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VIA ELECTRIC SUBMISSION

August 2, 2013

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

Subject: **Comments on CARB's July 2013 Discussion Draft of Proposed 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") July 2013 Discussion Draft of its proposed amendments to the Cap-and-Trade Regulation (the "Draft Amendments")[1] and the July 18, 2013 public workshop regarding the Draft Amendments.

I. Introduction

We recognize the enormity of CARB's efforts to address the many issues related to the Cap-and-Trade Regulation.[2] In particular, we acknowledge CARB staff's willingness to provide some relief to generators subject to legacy contracts[3] who cannot pass through the cost to procure greenhouse gas ("GHG") emission allowances. However, under the Draft Amendments, CARB staff is proposing not to provide complete relief to legacy contract generators; instead, it intends to provide allowances to such generators to satisfy only their 2013 and 2014 compliance obligations. CARB staff's proposal in this regard was a strong blow to stakeholders who have worked hard to resolve this issue over the past several years.

As described below, we strongly disagree with this approach and urge CARB staff to propose amendments to the Regulation in September 2013 to provide complete relief to legacy contract generators through the end of the contract period or until the contract is substantively amended. These requested amendments are necessary to satisfy the Board's September 2012 Resolution directing CARB

[1] *See* CARB, "DISCUSSION DRAFT JULY 2013," available at: http://www.arb.ca.gov/cc/capandtrade/meetings/071813/ct_reg_2013_discussion_draft.pdf.

[2] Tit. 17, Cal. Code Reg. §§ 95800 *et seq.*, referred to herein as the "Regulation".

[3] Legacy contracts are those that do not allow for a pass-through of the cost to purchase GHG emission allowances to meet generators' compliance obligation under the Regulation.

staff to fully address this important issue. Without such amendments, the energy-efficient electricity generating and combined heat and power ("CHP") facilities—that the Regulation is designed to promote—will incur severe financial hardship due to the related uncertainty and may be forced to shut down if burdened with such immense unrecoverable costs.

II. CARB Staff Must Adhere To The Board's Directive In Resolution 12-33 To Provide Complete Relief To Legacy Contract Generators

Since the Regulation was first proposed, CARB staff has been aware of the legacy contracts issue, and has worked extensively with stakeholders seeking to resolve this important issue.[4] Specifically, following discussions with legacy contract generators, CARB staff committed in December 2010 to "work with interested stakeholders to ensure proper treatment under the regulation of any electricity generators or combined heat and power facilities with pre-AB 32 long-term contracts that do not allow for pass-through of costs associated with greenhouse gas emissions."[5] Understanding the importance of this matter, as part of its adoption of the Regulation in 2011, the Board directed CARB staff to take certain steps to investigate and make improvements upon the Regulation. With regard to legacy contracts, the Board directed CARB staff to "monitor progress on bilateral negotiations between counterparties with existing contracts that do not have a mechanism for recovery of carbon costs associated with cap-and-trade for industries receiving free allowances pursuant to Section 95981, and identify and propose a possible solution, if necessary."[6] However, CARB staff did not propose a solution to this issue in 2012. Recognizing the importance of this unresolved matter, the Board provided a clear and unqualified *directive* to CARB staff in September 2012 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."[7]

Contrary to the Board's directive in this regard, CARB staff is proposing to provide emission allowances to legacy contract generators to satisfy only their 2013 and 2014 compliance obligations. We are surprised and disappointed by CARB staff's about-face on this issue, as less than three months ago, during its May 1, 2013 workshop, there was no suggestion that CARB staff would provide anything less than complete relief to legacy contract generators. Indeed, CARB staff's May 1 presentation states that

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[4] Proposed Regulation to Implement the California Cap-and-Trade Program, Part I, Volume I, CARB Staff Initial Statement of Reasons ("ISOR"), at II-32, n.22 (October 28, 2010) ("Some generators have reported that some existing contracts do not include provisions that would allow full pass-through of cap-and-trade costs. These contracts pre-date the mid-2000s and many may be addressed through the recently announced combined heat and power settlement at the California Public Utilities Commission. Staff is evaluating this issue to determine whether some specific contracts may require special treatment on a case-by-case basis.")

[5] Board Resolution, 10-42, Attachment B (December 16, 2010), at 8 (emphasis added).

[6] Board Resolution, 11-32 (October 20, 2011), at 12.

[7] Board Resolution, 12-33 (September 20, 2012), at 3.

legacy contract generators are eligible for relief if the contract was entered into before AB 32 and remains in place and has not been renegotiated.[8] Such eligibility, however, "ceases when [the] ***contract expires***."[9] While CARB noted in September 2012 that "but for" CHP facilities would receive an exemption for only the first compliance period (i.e., 2013 and 2014), ***no*** such limitation was ever communicated regarding legacy contract generators. Significantly, the Draft Amendments are directly contrary to staff's representations to the Board made during its September 2012 public meeting. Specifically, in describing the necessary amendments to address legacy contracts, CARB staff was clear that it would provide relief to legacy contract generators for the full duration of their respective contracts:

> Only entities that signed contracts prior to January 1st, 2007, and whose legacy contracts were not significantly amended after this date would be eligible for allocation. Allocation would only be for that portion of the legacy contracts without cost recovery. ***Allocation would end when the existing legacy contract ends or is significantly amended.***[10]

A. CARB's Decision To Address Legacy Contracts With IOUs Does Not Justify Penalizing Legacy Contract Generators

Despite the clear directive from the Board in Resolution 12-33, CARB staff asserts that this new approach is necessary, because it is addressing legacy contracts with investor-owned utilities ("IOUs") as part of the Draft Amendments. Specifically, CARB claims that California Public Utility Commission ("CPUC") President Peevey's June 5 letter justifies abandoning the progress made on this issue over the past 10 months.[11] This purported rationale is unconvincing. All that President Peevey requested is that CARB address legacy contracts with IOUs and, if it decides to do so, President Peevey asked that all legacy contract generators be treated equitably, regardless of whether the counterparty is an IOU or not.[12] Nothing in President Peevey's letter requests or supports CARB's decision to penalize legacy contract generators as proposed in the Draft Amendments.

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[8] CARB Staff workshop presentation titled "Proposed Amendments to the Cap-and-Trade Program's Treatment of Universities, 'But For' CHP, and Legacy Contracts" (May 1, 2013), at 25.

[9] *Id.* (emphasis added).

[10] CARB September 20, 2012 Meeting transcript, at 106 (emphasis added); available at: http://www.arb.ca.gov/board/mt/2012/mt092012.pdf

[11] *See* CARB, Notice of Public Availability of Cap-and-Trade Discussion Draft and Workshop (July 18, 2013) ("Notice and Summary of Proposed Changes"), at 16-17.

[12] *See* Letter from CPUC President Michael R. Peevey to CARB Chairman Mary Nichols (June 5, 2013).

In addition, including what can only be a handful of legacy contracts with IOUs as part of legacy contract provisions provided in Draft Amendments does not undermine CARB's ability to address this issue. Given that only 19 legacy contracts remain—two more than the 17 contracts CARB staff noted in its September 2012 presentation to the Board[13]—it is difficult to conceive how providing complete relief to *all* legacy contract generators (whether the counterparty is an IOU or otherwise) would threaten the integrity of the GHG emissions cap, affect the implementation of the Regulation, or in any way undermine AB 32's goals.

Further, the ability to renegotiate contracts varies depending not only on the specific terms and conditions in each contract, but the nature of the relationship between the parties. For example, if the parties are involved in ongoing business transactions or relationships in other contexts, there may be incentives for the parties to renegotiate the particular legacy contract at issue. Of course, this is not the case in all contexts. Thus, given that there is not a one-size-fits-all approach to renegotiating these legacy contracts, we fail to see how providing relief to those remaining parties whose negotiation efforts were unsuccessful would "undermine the efforts of those that already renegotiated contracts to resolve disputes over carbon costs."[14] The financial burden to legacy contract generators will only *increase* in subsequent compliance periods as the cap declines and the availability of allowances decreases. No facts or circumstances justify providing legacy contract generators relief in during the first compliance period, but none thereafter.

B. Non-IOU Legacy Contracts Do Not Have The Same Options Available To IOU Legacy Contracts For Resolving This Issue

As CARB staff knows, the Regulation provides allowances to IOUs for sale at auction to be used for the protection of rate payers.[15] Thus, unlike counterparties who are not IOUs, proceeds are available to be used in a variety of ways as part of any solution to resolve or encourage renegotiation of legacy contracts with IOUs. However, generators with legacy contracts with non-IOU counterparties do not have the benefit of such options. In light of this important distinction, we believe the definition of "Legacy Contract."[16] should be modified to not include both contracts with IOUs (that are not party to the CPUC's Combined Heat and Power Program Settlement (the "QF Settlement"))[17] and non-IOUs. While the solutions to address legacy contracts with IOUs and non-IOUs should be equitable, the

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[13] CARB September 20, 2012 Meeting Transcript, at 106.

[14] *See* CARB, Notice of Public Availability of Cap-and-Trade Discussion Draft and Workshop (July 18, 2013), at 17.

[15] Tit. 17, Cal. Code Regs. § 95892(d).

[16] Draft Amendment, § 95802 (YYY), at 28.

[17] *See* CPUC, Qualifying Facilities and Combined Heat and Power Program Settlement, Decision 10-12-035 (Dec. 16, 2010).

Regulation should be structured to account for this significant difference associated with these different types of legacy contracts.

Further, given that IOUs are awarded allowances in this regard, it appears that the CPUC, not CARB, should address legacy contracts with IOUs. Indeed, in 2012, the CPUC expanded the scope of its proceeding in R.11-03-012 to address contracts with IOUs that did not resolve their issues as part of the CPUC's QF Settlement or through contract negotiations.[18] However, there is no discussion whatsoever in President Peevey's letter or CARB staff's Notice and Summary of Proposed Changes as to why legacy contracts with IOUs cannot be resolved by the CPUC. We simply see no justification or rationale for penalizing legacy contract generators who have worked extensively with CARB staff to address this issue (which appeared to be the case until two weeks ago) because the CPUC has apparently decided not to address legacy contracts with IOUs.

III. The Draft Amendments Provide No New Incentive For Contract Renegotiations

CARB staff contends that, providing relief to legacy contract generators for a limited period of time (i.e., the first compliance period), "maintain[s] a strong incentive to continue renegotiation."[19] Given that it has been seven years since the Legislature adopted AB 32 and almost two years since CARB adopted the Regulation, it is unclear how another two years of delay in fully addressing this issue provides any incentives for the parties to renegotiate their contracts. CARB staff's decision in this regard will only cause this issue to remain unresolved, forcing the agency and stakeholders to return to same circumstances that we are in today—only to commit additional time and resources to resolve the very same issue now before the Board. This delay will do nothing to bring the parties closer to renegotiation of their contracts, and, as described below, creates substantial regulatory uncertainty causing significant negative economic impacts to legacy contract generators.[20]

IV. CARB Staff's Incomplete Solution Will Cause Substantial Financial Harm to Legacy Contract Generators Without Any GHG Reduction Benefits

The Cap-and-Trade Program is designed to incentivize energy efficient use. Indeed, "the overall approach for the cap-and-trade regulations is to . . . create a price signal that will encourage investment in

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[18] *See* CPUC, Assigned Commissioner's and Administrative Law Judges' Ruling Amending Scoping Memo in R.11-03-012 (August 2, 2012).

[19] *Id.*

[20] We recognize that the Draft Amendments would subtract the legacy contract allocation amount from the number of allowances directly allocated to a counterparty who is otherwise eligible to receive a free allowance allocation. Draft Amendments, § 95891(f). However, because many legacy contracts do not involve such a counterparty, any incentive created by such an approach is limited to only contracts with such parties.

the most cost-effective emission-reduction projects."[21] However, by not providing relief to legacy contract generators until the end of the contract period, highly efficient electricity producing facilities, including CHP, will inevitably shut down if forced to incur these unrecoverable costs, which are expected to reach the tens of millions of dollars for certain facilities. In light of the less than complete relief provided in the Draft Amendments, rating agencies are expected to downgrade projects with legacy contracts that do not allow for a pass-through of GHG allowance costs. Such a downgrade threatens the ability of projects to finance debt and raise capital (and substantially increases the costs to do so), which is critical for the continued operations and economic viability of such projects. Further, the incomplete nature of the Draft Amendments creates uncertainty as to what, if anything, CARB staff intends to do to address the legacy contract issue in subsequent compliance periods. Such uncertainty hampers legacy contract generators' ability to plan or account for future contingencies, which is vital to the stability of such projects. At a minimum, important maintenance expenditures may need to be deferred, reduced or eliminated in an effort to plan for increased costs in subsequent compliance periods.

In addition, CARB's reversal on this critical issue (without any policy justification) will undoubtedly discourage developers from investing in California energy markets for fear of facing similar prospects in an arbitrary and uncertain regulatory environment. Many facilities affected by the Regulation were built in reliance upon California and federal energy policies designed to encourage the development, financing, ownership and operation of such efficient facilities. The imposition of these costs poses a crippling financial obligation on projects that lenders and equity investors never contemplated when such projects were originally structured and financed. Should CARB staff fail to revise the Draft Amendments to provide the necessary relief to legacy contract generators, future lenders and equity investors in California energy projects will undoubtedly take note of this type of political risk, which will likely increase the costs ultimately realized by ratepayers.

Finally, as described in prior comments, the structure of the Program is designed to embed a carbon price in rates of steam and electricity, by imposing a compliance obligation on such power plants to procure and surrender GHG emission allowances. In particular, if the price of steam and electricity reflects the marginal GHG abatement costs, CARB staff believes this incentivizes reduced energy use through energy efficiency or conservation and furthers power purchases from a cleaner portfolio.[22] However, this approach only works if "generators will be able to fully pass any carbon cost through into the wholesale power market."[23] Thus, stranding the allowance costs on legacy contract generators effectively penalizes such generators and has no corresponding GHG emissions reduction benefits. Such a result, therefore, does nothing to further the purpose of the Regulation or the related goals under AB 32.

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[21] CARB, FSOR, Response to Comment I-94, at 636.

[22] CARB, Initial Statement of Reasons ("ISOR"), Appendix J, "Allowance Allocations," J-15.

[23] *Id.* at J-16.

V. Emission Allowance Allocations For Legacy Contract Generators

While we strongly disagree with CARB staff's proposal to provide allowances to legacy contract generators for only the first compliance period, several other aspects of the Draft Amendments should be revised.

A. Legacy Contract Generators Should Receive A True-Up As Is Provided For Others Receiving Emission Allowances

First, as described in prior comments, a shortfall in any 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 include a true-up for legacy contract generators, as is provided to universities, petroleum refineries, and energy intensive/trade exposed industries under the Draft Amendments.[24] While CARB staff's July 18 workshop presentation notes that legacy contract generators will be provided such true-up allowances,[25] proposed regulatory language in this regard is noticeably absent from the Draft Amendments. We request that CARB staff provide the necessary regulatory provisions in the proposed amendments to the Regulation expected in September 2013.

B. Use of Vintage 2015 Allowances To Satisfy Compliance Obligations During First Compliance Period

To satisfy their 2013 and 2014 compliance obligations, legacy contract generators would be required to sell a portion of the vintage 2015 allowances allocated to them (or otherwise dedicate capital) in order to purchase vintage 2013 and 2014 allowances. Given that the price difference among vintage 2013, 2014 and 2015 allowances could be significant (resulting in substantial financial hardship to legacy contract generators), our prior comments on CARB staff's May 1st workshop presentation recommended that the agency include, as part of any proposed allocation methodology, a true-up for any differential between the price of vintage 2013 and 2014 allowances and the vintage 2015 allowances that CARB will allocate to legacy contract generators. However, CARB staff indicated during the July 18 workshop that vintage 2015 allowances allocated to legacy contract generators pursuant to section 95894 of the Draft Amendments could be used to satisfy legacy contract generators compliance obligation for the first compliance period (i.e., 2013 and 2014). Such regulatory language does not appear in the Draft Amendments, and thus, we request that CARB staff provide the necessary regulatory provisions to address this issue in the proposed amendments to the Regulation expected in September 2013.

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[24] *See, generally*, Draft Amendments, § 95891(b), 95891(c)(3)(B), 95891(d)(1)(B), 95891(d)(2)(B) and 95891(e)(1).

[25] CARB, July 18 Workshop Presentation, at 75.

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 for the amount of electricity and steam sold in the prior year. Under the Draft Amendments, 2012 data will be used in calculating the allowance allocation provided to legacy contract generators. Because facility output varies based on changes in market demand, production capacity, fuel quality, and facility downtime and maintenance, we 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 (i.e., 2013). Use of 2012 data will likely result in an under-allocation of allowances to legacy contract generators. In addition, the expected shortfall from using such 2012 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. Thus, by using the most current data, there is less risk that legacy contract generators would incur any costs to purchase allowances in advance of receiving a subsequent true-up.

D. Protection of Confidential and Privileged Information

As part of its review of legacy contracts under section 95894(a)(2) of the Draft Amendments, we encourage CARB staff to take all steps to protect all confidential and privileged information as provided under California law and regulations. We believe that legacy contract generators should be permitted to redact any confidential, privileged or proprietary information and sensitive commercial terms, as part of satisfying section 95894(a)(2) of the Draft Amendments.

VI. The Draft Amendments Propose Numerous Unnecessary and Burdensome Disclosure Requirements

The Draft Amendments propose a panoply of onerous disclosure requirements that are unnecessary in order for CARB staff to adequately monitor compliance with the Program.

A. Identification of Corporate Relationships

Under revised section 95830(c)(1)(H) of the Draft Amendments, CARB staff proposes to require Compliance Instrument Tracking System Service ("CITSS") registrants to disclose all entities with "whom the entity has a corporate association pursuant to section 95833" of the Regulation regardless whether such entity is registered to participate in CITTS.[26] The proposed amendment would

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[26] Draft Amendments, § 95830(c)(1)(H). Regardless of whether the entity is subject to the Regulation, a "corporate association" exists with such an entity "(A) Holds more than 20 percent of any class of listed shares, the right to acquire such shares, or any option to purchase such shares of the other entity; (B) Holds or can appoint more than 20 percent of common directors of the other entity; (C) Holds more than 20 percent of the voting power of the other entity; (D) In the case of a partnership other than a limited partnership, holds more than 20 percent of the interests of the partnership; or (E) In the case of a limited partnership, controls the general partner; or (F) In the case of a limited liability

require entities to identify and disclose an array corporate relationships with entities that have nothing whatsoever to do with the Regulation. Further, these relationships change many times and in a variety of contexts, such as stock transfers, mergers and acquisitions, asset purchases, and complex corporate structuring and financial transactions. Because the Draft Amendments seek identification of all such related entities, as part of registering with CITTS participants will need to spend potentially significant time and resources to identify and track all corporate transactions conducted by parent companies, subsidiaries and other entities with varying degrees of relationship to confirm whether such entities satisfy the complex "corporate association" definition provided in section 95833 of the Draft Amendments. CARB staff has not provided any rationale for this proposed amendment in its Notice and Summary of Proposed Changes. Given that this requirement could be quite burdensome for certain entities and that the entities for which CARB staff seeks this new information are not subject to the Regulation, we request that CARB not amend section 95830(c)(1)(H) of the Draft Amendments as proposed.[27]

B. Employee Disclosure Requirements

While existing disclosure requirements are focused mainly on those in a decision-making capacity (i.e., officers, owners, or account representatives), the newly proposed section 95830(c)(1)(I) of the Draft Amendments would require entities registering with CARB to provide:

> "Names and contact information for ***all*** persons employed by the entity that will either have access to ***any*** information regarding compliance instruments, transactions, or holdings; or be involved in decisions regarding transactions or holding of compliance instruments; or both. An entity already registered in the tracking system must provide the ***notarized letter from their employer no later than January 31, 2015***.[28]

According to the Notice and Summary of Proposed Changes, CARB staff seeks such information for any employee that gains knowledge of a registered entity's "compliance and transaction" strategy regardless of whether such person or persons have any authority to make any related decisions on behalf of the company or is responsible for compliance with the Program. This requirement would apply to any office personnel including clerks, administrative staff, accountants, paralegals and even attorneys. Without any clear justification for why this information is necessary, we request that CARB staff not

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corporation, owns more than 20% of the other entity regardless of how the interest is held. Draft Amendments, § 95833.

[27] To the extent that any of this information is currently obtained by the Federal Energy Regulatory Commission, the California Energy Commission, the CPUC or any other regulatory agency, such requirements under the Draft Amendments would be unnecessarily duplicative. CARB could therefore obtain such information from those public agencies without creating additional burdensome and unnecessary regulatory requirements.

[28] Draft Amendments, § 95830(c)(1)(I) (emphasis added).

include section 95830(c)(1)(I) of the Draft Amendments in its September 2013 proposed amendments to the Regulation.

C. Auction Advisor Disclosure Requirements

Proposed section 95830(c)(1)(J) would require entities that employ auction bidding advisors (and contractor (discussed below)) to disclose the name, contact information and physical address of such advisor.[29] In turn, however, the 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.[30]

Without a definition of "auction bid advisor" in the Regulation, such an advisor could presumably include *anyone* who provides advice to an auction participant, including an attorney. CARB staff simply notes that 95914(c)(3) was modified to include such information about advisors and auction participants in order "to enhance ARB's oversight ability."[31] However, if an auction participant retained a lawyer to advise it some aspect of the auction bidding process, proposed section 95914(c)(3) would require the attorney (not the entity) to provide a description of the advisory services performed for such an entity. In such a circumstance, section 95914(c)(3) would violate the attorney-client privileged provided under California statute,[32] and potentially subject the attorney to disciplinary action by the State Bar for violation of the California Rules of Professional Conduct, which could result in such attorney's disbarment.[33] In light of this significant issue, we request that CARB staff not include section 95914(c)(3) of the Draft Amendments in its September 2013 proposed amendments to the Regulation, and instead retain the current provisions of the Regulation designed to prohibit auction bid advisors

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[29] Draft Amendments, § 95923.

[30] Draft Amendments, § 95914(c)(3) (emphasis added).

[31] CARB, Notice and Summary of Proposed Changes (July 18, 2013), at 20.

[32] Evidence Code, § 954.

[33] *See* California Rules of Professional Conduct, Rule 3-100 (Confidential Information of a Client).

from sharing sensitive information or coordinating bidding strategies with other allowance market participants.[34]

D. Contractor Disclosure Requirements

Proposed section 95923 would require entities employing a "Cap-and-Trade Contractor" to disclose the name, contact information and physical address of such contractor.[35] "Cap-and-Trade Contractor" is defined as "a ***contractor*** employed by an entity registered in the cap-and-trade program to work on cap-and-trade compliance if the contractor: (A) Verifies the entity's emissions as part of ARB's Mandatory Reporting Regulation; [or] (B) ***Advises or consults with the entity*** regarding compliance with the Cap-and-Trade Program, and receives information from another registered Cap-and-Trade participant."[36] The Regulation, however, does not define "contractor". Thus, the board definition of "Cap-and-Trade Contractor" could encompass anyone retained or hired by an entity, including an attorney, to advise it on compliance with the Program. As described above in the context of an auction bid advisor, the requirements of section 95923 of the Draft Amendments violate California's attorney-client privilege and compliance with CARB's requirements could subject an attorney to disciplinary proceedings by the State Bar. We therefore request that CARB staff not include section 95923 of the Draft Amendments in its September 2013 proposed amendments to the Regulation.

VII. Conclusion

The basis for CARB staff's decision in September 2012, which it confirmed in May 2013, to provide complete relief to legacy contract generators has not changed. The very facilities that the Regulation is designed to promote are at significant financial exposure absent complete transition assistance to legacy contract generators. We implore CARB staff not to abandon this opportunity to adhere to the Board's directive in Resolution 12-33 to fully address this issue. The Draft Amendments do not provide any new incentives for the remaining parties to renegotiate their legacy contracts and will only cause this issue to remain unresolved, requiring dedication of additional time and resources by CARB staff and stakeholders in the future to resolve the very same issue. The incomplete nature of the Draft Amendments will force legacy contract generators to incur substantial financial consequences *now* in light of the associated regulatory uncertainty going forward. Stakeholders have worked extensively

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[34] Tit. 17 Cal. Code Regs., § 95914(c)(2) ("If an entity participating in an auction has retained the services of an advisor regarding auction bidding strategy, then: (A) The entity must ensure against the advisor transferring information to other auction participants or coordinating the bidding strategy among participants; (B) The entity will inform the advisor of the prohibition of sharing information to other auction participants and ensure the advisor has read and acknowledged the prohibition under penalty of perjury; and (C) Any entity that has retained the services of an advisor must inform ARB of the advisor's retention").

[35] Draft Amendments, § 95923.

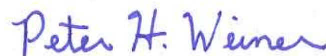
[36] *Id.*, at § 95923(a)(1) (emphasis added).

with CARB staff to resolve this matter, and we strongly urge the agency to provide complete relief to legacy contract generators through the end of their respective contract period.

Consistent with these comments, included as Exhibit A to this comment letter are recommended revisions to the Draft Amendments.[37] Although we provided comments on other aspects of the Draft Amendments, the proposed regulatory language in Exhibit A addresses only the complete resolution of the legacy contracts issue.

While we are incredibly disappointed by the Draft Amendments, we remain hopeful that CARB staff will strongly consider these comments and propose the necessary regulatory amendments as part of the September 2013 proposed amendments to the Regulation. We appreciate CARB staff's willingness to meet with stakeholders throughout this process and remain committed to working with staff to fully address this issue.

Respectfully submitted,



Peter H. Weiner

Attachment: Exhibit A: Recommended Revisions to Draft Amendments to Address Legacy Contracts

[37] Recommended insertions are shown in underlined text and deletions are shown in ~~strikethrough~~.

8.2.13

CARB Workshop

Proposed California Greenhouse Gas Cap-and-Trade Regulations

Exhibit A: Recommended Revisions to Draft Amendments to Address Legacy Contracts

§ 95894. Allocation to Legacy Contract Generators for Transition Assistance

(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 the following in writing via certified mail to the Executive Officer by June 30, 2014 or within 30 days of the effective date of this regulation, whichever is later:

* * * *

(4) Data requested pursuant to Section 95894~~(d)~~(e).

* * * *

(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, 2014 if it is eligible to receive an allocation ~~for the following compliance year~~of vintage 2015 allowances pursuant to section 95894(d)(1) and by September 30 of each subsequent year if it is eligible to receive an allocation of allowances of that same vintage pursuant to section 95894(d)(2).

* * * *

(c) The Executive Officer shall calculate the number of California GHG Allowances directly allocated due to the emissions under a legacy contract from stand-alone electricity generating unit using the following formulas:

(1) The following formula applies for allocating vintage 2015 allowances to legacy contract generators for 2013 and 2014 legacy contract emissions ~~Using 2012 reported and verified legacy contract emissions for 2012 and 2013~~ from a stand-alone generation facility:

$$A_{2015} = (EEm_{lc} * Ca,2013) + (EEm_{lc} * Ca,2014)$$

Where

"A_{2015}" is the number of vintage 2015 allowances directly allocated to the ~~L~~legacy ~~C~~contract ~~G~~generator based on calendar year ~~2012~~ 2013 ~~L~~legacy ~~C~~contract ~~E~~emissions reported and verified pursuant to MRR;

"EEm_{lc}," is the emissions reported, in MTCO2e, associated with electricity sold under the legacy contract in ~~2012~~2013;

"$c_{a,t}$" is the adjustment factor for budget year "t"

"a" to account for cap decline as specified in Table 9-2.

(2) The following formula applies for allocating allowances to legacy contract generators for 2015 and each subsequent year's legacy contract emissions:

$$A_t = (EEm_{lc-2} * C_t) + (EEm_{lc,\ trueup} * C_{t-2})$$

Where

"At" is the amount of California GHG allowances directly allocated to the legacy contract generator subject to a legacy contract from budget year "t";

"t-2" is the two years prior to year "t";

"t-4" is the four years prior to year "t";

"EE_{mlc-2}" is the emissions reported, in MTCO2e, associated with electricity sold under the legacy contract in data year "t-2";

"C_t" is the cap decline factor for budget year "t" as specified in Table 9-2.

"$EEm_{lc,\ trueup}$" adjusts for any emissions reported, in MTCO2e, associated with electricity sold under the legacy contract in year "t-2" not accurately accounted for in prior allocations. The Executive Officer will calculate this term using the difference between (1) the emissions reported associated with electricity sold under the legacy contract in year "t-2" and (2) the emissions reported associated with electricity sold under the legacy contract in year "t-4";

"C_{t-2}" is the cap decline factor for budget year two years prior to year "t" as specified in Table 9-2.

(d) The Executive Officer shall calculate the number of California GHG Allowances directly allocated due to the emissions under a legacy contract from a Cogeneration system using the following formulas:

(1) The following formula applies for allocating 2015 vintage allowances to legacy contract generators for 2013 and 2014 legacy contract emissions ~~For 2012 reported and verified legacy contract emissions~~ from a cogeneration system:

* * * *

[[No recommended changes to Draft Amendments section 95894(d)(1) for calculating allocation of vintage 2015 allowances for 2013 and 2014 emissions from cogeneration facilities]]

(2) The following formula applies for allocating allowances to legacy contract generators for 2015 and each subsequent year's legacy contract emissions:

$$A_t = ((Q_{lc-2} * B_s + E_{lc-2} * B_e) * C_t) + ((Q_{lc,\ trueup} * B_s + E_{lc,\ trueup} * B_e) * C_{t-2})$$

Where:

"A_t" is the amount of California GHG allowances directly allocated to the legacy contract generator subject to a legacy contract from budget year "t";

"t-2" is the year two years prior to year "t";

"t-4" is the year four years prior to year "t";

"Q_{lc-2}" is the Qualified Thermal Output in MMBtu sold under a legacy contract in data year t-2, as reported under the MRR;

"E_{lc-2}" is the electricity, in MWh, sold under the legacy contract in data year t-2;

"B_e" is the emissions efficiency benchmark per unit of electricity sold or provided to off-site end users, 0.431 California GHG Allowances/MWh;

"B_s" is the emissions efficiency benchmark per unit of Qualified Thermal Output, 0.06244 California GHG Allowances/MMBtu thermal;

"C_t" is the cap decline factor for budget year "t" as specified in Table 9-2;

"$Q_{lc,\ trueup}$" adjusts for any Qualified Thermal Output in MMBtu sold pursuant to a legacy contract in year "t-2" not accurately accounted for in prior allocations. The Executive Officer will calculate this term using the difference between (1) the amount of steam sold pursuant to a legacy contract reported in data year "t-2" and (2) the amount of steam sold pursuant to a legacy contract reported in data year "t-4";

"$E_{lc,\ trueup}$" adjusts for any electricity, in MWh, sold pursuant to a legacy contract in year "t-2" not accurately accounted for in prior allocations. The Executive Officer will calculate this term using the difference between (1) the amount of electricity sold pursuant to a legacy contract reported in data year "t-2" and (2) the amount of electricity sold pursuant to a legacy contract reported in data year "t-4";

"C_{t-2}" is the is the cap decline factor for the budget year two years prior to year "t" as specified in Table 9-2.

(e) Data Sources. In determining the appropriate values for section 95894(c), the Executive Officer may employ all available data reported to ARB under MRR for ~~2012~~ 2013 and all other relevant data, including invoices,

(f) Contract Expiration or Amendment. Once a legacy contract expires 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 before ~~2015~~the end of 2020, the allocation will be prorated for the time in which the contract was eligible during the final year of the contract.

Cap-and-Trade Regulation Amendment Request

NOTE: Please use this form to highlight a request to amend a specific section (or related sections) of the Cap-and-Trade Regulation. Submission of this form aids staff in tracking requests and **does not mean** staff will ultimately propose an amendment in the version of the amendments noticed pursuant to the Administrative Procedure Act. This form is intended only as an additional tool ARB will use to evaluate requested changes to the regulation. Amendment requests may be for reasons of policy, clarity, or errors, etc. Staff may contact you if we need more information. Additionally, submission of this form will be a public record, and will be included in the ultimate rulemaking file related to these amendments, but may not be specifically answered in the Final Statement of Reasons. (Government Code section 11346.9(a)(3).) Please complete this form (with as much detail as possible, though it need not be formal regulatory language) and mail or email (preferred) to:

David Allgood (dallgood@arb.ca.gov)
Stationary Source Division
P.O. Box 2815
Sacramento, CA 95812

General Information

Date: August 2, 2013

Submitted by: Peter H. Weiner Affiliation: Paul Hastings LLP

Contact Phone: (415) 856-7010 E-mail: peterweiner@paulhastings.com

Section

Primary section(s): 17 CCR 95894

Related section(s): 17 CCR 95830(c)(1)(H),(I),(J); 95914(c)(3); 95923

Amendment Request

Type of amendment: ☐Policy ☐Error ☐Clarity

Reason for amendment: See Paul Hastings LLP August 2, 2013 Comments on CARB's July 2013 Discussion Draft of Proposed Amendments to the California Cap-and-Trade Regulation

Additional information: