Walter McGuire
CHAIRMAN
Jose Mejia
VICE-CHAIRMAN
Gerald D. Secundy
PRESIDENT
William J. Quinn
CHIEF OPERATING OFFICER
Steve Gross
TREASURER
Randy Fischback
SECRETARY

BOARD OF DIRECTORS
Linda Adams
Bob Antonoplis
William T. Bagley
Robert Balgenorth
Michael Barr
Jack Bean
Mike Beasley
Ed Bedwell
Joseph C. Bellas
Russ Burns
Steve Burns
Ken Casarez
John Chillemi
Michele Corash
Tim Cremins
Hal Dash
Bill Devine
Cesar Diaz
Greg Feere
Randy Fischback
Steve Gross
Michael Hertel
Fred John
James (J.P.) Jones
Kenneth L. Khachigian
John T. Knox
Kristen Korbus
Kirk Marckwald
Walter McGuire
Sunne McPeak
Jose Mejia
Cindy Montanez
Richard Morrison
Cressey Nakagawa
Joe Nuñez
George Piantka
Art Pulaski
Mike Roos
Lanny Schmid
Gerald D. Secundy
Dan Skopec
Don Solem
Katherine Strehl
Steve Toth
Minnie Tsunezumi
Victor Weisser

CONSULTANTS
Kendra Daijogo
THE GUALCO GROUP, INC.

Jackson R. Gualco
THE GUALCO GROUP, INC.

Robert W. Lucas
LUCAS ADVOCATES

Gov. Edmund G. "Pat" Brown
FOUNDING CHAIRMAN 1973

www.cceeb.org

California Council for Environmental and Economic Balance

100 Spear Street, Suite 805, San Francisco, CA 94105 • (415) 512-7890 • FAX (415) 512-7897

September 19, 2012

Via Electronic Mail

Chairman Mary Nichols and Members of the Air Resources Board
Air Resource Board
1001 I Street
Sacramento, CA 95814

RE: Proposed Revisions to Mandatory Reporting Regulation/Penalty and Enforcement Guidance

The California Council for Environmental and Economic Balance (CCEEB) is a non-partisan, non-profit coalition of business, labor and public leaders that works to advance policies that protect public health and the environment while expanding economic opportunities for all Californians.

Over the past two years CCEEB has commented and discussed with California Air Resources Board (ARB) our concerns with various vague and potentially burdensome provisions of the Mandatory Reporting Regulation (MRR) that could lead to severe penalties and unintended consequences as ARB implements and facilities comply with the MRR and the Cap-and-Trade Rules. As ARB staff says the MRR and Cap-and-Trade regulations are in essence one 500-page rule in two separate covers. Issues with one impacts the other and more importantly misinterpretation or inadvertent errors in one could have severe compliance and economic consequences on facilities – such as a facility being subject to potential denial or access to free allowances. Our October 18, 2011 letter indeed appealed to ARB for further discussion of these MRR and Cap-and Trade compliance and enforcement issues.

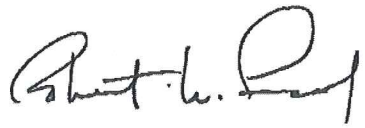
We would like to acknowledge ARB's willingness to continue discussions on these issues. On June 18, 2012, CCEEB met with ARB managers, technical and legal staff to discuss these issues of concern. At that meeting, CCEEB raised issues with meter calibration failures, missing data, use of missing data, and corrections to an MRR report that could lead to severe penalties. At the crux of the issue was CCEEB's view that in order to prevent fraud, the MRR/Cap-and-Trade regulation gives the Executive Officer broad authority to impose very severe penalties for seemingly minor or inadvertent errors. ARB countered that many of CCEEB's concerns had been specifically addressed in the Final Statement of Reasons for the Cap and Trade Regulation.

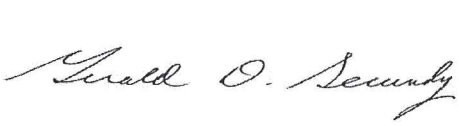
CCEEB acknowledges that indeed ARB did makes clarifying statements in the FSOR that could address CCEEB's concerns. However, the FSOR is 2400 pages long and the statements designed to address CCEEB's concerns are in numerous pages throughout the FSOR. Attachment A is CCEEB's list of potential ARB interpretation's that could provide more certainty to facilities as to how ARB will deal with violations.

However, CCEEB would encourage ARB to take the FSOR statements and blend them into guidance for use by facilities, verifiers and ARB enforcement staff in the future. Such guidance has been developed by ARB for other MRR rules subject to potential varying interpretations (for example see the metering accuracy guidance - http://www.arb.ca.gov/cc/reporting/ghg-rep/guidance/ghg_meteringaccuracy.pdf).

Thank you for considering this request for guidance. If there are any questions, please call Robert Lucas at 916/444-7337.

Sincerely,





Robert W. Lucas
Climate Change Project Manager

Gerald D. Secundy
President

cc: Matthew Rodriquez, Secretary for California Environmental Protection Agency
James Goldstene, Executive Officer, California Air Resources Board
Jackson Gualco, The Gualco Group, Inc.

Attachment A
FSOR Responses related to Violations and Enforcement - not all

Page 372
No provisions for due process were added to the regulation because ARB's process for investigating violations includes discussions with the entity where needed.

Page 693
The regulation is written to provide the Executive Officer flexibility in how to respond to an issue that results in a violation of the regulatory requirements.

Page 693
Section 96011 gives the Executive Officer authority and discretion to determine whether to invoke the remedies set forth in that section. Implicit in that authority is the ability to lift a suspension, revocation, or restriction. At this time, in the absence of particular facts and circumstances, it would not be appropriate to prescribe detailed procedures or a particular duration for those remedies.

Page 694
Health and Safety Code section 38580 commands that ARB enforce AB 32 regulations. Under the Health and Safety Code, ARB can seek penalties, but only an administrative law judge or court can impose penalties. ARB's authority does not extend to determining final penalty amounts. In many of its enforcement actions, ARB and the entity from whom ARB is seeking penalties will reach a mutual settlement agreement, including an agreed upon penalty amount. ARB may seek penalties in a judicial action, in which the ultimate penalty amount is determined by a neutral judge, based on the statutory penalty structure. In no instance is ARB able to unilaterally assign a penalty amount on a violator. Nevertheless, we modified section 96013 to include a reference to Health and Safety Code section 42403(b); in seeking a penalty, ARB will consider all relevant circumstances. Section 42403 is the appropriate reference because it relates to penalty determinations in civil actions, the kind of enforcement action that ARB can initiate.

Page 695
ARB agrees that penalties should be high enough to deter violations, but does not believe it is possible to determine what penalty will be "just high enough to induce compliance," particularly before knowing the actual circumstances of a particular violation. We modified section 96013 to include a reference to Health and Safety Code section 42403(b), to consider all relevant circumstances related to assessing a penalty. Section 42403 is appropriate because it relates to penalty determinations in civil actions, which is what an ARB enforcement action would be considered. Additionally, section 96014 has been modified to calculate penalties on late surrendered compliance instruments every 45 days instead of per day. We examined the possible penalties and found that the "per ton per day" approach could theoretically result in penalties that were too high.
Provide Flexibility Before

Page 697
In seeking any penalty, ARB would consider compliance efforts and compliance challenges that any alleged violator faced among the circumstances required to be considered under section 96013 of the rule and Health and Safety Code section 42403(b).

Page 698
Moreover, Health and Safety Code section 38580(b)(3) authorizes ARB to define penalties on a per-unit basis, proportional to the conduct, rather than defining violations purely in terms of days.

Pages 708 and 709
We worked extensively with stakeholders to ensure that penalties are not "layered" between the MRR and the cap-and-trade regulation. A covered entity reports its emissions under the MRR. Those emissions are then verified, and the covered entity receives either a positive, qualified positive, or adverse emissions verification statement. In the event of either a positive or qualified positive

verification statement, ARB accepts the emissions reported. The entity's compliance obligation is equal to one allowance for each ton emitted. If a covered entity receives an adverse verification statement, ARB uses default emission factors and calculates the covered entity's compliance obligation.

To the extent that a covered entity misreports emissions under the MRR, then amends the report (or get assigned an emissions number under the MRR) in time to surrender obligations under the cap-and-trade regulation, that entity faces penalties under only one rule: the MRR. If the error is discovered after the entity has already surrendered its original compliance obligation under the cap-and-trade regulation, section 95858 (added in response to stakeholder comments) gives the entity an additional six months to make up any additional surrender obligations related to the error. In this second situation, (assuming that the instruments are surrendered during the six-month period) the entity faces potential penalties under only one rule: the MRR. Independent of MRR compliance, once a surrender obligation has been established, an entity that fails to surrender compliance obligations under the cap-and-trade regulation faces potential penalties under only one rule for that failure: the cap-and-trade regulation.
To address the concern that per-ton per day violations may result in penalties that are too burdensome, we changed the basis for determining the number of violations. We modified section 96014 so that violations would be calculated on a per-ton basis after every 45-day period in which the covered entity fails to meet its surrender obligations. While we did not adopt the suggestion that the 30-day provision in section 95857(c)(4) be the "compliance date," we did add section 95857(b)(6) to give the covered entity time to access one auction or reserve sale before the untimely surrender is due. We believe that the process now provides adequate time for covered entities to meet their obligations. See also the responses to Comments J-15, J-20, J-23, and J-25.

Page 710
We disagree with the comment that the provisions in the cap-and-trade regulation on violations and penalties overlap. Each provision is designed to deal with a separate issue in setting penalties.

Page 713
Instead of a formal variance process, the MRR includes a process by which a facility may petition for an interim data collection method under certain circumstances that would result in loss of data due to unforeseen reasons. The MRR also contains a dispute-resolution process for when a reporting entity and its verifier do not agree on the quality of the emissions data report. We believe that these two design features will ensure an efficient market process where timely data are critical to the functioning of a well-developed market program and that they will address the commenter's concerns. Finally, we will be contracting for the services of an independent market monitor to help identify any issues in the implementation of the market program and to ensure market integrity.

Page 916
To ensure the enforceability of compliance offsets, we need to have the ability to investigate and take action for violations or noncompliance with the proposed regulation.

Page 1315 and 1316
Section 95914 sets forth actions the Executive Officer may take in
response to violations. We have a process for addressing violations. The process can include discussions with the alleged violator. We did not make the change suggested because we have demonstrated through years of enforcement how our procedure operates.

Page 1316
Section 95914 sets forth actions that the Executive Officer may take in response to violations. We have a process for addressing violations. The process can include discussions with the alleged violator. We did not make the change suggested because we have demonstrated through years of enforcement how our procedure operates. In addition, the requirement to prove intent is rarely achievable. Imposing it would limit our ability to deal with many legitimate violations.

Page 1391
We evaluated the language in this Regulation and the MRR and do not believe there is a new "layering" of penalties between the two regulations.

Page 1402
We wish to provide entities more flexibility for addressing underreporting shortfalls, especially when they are ensuring the environmental integrity of the program after the compliance period has ended.