CAPCOA
CALIFORNIA AIR POLLUTION CONTROL OFFICER'S ASSOCIATION

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EXEC. DIRECTOR
Kenneth Koyama
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Mary Nichols, Chairman
James Goldstene, Executive Officer
California Air Resources Board
1001 I Street
Sacramento, CA 95812

Re: CAPCOA Comments on the Proposed 15-day Changes to the Rulemaking Packages for the California Cap on Greenhouse Gas Emissions and Market-Based Compliance Mechanisms and Amendments to the Regulation for the Mandatory Reporting of Greenhouse Gas Emissions

Dear Ms. Nichols and Mr. Goldstene:

The California Air Pollution Control Officers Association (CAPCOA) represents the air pollution control officers from each of the 35 local or regional air quality agencies throughout California. CAPCOA has been in existence since 1975, and is dedicated to protecting public health and providing clean air for all residents and visitors to breathe. We continue to support the goals and implementation of AB 32, and recognize the tremendous work done by ARB staff and Board Members on this important program. We appreciate the opportunity to comment on the 15-day changes to the Mandatory Reporting and Cap and Trade rules.

CAPCOA continues to work with ARB to resolve our concerns about key implementation strategies, and the role of air districts in the overall climate protection program. We appreciate the support for these concerns that the ARB Board pledged in the adopting Resolution for the Cap and Trade program in December of 2010, and we are pleased to see some of them addressed in the 15-day changes to the program rules. But there remain unresolved issues.

Our comments again object to the unnecessary barriers created by the proposed language against air districts acting in partnership with ARB as co-regulators in this important area of air pollution control. We also continue to have significant concerns about key elements of practical enforceability of the rules, as well as the handling of Offsets, stranded allowances, and Verified Renewable Energy Allowances.

Air Districts as Co-regulators:

CAPCOA reiterates the considerable value local air districts can add to the climate program when ARB recognizes our role as co-regulators in this process, rather than considering us interested stakeholders. Local districts have decades of real-world expertise in evaluating, permitting, collecting and verifying emissions inventories from, and enforcing requirements on, the stationary sources subject to the Cap and Trade and Mandatory Reporting rules. This includes requirements related to cap and trade programs on the national and regional level, credit banking, and offset evaluation. This expertise has been hard-won, and with it has come a clearer understanding of the potential pitfalls and mistakes that can arise in early program development, and also how to structure programs to ensure the best compliance, and overall program performance. Our success has secured substantial reductions in ozone precursors, sulfur oxides, and particulate matter, as well as regional exposures to toxic air contaminants and smoke from open burning. CAPCOA and its members continue to offer this expertise to ARB as it develops and implements the rules for the Cap and Trade program, as well as other climate protection rules. We continue to object to program provisions that restrict district actions, and imply that air districts have a profit or other motive in participating in any program, beyond the common objective we share with ARB to achieve emission reductions and ensure the proper and successful implementation of the program.

Mandatory Reporting Rule- CAPCOA is pleased that new language in the Mandatory Reporting Regulation section 95133(h)(1) establishes a presumption that multiple functions performed by air districts as a part of their regulatory duties do not constitute a potential for a high conflict of interest with regard to verifying emissions of greenhouse gases under the mandatory reporting program. This change will enable air district staff to cost-effectively verify emissions reports for facilities that elect to use our services, and to do so with a high degree of quality. We are satisfied that our concerns have been met regarding the language in the Mandatory Reporting Regulation and we look forward to jointly implementing it with the ARB staff.

Cap and Trade Rule- The proposed 15-day changes include language regarding conflict of interest that responds to CAPCOA's concerns, however other provisions of the rule specifically prevent districts from performing the certain functions in this program that we have historically performed in similar criteria pollutant programs for decades with great success.

Conflict of Interest- CAPCOA supports the 15-day language included in Section 95979(g) that is specific to air districts and will allow districts to verify Offsets in the program. We appreciate this change to the rule language, and we believe it addresses our concern about this provision of the rule.

Ability to Perform Multiple Roles- The proposed 15-day changes reinforce language that precludes districts carrying out multiple functions in the Cap and Trade program, in spite of direction from the ARB Board that this issue be resolved.

- Section 95814 precludes any air district that is acting as a verifier from holding compliance instruments. There are legitimate reasons why a regulating agency may need to do this. Districts do hold emission reduction credits (or other credits that are analogous to compliance instruments as the term is used here) in criteria pollutant programs without compromising the integrity of the program; in fact, in every case that a district has elected to do this, it is to ensure the proper, efficient, and effective functioning of the program.

CAPCOA has offered to work with ARB to clarify our concerns and derive a mutually agreeable solution, without success.

- Section 95986 only allows an organization to serve as a registry if that is the organization's primary business, and prohibits such an organization from performing many other functions related to Offsets. As with our concerns about Section 95814, there are legitimate reasons for a regulatory agency to perform multiple functions that, in a non-regulatory organization could create a conflict of interest or compromise the integrity of the program.

Air districts will make programmatic choices to enhance efficiencies across air programs, and support effective enforcement and the best overall performance of the program; we are not motivated by profit or other concerns. Restrictions designed to prevent other types of businesses or organizations from taking advantage of or otherwise corrupting the market system are appropriate, but should clearly not apply to co-regulators. CAPCOA strongly urges ARB to include the language previously submitted to address this issue:

"Section 95989. California air pollution control districts or air quality management districts. Notwithstanding any other provision of this regulation, California air pollution control districts or air quality management districts may be approved for multiple roles, including verification for mandatory reporting or Offsets, holding compliance instruments, implementing offset projects that are verified by a third party and approved by ARB, and running a Registry, provided the appropriate training, certification, or approvals are obtained from ARB. Decisions on such approval requests will be provided in a timely fashion."

In the eight months since the December Hearing, ARB staff has not discussed this language with CAPCOA or met with us to resolve the underlying concern, in spite of our requests to do so. We would like to emphasize that under this language, districts are still required to have the necessary training, certifications, and approvals from ARB, and we do not understand why the language is not part of the 15-day proposal. Again, we strongly urge that it be included.

Conflict Resolution- In the adopting Resolution for the Hearing in December of 2010, the ARB Board directed the Executive Officer to establish a venue, facilitated by a Board Member, to resolve implementation concerns with CAPCOA (see page 13 of the Resolution):

BE IT FURTHER RESOLVED that the Board directs the Executive Officer to establish a Board-member facilitated dialogue with the California Air Pollution Control Officers Association regarding involvement of the air pollution control and air quality management districts (air districts) in the implementation of the cap-and-trade regulation, development of compliance offset protocols, and other AB 32 programs.

We are disheartened to report that the "Board-member facilitated dialogue" has not been convened. CAPCOA has made several attempts to schedule a meeting to initiate the dialogue. In early May, Mr. Goldstene met with the CAPCOA Board and requested a delay to allow staff the opportunity to work with CAPCOA on our concerns. Unfortunately, no meaningful discussions have been held (ARB staff requested a conference call with a small group of CAPCOA members to ensure we understood the CAP and Trade program, and Mr. Goldstene and staff have briefed the CAPCOA Board on ARB's progress on this rulemaking and several other programs). At the same time, the 15-day changes do not address a number of our concerns, nor do they leave any room for them to be

addressed in the future. We believe the facilitated dialogue could have helped to resolve this before the matter came before the ARB Board a second time, and we still believe it will be critical going forward. We respectfully request that the Board urge that this process get under way expeditiously, and that language be included in the Cap and Trade rule to allow the implementation of any future agreements.

Enforcement Concerns:

Violations- In the 15-day changes, ARB has revised Section 96014 in ways that we believe substantially undermines the enforceability of the program, and is likely to compromise the ultimate objective of reducing emissions. Specifically:

Days of Violation- We strongly recommend you reinstate the deleted language that specified that "each day or portion thereof in which any other violation of this Article occurs is a separate offense." Further, at a minimum, the counting of violation days should begin as soon as the compliance target is exceeded, not delayed until five days after the reporting period ends. Ideally, the number of days of violation should be the number of days in the compliance period subject to reduction according to the proof presented by the entity. For example, if an entity has submitted data in year Y, and surrenders insufficient compliance instruments on November 1 in year Y+1 (as required in 95856(d)), the violation should be counted based on the number of days in the compliance period for which the surrendered instruments were insufficient.

Types of Violations- We recommend the language be expanded to recognize other types of violations beyond failure to submit sufficient compliance instruments, and submittal of false documentation. Other potential violations include, but are not limited to, failure to register, failure to comply with requests for information, failure to retire Offsets, etc. The rule should provide enforcement authority over failure to comply with any requirements of the program unless specifically exempted.

Exclusions from Violations- We recommend against the revision that would allow the first five percent of emissions over the reported level to be protected from enforcement. By including this language, ARB has essentially raised the cap by five percent. It is not necessary from a programmatic standpoint, and is not allowed in other air programs. If ARB continues to allow this exclusion, at a minimum, the rule should be clear that if an entity under-reports by more than the five percent "free" level, *all* under reported emissions will be subject to violation, not just emissions beyond five percent.

Violations of Reporting Requirements- We strongly recommend that ARB retain the ability to enforce against negligent actions, and strict liability for errors and omissions, etc. While we agree that severe penalties should apply to knowing and intentional violations, intent can be very difficult to establish, and it is important for the integrity of the program that lesser violations be subject to enforcement action, and penalty amounts up to the limits prescribed in the Health and Safety Code. ARB always retains the ability to use its enforcement discretion, should it feel that the facts do not warrant those penalty levels.

Compliance Deadlines- In the 15-day changes, ARB proposes to extend the deadline to surrender compliance instruments from six weeks to five or seven months. We do not understand why such a long period of time is needed, and believe it will complicate enforcement later. We recommend that ARB retain the original language. In addition, we recommend a shorter time period for the surrender of additional compliance instruments that are owed as a penalty for untimely surrender. Currently, with the extension in the original deadline to surrender, the penalty is not due until over a year after the compliance period ends. Finally, in Section 95850(c), the rule provides 20 days for an entity to provide records requested by the Executive Officer; standard language is always that records shall be made available upon request. The Executive Officer retains discretion to provide some amount of time for the records to be produced, depending on the complexity of the request, however he or she should always be able to conduct an un-announced inspection and review records.

Enforcement Agents- In all places where the rules refer to the enforcement authority of the State of California, or to the authority of the Executive Officer of the ARB, it should be noted that such authority is conferred on any agent officially designated or recognized as having such authority, or authorized by law to enforce these rules.

Offsets and Stranded Allowances:

CAPCOA believes the handling of Offsets in the Cap and Trade program will significantly affect the success of the program, and we continue to support the use of only the highest quality verified Offsets. To that end, we recommend that ARB continue to require that 20% of the annual offset verifications be audited by a registry, rather than the lesser amount (10%) proposed in the 15-day changes.

Also, we recommend that ARB specify the fate of any allowances provided to a facility free of charge if the facility leaves the program because its emissions drop below the threshold for covered entities (Section 95812). Our experience shows that considerable disagreement can arise about these stranded allowances if their disposition is not clearly set out in the regulations.

Voluntary Renewable Electricity Allowances:

CAPCOA recommends that:

- Voluntary Renewable Electricity Allowances (VREAs) should be preferably awarded to those projects which are "additional" and would not have happened under baseline business as usual conditions without the GHG value of the allowance.

- The VREA pool should be large enough and have sufficient flexibility to stimulate "additional" renewable energy projects – this may need to be more than the 0.5% proposed allotment.

CAPCOA supports reporting and verification procedures for biomass wastes that are workable within the existing practices of the biomass industry and doesnot support procedures that are a burden to, and discourage, the use of biomass wastes for renewable energy production.

Additionally, CAPCOA requests the careful consideration and processing for adoption by CARB of GHG offset protocols that have been fully vetted and developed by California Air Districts.

In closing, CAPCOA appreciates the opportunity to comment on the proposed 15-day changes to the Cap and Trade and Mandatory Reporting rules. We also appreciate the changes made to the Conflict of Interest provisions regarding air districts. We ask the Board to press for the Board Member facilitated dialogue to begin expeditiously, and that language be included in the rules to accommodate any agreements that arise from that process.

If you have any questions about these comments, please feel free to contact me.

Sincerely,

Tom Christofk
President

Cc: ARB Board Members