshop Presentation, at 25.

<sup>20</sup> *Id.* (Legacy contract generators must "[s]ubmit annual attestation attesting GHG costs under legacy contract not able to be passed down.")



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In addition, to the extent that CARB staff seeks to review a copy of a legacy contract, it should take all steps to protect all confidential and privileged information as provided under California law and regulations. Further, legacy contract generators should be permitted to redact all confidential, privileged, and proprietary information and any sensitive commercial terms, including pricing, as necessary prior to providing a copy of such contract to CARB staff.

**IX. It Is Unclear How Higher Natural Gas Prices Would Provide Relief To Legacy Contract Generators**

CARB staff has inquired whether legacy contract generators could recover the costs to satisfy their compliance obligation if the obligations for the GHG emission were captured at the natural gas supplier in the second and third compliance period.<sup>21</sup> Under the Regulation, however, suppliers of natural gas have a compliance obligation for all GHG emissions that would result from full combustion of fuel delivered in California, "*less the fuel delivered to covered entities.*"<sup>22</sup> Because legacy contract generators *are* "covered entities" under the Regulation,<sup>23</sup> suppliers of natural gas do *not* have a compliance obligation for the GHG emissions associated the sale of natural gas to legacy contract generators. Thus, it is unclear how an increase in gas prices would provide relief to legacy contract generators. CARB staff should provide details on the basis for this inquiry, so interested parties can consider and answer these questions.

Consistent with CARB staff's proposed Option One and these comments, included as Exhibit A to this comment letter is recommended regulatory amendments to fully address the legacy contracts issue. We greatly appreciate CARB staff's efforts, and believe the workshop presentation is a significant step towards resolving this important issue.

We look forward to continuing to work with CARB staff to bring about the necessary regulatory amendments.

Respectfully submitted,



Peter H. Weiner

Attachment: Exhibit A: Recommended Regulatory Amendments to Address Legacy Contracts

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<sup>21</sup> *Id.*, at 24 ("Could emissions be captured at the natural gas supplier in the second and third compliance periods?"; "Can generators recover costs based on increases in natural gas price?").

<sup>22</sup> Tit. 17, Cal. Code Regs. § 95852(c) (emphasis added).

<sup>23</sup> *See id.*, § 95802(62).

**CARB Workshop Regarding Proposed Adjustments to the Cap-and-Trade Program's  
Treatment of Universities, 'But For' CHP, and Legacy Contracts**

**Exhibit A: Recommended Regulatory Amendments To Address Legacy Contracts**

**§ 95802. Definitions.**

(a) Definitions. For the purposes of this article, the following definitions shall apply:

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(xxx) "Legacy Contract" means a sales or tolling agreement governing the sale of electricity and/or useful thermal energy from an electric generating facility or cogeneration facility at a price (whether a fixed price or price formula) that does not allow for reasonable recovery of the costs of compliance with this regulation. For purposes of this regulation, legacy contracts exclude contracts with a public utility as defined in the Public Utilities Code section 216 (referred to as an Investor Owned Utility or IOU), and only include contracts originally executed prior to January 1, 2007, that have remained in effect and have not been amended since that date to change the terms governing the price or amount of electricity or useful thermal energy sold or the expiration date.

(xxx) "Legacy Contract Generator" means a covered entity which is not an electrical distribution utility and which operates an electricity generating facility or cogeneration facility pursuant to one or more legacy contracts.

**§ 95870. Disposition of Allowances**

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(e) Allocation to Industrial Covered Entities. Allowances allocated for the purposes of industry assistance shall be transferred to holding accounts for industrial sectors listed in Table 8-1.

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(4) Purchasers of electricity or useful thermal energy pursuant to a legacy contract shall not be eligible for any allowances allocated for the purposes of industrial assistance as a result of electricity and/or useful thermal energy purchased pursuant to the legacy contract. Where an allocation to a legacy contract generator is provided pursuant to subsection (f) of this section, the number of allowances deposited to the holding account of the counterparty to the legacy contract pursuant to this subsection (e) shall be reduced by the number of allowances provided to the legacy contract generator.

(f) Allocation to Legacy Contract Generators. Allowances allocated to legacy contract generators shall be transferred to the holding accounts for each eligible legacy contract generator.

- (1) The Executive Officer will place an annual individual allocation in the holding account of each eligible legacy contract generator by November 1, 2014, for the allocation of 2015 vintage allowances covering allocations for the 2013, 2014 and 2015 compliance years, and by November 1 of each calendar year 2015–2019 for allocations from 2016–2020 annual allowance budgets.
- (2) For any given compliance year, the number of allowances allocated to an eligible legacy contract generator shall be calculated using the following equations:

$$A_{2015 \text{ in } 2014} = [(O_{s,2013} - O_{s,2013,\text{reimb.}}) * B_s + (O_{e,2013} - O_{e,2013,\text{reimb.}}) * B_e] * c_{2013} + [(O_{s,2013} - O_{s,2013,\text{reimb.}}) * B_s + (O_{e,2013} - O_{e,2013,\text{reimb.}}) * B_e] * c_{2014} + [(O_{s,2013} - O_{s,2013,\text{reimb.}}) * B_s + (O_{e,2013} - O_{e,2013,\text{reimb.}}) * B_e] * c_{2015}$$

$$A_t = [(O_{s,t-2} - O_{s,t-2,\text{reimb.}}) * B_s + (O_{e,t-2} - O_{e,t-2,\text{reimb.}}) * B_e] * c_t + \text{True-up}$$

Where:

“A<sub>2015 in 2014</sub>” is the number of vintage 2015 allowances directly allocated to the legacy contract generator in calendar year 2014;

“A<sub>t</sub>” is the number of allowances directly allocated to the legacy contract generator from budget year “t” for budget years starting with 2016;

“O<sub>s,y</sub>” will be calculated by the Executive Officer as the steam output in calendar year “y,” as reported to ARB in MMBtu;

“O<sub>s,y, reimb</sub>” will be calculated by the Executive Officer as the steam output in calendar year “y,” as reported to ARB in MMBtu, for which costs are passed through to the purchaser or user of the steam;

“O<sub>e,y</sub>” will be calculated by the Executive Officer as the electricity output in calendar year “y,” as reported to ARB in MWh;

“O<sub>e,y, reimb</sub>” will be calculated by the Executive Officer as the electricity output in calendar year “y,” as reported to ARB in MWh, for which costs are passed through to the purchaser or user of the electricity;

“t” is the budget year, starting with 2016, from which the direct allocation occurs;

“t-2” is the data year two years prior to “t”;

“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;

“Bs” is the emissions efficiency benchmark per unit of steam, 0.06244 California GHG Allowances/MMBtu Steam;

“c2013” is the adjustment factor for budget year 2013 to account for cap decline as specified in Table 9-2;

“c2014” is the adjustment factor for budget year 2014 to account for cap decline as specified in Table 9-2;

“c2015” is the adjustment factor for budget year 2015 to account for cap decline as specified in Table 9-2;

“ct” is the adjustment factor for budget year “t” to account for cap decline as specified in Table 9-2; and

“True-up” adjusts for any output not properly accounted for in prior years’ allocations and any price differential between the price of 2013 and 2014 vintage allowances and the 2015 vintage allowances allocated to legacy contract generators.

(3) Data Sources.

In determining the appropriate values for section 95870(f)(2), the Executive Officer may employ all available data reported to ARB under MRR for the data year prior to the year in which the allocation is made and all other relevant data, including invoices, demonstrating the amount of electricity and steam sold or provided for off-site use that 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.

(4) Maximum Free Allocation.

Excluding any true-ups provided pursuant to section 95870(f)(2), the Executive Officer shall ensure that the annual amount of California GHG Allowances directly allocated under the output-based methodology to a covered entity for operations at a facility shall not exceed 100% of the maximum annual level of greenhouse gas emissions, adjusted for steam purchases and sales and electricity sales, emitted during the years used in establishing the allocation for the facility in question.

(5) Contract Expiration or Amendment.

Once a legacy contract expires or is amended to: (i) change the terms governing the price or amount of electricity or useful thermal energy sold or the expiration date, or (ii) address recovery of compliance costs under this regulation, or the legacy contract generator closes operations, the legacy contract generator will no longer be eligible for a free allocation.

If the legacy contract expires or the legacy contract generator amends the contract to change the terms governing the price or amount of electricity or steam sold, the legacy contract generator will be required to return allocated allowances that cover the period since contract expiration or amendment.

§ 95890. General Provisions for Direct Allocations.

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(c) Eligibility Requirements for Legacy Contract Generators. A legacy contract generator that has demonstrated its eligibility to the satisfaction of the Executive Officer pursuant to section 95893 of this regulation shall be eligible for a direct allocation of California GHG allowances if it has complied with the requirements of the MRR and has obtained a positive or qualified verification statement for the prior year pursuant to the MRR.

§ 95893 Eligibility for Legacy Contract Generators

(a) Demonstration of Eligibility. To be eligible to receive a direct allocation of allowances under this section, the primary or alternate account representative of a legacy contract generator shall submit each of the following in writing via certified mail to the Executive Officer by June 30 of the calendar year prior to the budget year for which it is seeking an allocation:

- (1) A copy of any legacy contract for which it is seeking an allocation;
- (2) An attestation that:
  - (A) Each such legacy contract does not allow the covered entity to reasonably recover the cost of California GHG allowances from the counterparty purchasing electricity and/or useful thermal energy from the facility;
  - (B) The legacy contract was originally executed prior to January 1, 2007, remains in effect and has not been amended since that date to change the terms governing the price or amount of electricity or useful thermal energy sold or the expiration date; and
  - (C) The legacy contract generator made a good faith effort, but was unable to renegotiate the legacy contract with the counterparty to address recovery of the costs of compliance with this regulation.
- (3) Data requested pursuant to Section 95870(f)(3).

If, subsequent to the submittal of the foregoing information and supporting documentation, there is any material change in the information and statements provided to the Executive Officer, the party who submitted such information and statements shall submit a supplemental attestation and supporting materials addressing any such material change to the Executive Officer within 30 days after the change occurs.

- (b) Determination of Eligibility. Upon receipt of the information required by paragraph (a) of this section, the Executive Officer shall determine whether the party submitting such information has demonstrated that it is eligible to receive a direct allocation of allowances pursuant to this section and shall notify that party by September 30 of the same year in which the information is submitted pursuant to section 95893(a) if it is eligible to receive an allocation for the following compliance year.
- (c) The legacy contract generator may redact as necessary portions of the legacy contract submitted pursuant to 95893(a)(1) in order to protect any confidential, privileged or proprietary information.