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December 8, 2010

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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 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.

CAPCOA members support the state's climate change efforts and have been committed to assisting with development and implementation of AB32 programs. California Air Resources Board (CARB) staff met with the CAPCOA Board of Directors last week and we are pleased to report that one implementation area of long-standing disagreement appears to now be resolved. Air districts who have completed the CARB verifier certification process will now be allowed to serve as verifiers.

CAPCOA appreciates the decision made by staff to resolve our differences over perceived air district conflict of interest in verifying reported GHG emissions in the Mandatory Reporting regulation. Regretfully, we find ourselves in a position where we must submit comments and suggested rule changes on the proposed Cap and Trade regulation because CAPCOA recommendations related to air district participation have not been incorporated into this regulation. These are the same issues that have been under discussion for years in the context of Mandatory Reporting.

The following comments are organized by the need for partnerships, key actions not completed by CARB staff, and specific CAPCOA recommendations.

Partnerships

CAPCOA believes that the proposed Cap and Trade regulation regards local air districts as if they were profit-driven businesses, not regulatory partners. We are concerned that there are many restrictions written into the draft regulation that: (a) disqualify local air district participation as verifiers for offsets, and (b) place limitations on the functions that local air districts can provide for the program's benefit. This will lead to inefficiencies in resource allocations, duplication, added cost, and delays to implementation.

The main obstacle apparently continues to be a perceived conflict of interest, with which CAPCOA fundamentally does not agree. As we explained in relation to Mandatory Reporting, pursuant to state law, local air district staff must report any potential conflicts of interest, and are faced with criminal penalties and prosecution for failure to comply. In addition, internal conflict of interest policies are in place and enforced to ensure that staff acts appropriately.

Relative to concerns that CARB staff have raised about local air districts performing multiple functions in the cap and trade program, CAPCOA would respectfully point out that having multiple roles is what local air districts have done successfully for decades. Districts collect and audit emission reports for criteria and toxic air pollutants, develop emission factors and conduct source tests, permit and inspect facilities, charge fees, issue emission reduction credits, and in the South Coast, implement a cap and trade program for large industrial facilities. This is all done without conflict of interest.

Local air districts are allied regulatory agencies with public health as our primary motivation. Local districts are not for profit, and approach all duties with the motivation to serve the public interest – not simply to make money or ensure repeat business.

The resource implications of this program are quite substantial for CARB. Local air districts have resources and expertise that can help ensure successful implementation of cap and trade and other stationary source programs under AB32.

By way of example, CAPCOA would like to point out that the State of California entrusts local air districts with billions of dollars to implement various incentive programs. Districts implement these with great public integrity, yet CARB is representing that districts can't be trusted with broad areas of AB 32 implementation. In 2011, the thirteenth year of the Carl Moyer program, districts will award \$59 million in funding to clean up diesel engines. The year 2011 will also be the second year of the four-year, \$1 billion Prop 1B program. Local air districts are among the agencies receiving large allocations of this funding to implement projects under this program. An additional \$200 million Prop 1B funding is being used by local air districts to implement school bus replacements in 2010 - 2011. Many local air district boards have authorized the collection of motor vehicle registration fees as authorized by AB 923. Local air districts allocate tens of millions of dollars worth of emission reduction projects with this funding. CAPCOA fully appreciates the sensitivity and magnitude of the financial ramifications of GHG emissions trading. We believe air districts have demonstrated the fiduciary expertise and responsibility needed to support successful implementation of this program.

Key Actions Not Completed

Over the past four years, CAPCOA has attempted to work with CARB on several joint projects, some at the direction of the CARB Governing Board. In spite of considerable time and effort, and in some cases substantial expenditure of district resources, key commitments have not been upheld by CARB. A summary of some of these is included below.

Joint Workplan

At the December 8, 2008 CARB Board meeting, as part of the adopting resolution for the Scoping Plan, the CARB Board directed staff as follows: **“BE IT FURTHER RESOLVED that the Board directs the Executive Officer to develop a joint workplan with the local air districts to define how to efficiently and effectively implement and administer the Scoping Plan”**

The joint workplan called for in the Resolution above has never been completed. A tremendous amount of effort and process occurred, including many meetings and conference calls. A joint workplan was prepared that detailed a robust working partnership that was to be developed. The workplan was substantially complete within a few months of the Board’s direction, but went into ‘management review’ and was never finalized. A collaborative partnership occurred for the refrigerant management regulation development, but was sorely lacking in most other areas.

CAPCOA has sought to have an active role in the development and implementation of AB 32 related regulations. CAPCOA has sent more than a dozen comment letters over the last three years to Mary Nichols, James Goldstene, and the former CARB Board Chair and Executive Officer, as well as CalEPA and CARB executive staff regarding early action measures, the draft Scoping Plan, recommendations for a cap and trade program, and mandatory reporting and verification. Attachment B shows a list of these letters.

Reporting software

The Regulation for the Mandatory Reporting of Greenhouse Gas Emissions includes a provision that allows a local air district to develop a consolidated reporting tool that facilities in their jurisdiction could use to report greenhouse gas emissions to CARB using an approved local air district program. Such a tool would avoid duplication for reporting and reduce inconsistencies that are bound to occur if the same information is reported to two agencies.

§ 95104. Emissions Data Report Contents and Mechanism

(e) Reporting *Mechanism*. Reporting entities shall submit emissions data reports, and any revisions to the reports, through the California Air Resources Board’s (ARB) Greenhouse Gas Reporting Tool, or any other reporting tool approved by the Executive Officer that will guarantee transmittal and receipt of data required by ARB’s Mandatory Reporting Regulation and Cost of Implementation Fee Regulation.

For over three years, local air districts have worked to ensure that this could occur, including developing software systems to improve reporting efficiencies. Some air districts spent significant staff hours and funds to develop a reporting tool, which was never accepted by CARB. There has been resistance from CARB staff to allow local air districts to pay the contractor that developed CARB's reporting tool to review the local district reporting system and identify any necessary improvements to make it complete in fulfilling the state greenhouse gas reporting requirements. Additional work would be needed to update the local air district programs to reflect the most recent proposed amendments, but this should be encouraged for districts that wish to pursue such a consolidated reporting option.

Interagency Task Force

A CARB/CAPCOA cap and trade work group was formed in March 2009 to help share experiences with developing and implementing the RECLAIM program and to work with CARB staff in developing the state program. An initial meeting was held in April 2009 and the plan was to have monthly meetings. No subsequent meetings were scheduled.

CAPCOA Requests

There are three elements to CAPCOA's request: (1) specific rule language to enable more active participation from air districts; (2) a more defined process and tangible commitments related to protocol development; and (3) follow-up reports to the Board relative to air district participation.

(1) Suggested Rule Language and Rationale

There are two specific areas where CAPCOA would like to have rule language amended to clarify requirements for local air districts regarding what activities could present a conflict of interest for offset verification; and adding language to enable local air districts to be able to provide multiple functions under the program. Proposed rule language and rationale follows:

First Area with Suggested Amended Language:

§ 95979(g). Specific Requirements for Air Quality Management Districts and Air Pollution Control Districts.
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- (1) If an air district has provided or is providing any services listed in section 95979 (b)(2) as part of its regulatory duties, those services do not constitute non-verification services or a potential for high conflict of interest for purposes of this subarticle;**
- (2) Before providing offset verification services, an air district must submit a self-evaluation pursuant to 95979 (e) to the Offset Project Operator or Authorized Project Designee and CARB or the Offset Project Registry for each offset project for which it will perform offset verification services. The**

self-evaluation must contain the information specified in section 95979 (e) for all entities for which it intends to provide offset verification services;

- (3) As part of its conflict of interest self-evaluation submittal under section 95979 (e), the air district shall certify that it will prevent conflicts of interest and resolve potential conflict of interest situations pursuant to its policies and mechanisms submitted under section 95132 (b)(1)(G);**
- (4) If an air district hires a subcontractor to provide offset verification services, the air district shall be subject to all of the requirements of section 95979.**

Rationale for above request:

Local air districts have substantial expertise related to the operations and emissions of stationary sources and can provide technically sound emission and offset verification services. This has been recognized by the CARB in the suggested changes to the Mandatory Reporting Rule. Local air districts do not have a profit motivation, can be an effective regulatory partner with CARB and also can reduce otherwise needed CARB implementation resources.

Second Area with Suggested Amended Language:

Section 95989. California Air Pollution Control Districts or Air Quality Management Districts

California air pollution control districts or air quality management districts shall be approved for multiple roles, which include verification of offset projects or emissions data for mandatory reporting, holding compliance instruments, implementing offset projects that are verified by a third party and approved by CARB, and running a Registry; provided the appropriate training, accreditation or approvals are obtained from CARB pursuant to sections 95132, 95978, 95814 and 95986. Decisions on such approval requests shall be provided in a timely fashion.

Rationale for above request:

Local air districts have the expertise for protocol development and can help ensure high quality offset projects. CAPCOA members are willing to have any offsets developed by local air districts following CARB-approved protocols verified by a 3rd party. This is important to local air districts because they want local co-benefits from offset projects, and to keep investments and jobs local.

Local air districts do not have potential conflict of interest issues that private firms may have for implementing projects, verifying reductions or running a Registry. We are not the same as for-profit businesses – our motivation is to do what is right for our local communities and citizens.

Having local air districts perform these and other functions will help keep costs down and can reduce otherwise needed CARB implementation resources.

(2) Protocols

CAPCOA can help fill the need for technically strong offset protocols. In the past, several local air district proposals developed for voluntary purposes did not get adequate review and attention from CARB staff.

In May 2008, several CAPCOA Board members met with CARB and CCAR to discuss developing many protocols for potential use for voluntary early action. Local air districts were encouraged to develop protocols for CARB review. The South Coast Air Quality Management District (SCAQMD) developed four protocols and Placer County APCD developed one protocol. SCAQMD protocols were sent to CARB in mid May 2009, and a commitment was made to provide comments by the end of June. CARB review was provided on September 23, 2009 with only cursory verbal comments given on three of the four protocols.

SCAQMD did get quick response for technical review of a boiler and process heater protocol, but were told that CARB staff did not see value for it to be a voluntary protocol, due to the relatively short number of years reductions would be additional.

Placer County APCD had a similar experience with their Biomass for Energy GHG Offset Protocol, which they developed in May 2009. Starting September, 2009 and continuing through March 2010, a total of 11 support letters were submitted, including endorsement by the United States Department of Agriculture, Forest Service and the State Board of Forestry and Fire Protection. These letters were sent to the CARB Board Chairman urging support for quick review and approval by CARB, but no action has occurred.

CARB staff recently stated that they would not have time to review protocols developed by air districts. CAPCOA recommends that a process be established to bring local air districts, CARB, and other parties together to develop a list of protocols that would be worthwhile to explore developing. If local air districts step up to produce a protocol, they need assurance that timely review and quick approval will be provided once the protocols are technically sound. CAPCOA requests a tangible commitment to air districts.

(3) Follow up

To help ensure more productive collaboration in the future, CAPCOA suggests a report to the CARB Board in three months regarding how local air districts are being utilized in various aspects of the program, such as emission verification. We also respectfully suggest that the Board consider whether an advisory group with participation by a Board member, would enhance the collaborative process. It has been our experience that the Incentives Programs Advisory Group has been very effective, both in developing the partnership between CARB and the districts, and in making real improvements to the incentive programs.

Attachment

The Attachment includes some technical corrections that CARB staff may wish to address in the 15-day change process.

Summary

CAPCOA supports the Proposed California Cap on Greenhouse Gas Emissions and Market-Based Compliance Mechanisms, but is concerned that impediments in the proposed regulations would limit use of the expertise and resources of local air districts for implementing several aspects of this regulation. The rule language proposed by CAPCOA would enable many local air districts to be full partners with CARB in this groundbreaking effort to reduce greenhouse gases. This will make the state's program more effective, and be beneficial for Californians. We urge you to add the proposed language and implement the other requested changes. Please feel free to contact me at (530) 745-2330 if you have any questions or if CAPCOA can be of service.

Sincerely,

A handwritten signature in black ink that reads "Thomas J. Christofk". The signature is written in a cursive, flowing style.

Thomas Christofk
President

Atchs.

cc: CARB Board Members

Attachment A - Additional Comments on the Proposed Regulation

Improving Enforceability

Sec. 95840: Compliance Periods.

- The regulation is silent on what happens after 2020. There must be a mechanism to address violations for facilities that do not surrender enough compliance instruments to cover their emissions in the third compliance period.

Sec. 95856: Timely Surrender of Compliance Instruments by a Covered Entity

- Compliance instruments must be surrendered for the annual and triennial compliance obligations. There is apparent no enforcement by CARB until the final year of the three year compliance period. This could give rise to Statute of Limitations problems if timely verification of emissions and issuance of final determinations is not conducted in a timely fashion.

Sec. 95857: Untimely Surrender of Compliance Instruments by a Covered Entity

- Sec. 95857(a)(2) states that the compliance obligation for untimely surrender ("excess emissions") will not apply if the instruments transferred to meet the obligation were rendered invalid because of the reversal of an offset credit. In that case, the entity is given 30 days after the notice of reversal is received to make up the excess emissions. This, in effect, allows a facility to purchase dubious offsets or even those known to be likely found to be invalid, in order to delay or avoid the penalty for untimely surrender of compliance instruments. This provision also compromises the point at which the penalty provisions, which state that each day after a required instrument is not timely submitted is a separate day of violation, are triggered. Is it when the instrument was originally due? When it is determined to be invalid? When any rights to appeal that determination are exhausted?

Similarly, Sec. 95857(c)(1) states that the obligation to surrender allowances for excess emissions is "immediately due." But, there is no mention of the triggering date. Is it the date the report for that compliance period is submitted? Is it as of the date that an audit is complete? Is it the date that CARB issues its final determination? For penalty purposes, this date is critical.

Sec. 95857(c)(5) gives CARB's Executive Officer the power to identify holding accounts controlled by "affiliates" of the deficient covered entity to which the covered entity has transferred compliance instruments and prevent transfers from the holding accounts and retrieve allowances from them to address the deficient surrender by the covered entity. However, "affiliate" is not defined.

Subarticle 9: Direct Allocations of California GHG Allowances

- The regulations are silent on whether the allocation is appealable.

Sec. 95892: Allocation to Electrical Distribution Utilities for Protection of Electricity Ratepayers

- Sec. 95892(d)(3) limits the use of auction proceeds obtained by an electrical distribution utility to those purposes that benefit retail ratepayers. This is vague and unenforceable - what is an example of a use of auction proceeds that could not be characterized as ultimately "for the benefit of retail ratepayers." Also, what are the consequences if auction proceeds are used inappropriately?

Sec. 95920: Trading

- This rule sets forth a multitude of violations that are established if trading is manipulated, fraudulent or based on misinformation or attempts to fix price. However, the consequences for such behavior are unclear. Does a fraudulent trade result in a one-day violation of the Health and Safety Code? Without a clear definition of the number of days of violation or counts associated with these acts, there will be grossly inadequate penalties associated with violations that could result in huge profits.

Sec. 95983: Offset Reversal

- It is unclear what happens if offsets are subsequently discredited. The project is terminated and Sec. 95983 provides for "offset reversals." But, if compliance depends on the purchase of the subject offsets, it is not clear if or how the affected facility will be held accountable, especially in the case of "unintentional reversals" which can happen without adequate notice.

Technical Corrections

Sec. 95802: Definitions

- The definition of greenhouse gases within Section 95802 does not include fluorinated compounds listed within 40 CFR Part 82, subpart A. This definition is inconsistent with the compounds listed within the ODS protocol in this regulation; all of which are listed within 40 CFR Part 82, subpart A.

Sec. 95852: Emission Categories used to calculate compliance obligations

- (h) The compliance obligation is calculated based on the **sum** of (i) emissions of CO₂, CH₄, and N₂O resulted from combustion of fossil fuel... It is not based on the sum of the individual gas, should read "based on the CO₂e emissions determined from (i) emissions..."

Sec. 95922: Banking, Expiration, and Voluntary Retirement

- Under paragraph (b) a reference is made to section 95930 which does not exist.

Socioeconomic Appendix to Staff Report

- There is an apparent inconsistency:

The supply of offsets is given to be " $Q = (P-8)/0.75$ " where P is the allowance price (page N-8 of Appendix E). In a prior document, the offset supply is given to be " $Q = (P-8)/0.15$ " (Updated Economic Analysis of Scoping Plan March 24, 2010). Based on the offset supply numbers presented in CARB's latest analysis, it is not clear which of the two offset supply formulas is the correct one.

Attachment B - CAPCOA Comment Letters Regarding AB32

DATE	TO	TOPIC
August 24, 2010	Ms. Mary Nichols	Approval of Air District Verification Body and Verifiers
September 23, 2009	Ms. Mary Nichols	CAPCOA Comments on Proposed AB 32 Cost of Implementation Fee Regulation and Proposed Amendment to the Regulation for the Mandatory Reporting of Greenhouse Gas Emissions
May 4, 2009	Mr. Robert Fletcher	Air District Implementation and Enforcement of Landfill Methane Regulation
November 18, 2008	Ms. Mary Nichols, Chairman	CAPCOA Proposal for Joint CARB/Air District Implementation of Stationary Source Measures in the Climate Change Proposed Scoping Plan with Comments on Specific Measures
November 14, 2008	Mr. James Goldstene	CEQA for GHGs
August 15, 2008	Mr. James Goldstene	Comments on Draft Scoping Plan
September 25, 2007	Mr. Tom Cackette, Acting Executive Officer	Comments on Mandatory Reporting of Greenhouse Gases
September 5, 2007	Ms. Lynn Terry	Comments on Mandatory Reporting of Greenhouse Gases
July 13, 2007	Ms. Mary Nichols	CAPCOA Comments on the June 30, 2007 Market Advisory Committee Report: Recommendations for Designing a Greenhouse Gas Cap-an-Trade System for California
June 20, 2007	Mr. Richard Bode	GHG Inventory and Reporting
June 20, 2007	Dr. Robert Sawyer, Chairman	Proposed Early Action Measures to Reduce Greenhouse Gases
June 15, 2007	Ms. Eileen Wenger Tutt	CAPCOA Comments on the Market Advisory Committee Report: Recommendations for Designing a Greenhouse Gas Cap-and-Trade System for California
May 14, 2007	Ms. Catherine Witherspoon, Executive Officer	Proposed Early Action Measures Under AB 32