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November 15, 2013

By *Electronic Submission*: <http://www.arb.ca.gov/lispub/comm/bclist.php>

Richard Corey, Executive Director
California Air Resources Board
1001 I Street
Sacramento, CA 95814

Re: Comments on the 15-Day Proposed Amendments to the Mandatory Reporting Rule

Dear Mr. Corey:

Calpine Corporation (hereinafter, “Calpine”) appreciates the opportunity to provide these written comments on the California Air Resources Board’s (“CARB” or the “Board”) 15-Day Proposed Amendments to the Regulation for the Mandatory Reporting of Greenhouse Gas Emissions (Cal. Code Reg. tit. 17, §§ 95100 *et seq.*, “Mandatory Reporting Rule” or “MRR”) (collectively, “15-Day Amendments”).

I. INTRODUCTION AND SUMMARY

Calpine has been a longtime supporter of CARB’s efforts to develop and implement an economy-wide greenhouse gas (“GHG”) mitigation program. We have actively participated in the development of the MRR and the California Cap on Greenhouse Gas Emissions and Market-Based Compliance Mechanisms Regulation (Cal. Code Reg. tit. 17, §§ 95800 *et seq.*, “Cap-and-Trade Regulation”).

Calpine has serious concerns regarding one section of the 15-Day Amendments. Section 95104(f) would require a facility operator to specify in each emissions data report whether a change in the facility’s operations or status resulted in an increase or decrease of more than five percent in GHG emissions compared to the previous data year. If there is such a change, the facility operator must specify the reason(s) for the change in GHG emissions and provide a “narrative description” of how each identified reason caused the increase or decrease in GHG emissions.

The requirement to produce such a “narrative description” is a high burden to place on each facility operator given the complex universe of factors that collectively result in higher or lower GHG emissions for any given facility, especially in the power sector. As CARB is aware, weather patterns or the unavailability of a single generating facility can have profound effects on

dispatch of electric generating units and, consequently, their GHG emissions. Thus, it is conceivable that operators of generating facilities and electricity importers could experience a change triggering reporting under this provision every year or nearly every year. However, section 95104(f) provides no option that would allow an individual facility operator or importer to indicate that such changes were due simply to an increase or decline in the dispatch of its generating units or the volume or source of imports.

We do not question the importance of CARB's monitoring for adverse localized air quality impacts that might be linked to implementation of the Cap-and-Trade Regulation. However, to the extent CARB is seeking information on changes in GHG emissions as a surrogate for information about such localized impacts, we would submit that CARB should seek—and indeed already has available to it or could easily obtain—more pertinent data on facility-specific emissions of criteria pollutants and toxic air contaminants (“TACs”), before imposing such an onerous GHG reporting obligation on entities as part of the MRR.

In sum, proposed section 95104(f) asks too much of individual reporting entities, with no clear benefit to CARB in fulfilling its duties with respect to the MRR or Cap-and-Trade Regulation. These burdens are particularly acute for entities within the electric sector, where large shifts in operation and, as a consequence, GHG emissions can occur from year to year due to an innumerable number of factors. We therefore propose that CARB revise the 15-Day Amendments to allow electricity generators and importers to specify changes in the volume of products delivered as the basis for any observed increase or decrease and to eliminate the narrative description requirement altogether.

II. BACKGROUND

On August 27, 2013, CARB released its 45-Day Proposed Amendments to the Mandatory Reporting Rule (“45-Day Proposed Amendments”).¹ The 45-Day Proposed Amendments would have required a facility operator to specify in each emissions data report whether a change in the facility's operations or status “potentially resulted in an increase in emissions of criteria pollutants or toxic air contaminants in relation to the previous data year.”² If so, the facility operator would have needed to specify the increase in emissions was due to: a change in production, changes in facility operations to comply with regulatory requirements (including, but not limited to, the Cap-and-Trade Regulation), and/or changes in facility efficiency.³ Further, the facility operator would have been required to provide “[a] narrative description of how each reason identified caused the increase in emissions.”⁴

¹ Available at: <http://www.arb.ca.gov/regact/2013/ghg2013/ghg2013isorappa.pdf>.

² 45-Day Proposed Amendments § 95104(e)(1).

³ *Id.* § 95104(e)(2).

⁴ *Id.* § 95104(e)(3).

CARB indicated that “[t]his qualitative data is needed to support ARB’s Cap-and-Trade adaptive management monitoring, review, and analysis. The information will be used to assess the potential localized air quality impacts that may result from the Cap-and-Trade program.”⁵ CARB is referring here to its Adaptive Management Plan (“AMP”), which was approved by the Board in 2011.⁶ The key elements of the AMP are: “(1) data and data source identification (information gathering); (2) analysis to determine whether an adverse impact is caused by the cap-and-trade regulation (review and analysis); and (3) identifying potential actions ARB could take to address these impacts and committing to take appropriate action (response).”⁷

In response to multiple public comments opposing the proposed criteria pollutant and TAC reporting requirement⁸, CARB deleted this proposal in the 15-Day Amendments. In its place, CARB is now proposing a nearly identical requirement with respect to GHG emissions alone.⁹

⁵ CARB, Staff Report: Initial Statement of Reasons for Rulemaking Public Hearing to Consider Amendments to the Regulation for the Mandatory Reporting of Greenhouse Gas Emissions, at 54 (Sep. 4, 2013), available at: <http://www.arb.ca.gov/regact/2013/ghg2013/ghg2013isor.pdf>; see also CARB, Notice of Public Hearing to Consider Amendments to the Regulation for the Mandatory Reporting of Greenhouse Gas Emissions, at 7 (Aug. 27, 2013), available at: <http://www.arb.ca.gov/regact/2013/ghg2013/ghg2013notice.pdf>.

⁶ See CARB, Resolution 11-32, at 10 (2011), available at: <http://www.arb.ca.gov/regact/2010/capandtrade10/res11-32.pdf>. The Board approved the AMP in 2011 along with certification of the Functional Equivalent Document (“FED”) for the Cap-and-Trade Regulation pursuant to CARB’s certified regulatory program under the California Environmental Quality Act. See CARB, Resolution 11-32, at 10; see also FED, Staff Report: Initial Statement of Reasons for the Proposed Regulation to Implement the California Cap-and-Trade Program, Appendix O, available at: <http://www.arb.ca.gov/regact/2010/capandtrade10/capv5appo.pdf>. Although the FED’s Statement of Overriding Considerations concludes “that the potential for increases in localized air pollution, including toxic air contaminants and criteria air pollutants, attributable to the cap-and-trade program, are extremely unlikely”, it also acknowledges that “specific adverse localized emissions impacts cannot be ruled out”, and, accordingly, determines that implementation of the AMP would “reduce the risk that the program will have such unanticipated, unintended and ongoing adverse localized air quality impacts.” CARB, Resolution 11-32, Attachment D, Findings and Statement of Overriding Considerations, at 3-4, available at: <http://www.arb.ca.gov/regact/2010/capandtrade10/attachd.pdf>. *Id.* at 4.

⁷ See CARB, Adaptive Management Plan for the Cap-and-Trade Regulation, at 2 (2011), available at: http://www.arb.ca.gov/cc/capandtrade/adaptive_management/plan.pdf (hereinafter, “AMP”).

⁸ See, e.g., California Council for Environmental and Economic Balance, “Comments on Proposed Amendments to the Regulation for the Mandatory Reporting of Greenhouse Gas Emissions: 45-Day Draft Comment”, at 1-3 (Oct. 22, 2013), available at: <http://www.arb.ca.gov/lists/com-attach/36-ghg2013-UzBVPAdrUmwFZIU7.pdf>; Sempra Energy utilities, “Amendments to the Regulation for the Mandatory Reporting of Greenhouse Gas Emissions”, at 3 (Oct. 23, 2013), available at: <http://www.arb.ca.gov/lists/com-attach/45-ghg2013-BnJQN1wwVmQCdgZn.pdf>; Pacific Gas & Electric, “Pacific Gas and Electric Company’s Comments on the Air Resources Board 45-day Amendments to the Mandatory Reporting Regulation”, at 6 (Oct. 16, 2013), available at: <http://www.arb.ca.gov/lists/com-attach/13-ghg2013-B3dSMwFfADYDWgNg.pdf>.

⁹ 15-Day Amendments § 95104(f).

Accordingly, each facility operator submitting an emissions data report must report “[w]hether a change in the facility’s operations or status resulted in an increase or decrease of more than five percent in emissions of [GHGs] in relation to the previous data year.”¹⁰ If so, the facility operator must specify the reason(s) for the increase or decrease in GHG emissions and provide a “narrative description of how each reason identified [] caused the increase or decrease in emissions.”¹¹

III. CARB SHOULD REVISE SECTION 95104(f)

Section 95104(f) would represent a significant new burden for every facility operator where the facility experienced a 5 percent (%) change in GHG emissions from the previous year. In the electricity generation sector, a 5% difference (either increase or decrease) in GHG emissions reflects a small change in output that could literally occur every year. Indeed, data reported to CARB in 2012 indicates that the in-state electricity generation source category collectively had emissions of 30,732,215 metric tons of carbon dioxide-equivalent per year (“MTCO₂e/year”) in 2011 and 41,610,182 MTCO₂e/year in 2012, representing a 35% increase in GHG emissions year-over-year for the sector as a whole.¹²

If a 5% change in GHG emissions occurs, the facility operator must specify whether the change was caused by: “(A) Change in production; (B) Changes in facility operations in order to comply with: 1. The cap-and-trade regulation; 2. Other air pollution regulations; 3. Other regulations, not related to air pollution or greenhouse gases; (C) Changes in efficiency due to: 1. Process or material changes; 2. The addition of control equipment; 3. Other efficiency measures; (D) Other”¹³ and provide a “narrative description of how each reason identified [] caused the increase or decrease in emissions.”¹⁴ The sheer breadth of the potential reasons that CARB provides in section 95104(f)(2) suggests that identifying the cause of any observed emissions change is no simple task. Yet, among the options provided, none is well-suited to changes in emissions due solely to increased or reduced dispatch of a particular electric generating facility or deliveries of imported power from a particular source.

Consider the 35% increase in GHG emissions from in-state electricity generation from 2011 to 2012. CARB identifies the increase in *total* state-wide emissions as resulting from “California electricity generation using natural gas as a fuel” (i.e., increased dispatch of natural gas-fired power plants).¹⁵ In turn, “[t]he majority of this additional natural gas electricity generation is

¹⁰ *Id.* § 95104(f)(1).

¹¹ *Id.* §§ 95104(f)(2)-(3).

¹² CARB, 2008 to 2012 Emissions for Mandatory Greenhouse Gas Emissions Reporting Summary, at 1 (Nov. 4, 2013), available at: <http://www.arb.ca.gov/cc/reporting/ghg-rep/reported-data/2008-2012-ghg-emissions-summary.pdf> (“2012 MRR Emissions Summary”).

¹³ 15-Day Amendments § 95104(f)(2).

¹⁴ *Id.* § 95104(f)(3).

¹⁵ 2012 MRR Emissions Summary, at 2.

due to a decrease in available hydroelectric generation for 2012 and a reduction in nuclear generated power from the closure of the San Onofre Nuclear Generating Station.”¹⁶

However, for any given natural gas-fired power plant, the increase in GHG emissions is due simply to the fact that the plant was called to dispatch more in 2012 than in 2011. If section 95104(f) were in effect for the 2012 reporting year, it is unclear how an individual power plant operator would account for this change in its emissions data report. Of the choices presented, the operator might select “[c]hange in production” (section 95104(f)(2)(A)), because “production” of electricity increased and therefore “change[d]”. On the other hand, the operator might select “[o]ther” (section 95104(f)(2)(D)), because no change in the method of operation occurred and none of the other options applies. Asking the facility operator to then opine on how one or more of these reasons caused the increase in a “narrative description” only further confounds the exercise. An individual facility operator cannot be expected to deduce the intricate economic, factual and regulatory reasons behind every 5% change in an electric generating facility’s GHG emissions.

The same holds true with respect to electricity importers, who may experience greater than 5% increases or decreases in their GHG emissions between years due to changes in the volume of imported electricity or the source of such electricity, i.e., whether it obtains power from one specified source/asset-controlling supplier or another or from an unspecified source. In neither case should the reporting entity be expected to provide a detailed analysis of the multiple factors that resulted in dispatch of, or delivery from, one facility over another or at different levels than in the previous year.

Should CARB dispute the facility operator’s identified basis for the change or deem the accompanying “narrative description” inaccurate or inadequate, CARB could pursue an enforcement action against the reporting entity. Under the MRR, “[p]enalties may be assessed for any violation of this article pursuant to Health and Safety Code section 38580.”¹⁷ Additionally, “[e]ach day or portion thereof that any report required by this article remains unsubmitted, is submitted late, or contains *information that is incomplete or inaccurate* is a single, separate violation.”¹⁸ In turn, under Health and Safety Code section 38580, any person violating the MRR is subject to the general Health & Safety Code penalty provisions that apply to violations of air quality requirements (e.g., Health & Safety Code §§ 42400, 43025).¹⁹ Given how vague the “narrative description” requirement is, it is unclear what degree of detail is necessary to fulfill section 95104(f) and whether, in attempting to explain the multiple factors that might have arguably influenced demand for their products, reporting entities should err on the side of 1,000 words when 10 would suffice.

¹⁶ *Id.*

¹⁷ MRR § 95107(a).

¹⁸ *Id.* § 95107(b) (emphasis added).

¹⁹ Health & Safety Code § 38580(b)(1).

The proposal also presents significant questions with respect to protection of confidential business information under the California Public Records Act (“CPRA”). While the CPRA affords protections for “trade secrets”, it also includes an express exception for “all air pollution emission data, including those emission data which constitute trade secrets”. Gov’t Code § 6245.7(e). A reporting entity might justifiably be concerned that competitors operating under the guise of public interest will make the claim that the narrative explanations included in an emissions data report are more correctly categorized as “emissions data”, than protectable “[d]ata used to calculate emissions data”. *Id.* With so few parameters and limited guidance on what reporting entities must include in their narrative descriptions, a reporting entity may feel compelled, at risk of penalty, to describe innumerable factors that, if disclosed, could damage its competitive position, such as the terms of new contracts for the sale of electricity. While the MRR allows entities to designate certain information submitted in an emissions data report as “confidential” (MRR § 95106(b)), CARB can provide no guarantee that the limits of protection afforded by the MRR and CPRA will not be tested by those seeking a competitive advantage or that a judge will not decide that the purported public interest in understanding the basis for any increase in a reporting entity’s emissions outweighs any protectable interest in statements in its emissions data report.

Without diminishing the importance of the goals of the AMP, we question the value of information on observed changes in GHG emissions to CARB’s assessment of localized air quality impacts, which is the only conceivable basis for section 95104(f).²⁰ Both CARB and members of the public can readily discern whether a facility experiences a 5% change in its GHG emissions by direct reference to the annual MRR emissions data reports. Additionally, there is a wealth of existing data that CARB can use to determine whether TAC or criteria pollutant emissions are increasing at facilities subject to the MRR.²¹ CARB should utilize these data and then coordinate with local air districts to obtain additional information directly pertinent to increases in localized air pollutants, before imposing a burdensome reporting requirement on all reporting entities as part of the MRR.

²⁰ 45-Day Proposed Amendments § 95104(e); *see also* Environmental Justice Advisory Committee, Presentation, “Assessing the Effects of AB 32 Climate Change Mitigation Programs in Environmental Justice Communities”, slide 7 (Oct. 22, 2013), *available at*: <http://www.arb.ca.gov/cc/ejac/meetings/102213/ab-32-tracking.pdf> (stating that a “[p]roposal to add [a] reporting requirement to Mandatory Reporting on GHG increases [is] [i]n development to identify and respond to concern about the potential for localized emission increases due to the Cap-and-Trade Regulation”).

²¹ *See, e.g.*, Air Toxics “Hot Spots” Information and Assessment Act (AB 2588, Connelly, 1987: chaptered in Health & Safety Code §§ 44300 *et seq.* (“AB 2588”). *See also* South Coast Air Quality Management District (“SCAQMD”), AER/AB 2588 – Search, <http://www3.aqmd.gov/webappl/aersearch/search.aspx> (cataloging the criteria pollutant emissions (in tons/year) and TAC emissions (in pounds/year) of each facility subject to AB 2588 in the SCAQMD’s jurisdiction); CARB, Facility Search Tool, <http://www.arb.ca.gov/ei/disclaim.htm> (providing an AB 2588 search tool similar to the SCAQMD’s search tool).

In sum, we do not question the importance of the AMP's goals, but whether CARB's proposal amounts to a reasonable means in furtherance of these goals. We therefore recommend that CARB include an additional option specifically tailored to operators of electric generating facilities and importers of electricity, allowing them to identify changes in the dispatch level of their facilities or the volume or source of imports as the basis for any observed increase or decrease, without requiring any further explanation or detail. We also recommend that CARB eliminate the "narrative description" requirement altogether due to the lack of any clear criteria on what level of detail is necessary to fulfill this requirement and the burden imposed on individual facility operators to explain the many factors affecting dispatch of electric generating units and deliveries of imported power. Accordingly, Calpine proposes the following revisions to section 95104(f), with additions shown in underlined text and deletions shown in ~~strikethrough~~ text:

§ 95104. Emissions Data Report Contents and Mechanism.

...

- (f) *Increases and Decreases in Facility Emissions.* The operator of a facility identified in section 95101(a)(1)(A)-(B) that is subject to the cap-and-trade regulation must include the following information in the emissions data report:
- (1) Whether a change in the facility's operations or status resulted in an increase or decrease of more than five percent in emissions of greenhouse gases in relation to the previous data year.
 - (2) Specify which of the following reason(s) ~~would be~~ were the cause of the increase or decrease in greenhouse gas emissions:
 - (A) Change in production;
 - (B) Changes in facility operations in order to comply with:
 1. The cap-and-trade regulation;
 2. Other air pollution regulations;
 3. Other regulations, not related to air pollution or greenhouse gases;
 - (C) Changes in efficiency due to:
 1. Process or material changes;
 2. The addition of control equipment;
 3. Other efficiency measures;
 - (D) For an electric power entity reporting pursuant to section 95111 or the operator of a facility reporting pursuant to section 95112, changes in either the volume or source of electricity imported by such entity or the volume of electricity or thermal energy generated by such facility;

(E) Other.

- (3) ~~A narrative description of how each reason identified in section 95104(f)(2) caused the increase or decrease in emissions. Include in this description any changes in your air permit status.~~
- (4) This section 95104(f) is not subject to the third-party verification requirements of this article.

These proposed revisions to the 15-Day Amendments would provide CARB with adequate screening information concerning observed increases and decreases in GHG, which it could then use to pursue additional information on possible impacts on localized air quality, in furtherance of the goals of the AMP. At the same time, individual facility operators would not be tasked with the potentially impossible task of analyzing the many potential factors that influence demand for electricity and face the risk of penalty, should CARB disagree with the identified reason for the reported change or find the accompanying narrative description to be either inaccurate or inadequate.

* * * *

Calpine requests that CARB consider the revisions we have proposed to the 15-Day Amendments. Please feel free to contact me with any questions or concerns regarding these comments. Thank you for the opportunity to submit these comments.

Sincerely,

/S/

Barbara McBride
Director – Environmental Services

cc: Edie Chang, Deputy Executive Officer
Steven S. Cliff, Ph.D., Assistant Division Chief, Stationary Source Division
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