

California Environmental Protection Agency

---



**Revised Final Statement of Reasons for Rulemaking,  
Including Summary of Public Comments and Agency Responses**

THE ADOPTION OF PROPOSED AMENDMENTS TO THE  
COST OF IMPLEMENTATION FEE REGULATION

Public Hearing Date: September 18, 2014  
Agenda Item No.: 14-7-7



## TABLE OF CONTENTS

<b>I.</b>	<b>GENERAL</b> .....	<b>4</b>
<b>II.</b>	<b>MODIFICATIONS MADE TO THE ORIGINAL PROPOSAL</b> .....	<b>6</b>
A.	Section 95201. Applicability.....	6
B.	Section 95202. Definitions.....	6
C.	Section 95203. Calculation of Fees.....	6
D.	Section 95204. Reporting and Recordkeeping Requirements.....	6
<b>III.</b>	<b>DOCUMENT INCORPORATED BY REFERENCE</b> .....	<b>7</b>
<b>IV.</b>	<b>SUMMARY OF COMMENTS MADE DURING THE PUBLIC COMMENT PERIODS AND AGENCY RESPONSES</b> .....	<b>8</b>
<b>V.</b>	<b>PEER REVIEW</b> .....	<b>17</b>

State of California  
AIR RESOURCES BOARD

**Revised Final Statement of Reasons for Rulemaking,  
Including Summary of Public Comments and Agency Responses**

PUBLIC HEARING TO CONSIDER ADOPTION OF PROPOSED AMENDMENTS  
TO THE COST OF IMPLEMENTATION FEE REGULATION

Public Hearing Date: September 18, 2014  
Agenda Item No.: 14-7-7

**I. GENERAL**

The Staff Report: Initial Statement of Reasons for Rulemaking (Staff Report), entitled "Proposed Amendments to the AB 32 Cost of Implementation Fee Regulation," released July 29, 2014, is incorporated by reference herein. The staff report contained a description of the rationale for the proposed amendments. The originally proposed text of the amended regulation was included as Appendix A to the Staff Report. These documents were also posted on ARB's internet site for this rulemaking at <http://www.arb.ca.gov/regact/2014/feereg2014/feereg2014.htm>.

On September 18, 2014, the Air Resources Board (ARB or the Board) conducted a public hearing to consider staff's proposal for adoption. At the conclusion of the hearing, the Board adopted Resolution 14-33, which initiated steps toward final adoption of the proposed amendments. The approved action included modifications to the originally proposed language. These modifications had been suggested by staff in response to public comments made after issuance of the original proposal. Proposed modified regulatory language, or narrative description of each modification, was contained in a four page document entitled, "Modified Regulatory Text for 15-Day Public Comment for the AB 32 Cost of Implementation Fee Regulation," which was distributed at the beginning of the hearing and included as Attachment A to the Resolution.

Resolution 14-33 directed the Executive Officer to adopt the amended regulation after making the modified regulatory language available for public comment for a period of at least 15 days, in accordance with Government Code section 11346.8(c), and to make such additional modifications as may be appropriate in light of the comments received.<sup>1</sup>

A "Notice of Public Availability of Modified Text" together with a copy of the full text of the regulation modifications, with the modifications clearly indicated, were distributed on October 2, 2014, to each of the individuals described in subsections (a)(1) through (a)(4) of section 44, title 1, CCR. By

---

<sup>1</sup> California Air Resources Board. Board Resolution 14-33. Posted October 2, 2014. Available online at: <http://www.arb.ca.gov/regact/2014/feereg2014/feereg2014.htm>

this action, the modified AB 32 Cost of Implementation Fee Regulation was made available to the public for a 15-day comment period from October 2, 2014, to October 17, 2014, pursuant to Government Code section 11346.8. The Executive Officer then determined that no additional changes should be made to the regulations, and subsequently issued an Executive Order, by which the modifications to the AB 32 Cost of Implementation Fee Regulation were adopted.

The Final Statement of Reasons (FSOR) updates the Staff Report by identifying and providing the rationale for the modifications made to the originally proposed amendments. The FSOR also contains a summary of the comments received on the proposed amendments during the formal regulatory process and ARB's responses to those comments. The comments are available on ARB's internet site at <http://www.arb.ca.gov/lispub/comm/bccommlog.php?listname=feereg2014>. Modifications to the original proposal are described in Section II of this FSOR entitled "Modifications Made to the Original Proposal."

On November 14, 2014, ARB submitted the FSOR for the "Adoption of the 2014 Amendments to the AB 32 Cost of Implementation Fee Regulation" to the Office of Administrative Law (OAL) for its review and approval. In the course of its review, OAL requested additional information and clarification of some of the language in the FSOR. This Revised FSOR provides additional information and clarifications.

In this rulemaking, the Board adopted amendments to the AB 32 Cost of Implementation Fee Regulation (Fee Regulation) that provide clarity, and consistency with the Mandatory Reporting of Greenhouse Gas Emissions Regulation (Mandatory Reporting Regulation or MRR) and the Regulation for the California Cap on Greenhouse Gas Emissions and Market-Based Compliance Mechanisms (Cap-and-Trade Regulation). The Fee Regulation is primarily designed to assess a fee to be paid by sources of greenhouse gas (GHG) emissions in order to fund the State's AB 32 implementation costs. The regulation is codified in sections 95200-95207, title 17, California Code of Regulations (CCR).

#### **A. MANDATES AND FISCAL IMPACTS TO LOCAL GOVERNMENTS AND SCHOOL DISTRICTS**

The Board has determined that this regulatory action will not result in a mandate to any local agency or school district such that the costs of which would be reimbursable by the state pursuant to Part 7 (commencing with section 17500), Division 4, Title 2 of the Government Code.

#### **B. CONSIDERATION OF ALTERNATIVES**

Staff is required to consider alternatives to the proposed amendments. For the reasons set forth in the Staff Report, in staff's comments and responses at the hearing, and in this FSOR, the Board determined that no alternative

considered by the agency would be more effective in carrying out the purpose for which the regulatory action was proposed, or be as effective and less burdensome to affected private persons and businesses, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provisions of law than the action taken by the Board.

## **II. MODIFICATIONS MADE TO THE ORIGINAL PROPOSAL**

Various modifications to the original proposal were made in order to address comments received during the 45-day public comment period, and to clarify the regulatory language. Pursuant to the Board direction provided in Resolution 14-33, ARB released a Notice of Public Availability of Modified Text and Availability of Additional Documents and Information (15-Day Notice) on October 2, 2014, which placed documents into the regulatory record and presented the additional modifications to the regulatory text.<sup>2</sup> These modifications are described below.

### **A. Section 95201. Applicability.**

1. In Section 95201(c), clarifications were made to the descriptions of the excluded biodiesel and renewable diesel fuels consistent with the Mandatory Reporting Regulation. These clarifications were necessary to align the Fee Regulation with modifications to these terms in the Mandatory Reporting Regulation.
2. In Section 95201(d), a sentence was added clarifying the effective date of the proposed amendments. This modification was made in response to a comment received during the rulemaking formal comment period.

### **B. Section 95202. Definitions.**

1. In Section 95202(a)(111), the term catalyst coke has been removed from the definition of petroleum coke, as the term is not necessary. This modification was made in response to a comment received during the rulemaking formal comment period.

### **C. Section 95203. Calculation of Fees.**

1. In Section 95203(b), extraneous letters in the denominator of the equation were omitted as appropriate since these letters did not exist in the codified regulation.
2. In Section 95203(d), the term “arithmetic” has been added to clarify that fuel emission factors will be calculated using an arithmetic average of fuel grades taken from column C of 40 CFR 98 Table MM-1. Additionally, the website for the ARB Greenhouse Gas Inventory was added. These modifications were made in response to a comment received during the rulemaking formal comment period and to provide clarity to the existing

---

<sup>2</sup> California Air Resources Board. Notice of Public Availability of Modified Text and Availability of Additional Documents. Posted October 2, 2014. Available online at: <http://www.arb.ca.gov/regact/2014/feereg2014/feereg2014.htm>.

- provision.
3. In Section 95203(e), corrections were made to the description for the electricity fee rate for electricity imported into California. Additionally, language has been added to refer to the transmission loss correction factor per Section 95111(b) of the Mandatory Reporting Regulation. These modifications were made in response to a comment received during the rulemaking formal comment period and to provide clarity to the existing provision.
  4. In Section 95203(l), an extraneous addition defining the term QE was removed as a definition already existed in this section of the codified regulation.

#### **D. Section 95204. Reporting and Recordkeeping Requirements.**

1. In Section 95204(b), clarifications were made to identify the section of the Mandatory Reporting Regulation that requires certification of reported emissions data. This modification was made in response to a comment received during the rulemaking formal comment period and to provide clarity to the existing provision.
2. In Section 95204(d), extraneous language was deleted as appropriate since this language did not exist in the codified regulation.
3. In Section 95204(i), corrections were made to the records retention provision aligning the Fee Regulation with the Mandatory Reporting Regulation. This modification was made in response to a comment received during the rulemaking formal comment period and to provide clarity to the existing provision.

### **III. DOCUMENT INCORPORATED BY REFERENCE**

The regulation adopted by the Executive Officer incorporates by reference the following document:

- The California Energy Commission's "Renewable Portfolio Standard Eligibility," 7<sup>th</sup> edition, Commission Guidebook, April, 2013; CEC-300-2013-005-ED7-CMF, pages 123-125 per regulatory definition of "Renewable Energy Credit" or "REC."

This document was incorporated by reference because it would be cumbersome, unduly expensive, and otherwise impractical to publish it in the California Code of Regulations. In addition, the document is copyrighted, and cannot be reprinted or distributed without violating the licensing agreements. The document is lengthy and highly technical test methods and engineering documents that would add unnecessary additional volume to the regulation. Distribution to all recipients of the California Code of Regulations is not needed because the interested audience for these documents is limited to the technical staff at a portion of reporting facilities, most of whom are already familiar with these methods and documents. Also, the incorporated document was made available by ARB upon request during the rulemaking action and will continue to be available in the future. The document is also available

from college and public libraries, or may be purchased directly from the publisher.

#### IV. SUMMARY OF COMMENTS MADE DURING THE 45-DAY AND 15-DAY COMMENT PERIODS AND AGENCY RESPONSES

Written comments were received during the 45-day comment period in response to the July 29, 2014, public hearing notice. No oral or written comments were presented at the Board Hearing for the Proposed Amendments to the AB 32 Cost of Implementation Fee Regulation. Comments were also received during the 15-day comment period in response to the October 2, 2014, public notice. Listed below are the organizations and individuals that provided comments during the 45-day comment period and the 15-day comment period:

Commenter	Affiliation
Blixt, Amber (August 8, 2014)	Independent Energy Producers Association (IEP)
Tang, Diana (September 11, 2014)	City of Long Beach (Long Beach)
Plummer, Matthew (September 12, 2014)	Pacific Gas and Electric Company (PGE)
Booth, Ellie (September 15, 2014)	Covanta
Caponi, Frank (September 15, 2014)	Sanitation Districts of Los Angeles County (LACSD)
Reheis-Boyd, Catherine (September 15, 2014)	Western States Petroleum Association (WSPA1)
Bell, Janet (September 15, 2014)	Metropolitan Water District (MWD)
Heller, Miles (October 17, 2014)	Tesoro
Secundy, Gerald (October 17, 2014)	California Council for Environmental and Economic Balance (CCEEB)
Reheis-Boyd, Catherine (October 17, 2014)	Western States Petroleum Association (WSPA2)

- Comment:** IEP’s comments focus the need to amend (or at least re-assess) the current and proposed methodology for inputting emissions associated with so-called “Unspecified Imports.” IEP is concerned that there are no amendments proposed related to the re-calculating of the default emissions factor for unspecified electricity imports. Proposed Section 95203(e)(2) of the Cost of Implementation Fee Regulation actually addresses the default emission factor for unspecified sources; however, this section reverts back to the same emission factor 0.428MTCO<sub>2</sub>e/MWh that is currently being used under the Mandatory Reporting Regulations. [IEP]

**Response:** Staff revised the unspecified source emission factor to support the modification of emissions applicability from CO<sub>2</sub> to CO<sub>2</sub>e. The revised 0.428 MTCO<sub>2</sub>e per MWh is consistent with the MRR emission factor that was developed through a public process that also included coordination with California Energy Commission and California Public Utilities Commission.

For more information please see staff's response to IEP's comments in the Mandatory Reporting Rule Amendments' 2013 Final Statement of Reasons at: <http://www.arb.ca.gov/regact/2013/ghg2013/ghg2013fsor.pdf>

2. **Comment:** LACSD strongly opposes imposing an administrative fee on waste-to-energy facilities at this time for two reasons. First, waste-to-energy facilities are both waste management activities and resources recovery facilities, not electric utilities. Sale of electrical energy simply "pays the bills". In fact, it could be argued that any use of natural gas at these facilities is targeted for pollution control, not electrical generation. This makes these facilities unique and should not be the target of the emission fees. Even in the most recently proposed EPA Clean Power Plan, waste-to-energy is treated as resource recovery with its CO<sub>2</sub> emissions not used in the calculations of a state's emission targets.

A second, and perhaps more important reason is a fee imposed at this time isolates only one aspect of the State's solid waste management system while ignoring all other emissions and reductions/sinks. Waste management in the State of California is a comprehensive system involving recycling, reuse, organics management (e.g., composting and anaerobic digestion), waste-to-energy and landfilling. It is not appropriate to address the emissions from only one aspect of this system (in this case waste-to-energy), but to draw boundaries around the system and conduct a more comprehensive life cycle assessment. Carbon flows in and out of this system, so for example, recycling results in a net greenhouse gas GHG reduction, and landfills, while emitting methane, also serve as long-term carbon storage. By itself, waste-to-energy will emit fossil-based GHGs; however, this system is also subject to leakage. So if for example, a waste-to-energy facility ceases operation, GHG emissions will increase because the displaced waste (leakage) is now going to landfills. Also, carbon flows from other sectors (e.g., energy sector) into products that, following the product's useful life, are recycled into new products, utilized back into energy or become waste carbon. Therefore, given the complexities of carbon flow in the waste management sector, the type of fee collected under the CARB Cost of Implementation Fee regulation does not lend itself at this time to waste management activities, since isolating one small portion of waste management is not equitable. [LACSD]

**Response:** The Fee Regulation is designed to ensure equity in fee responsibilities by invoicing emitters according to their relative contribution to statewide GHG emissions. While waste-to-energy facilities may reduce the volume of material deposited in landfills, these facilities also combust fossil-derived fuels and materials (e.g., plastics) to produce electricity. This electricity production results in GHG emissions. Limiting the exemption to only emissions from the combustion of biogenic municipal solid waste improves equity amongst fee-paying electricity generating facilities that combust fossil fuels and is consistent with the current treatment of other electricity generators.

In response to the commenter's second reason for opposing administrative fees for waste-to-energy facilities, the Fee Regulation is not intended to be an enforcement mechanism, or to specifically encourage reductions in GHG emissions. The Fee Regulation applies to major sources of GHGs and process emissions in the State for the purposes of directly funding the State's AB 32 program costs.

As identified in the First Update to the AB 32 Scoping Plan, ARB and CalRecycle will continue to evaluate opportunities for additional emissions reductions within the waste sector and ensure that State policies on waste and GHG reductions are aligned in order to achieve both waste and GHG reduction goals.

In response to both points one and two, the Fee Regulation is designed to ensure equity in fee responsibilities by invoicing emitters according to their relative contribution to statewide GHG emissions from non-biogenic sources. Since other power generating sources using non-biogenic fuel are covered by the Fee Regulation, we believe it equitable and appropriate for waste-to-energy facilities to be subject to the regulation for GHG emissions associated with the combustion of non-biogenic material.

3. **Comment:** Covanta has concerns with the proposed amendments to the GOI (*sic*) fee that would include the non-biogenic portion of EfW's (energy-from-waste) emissions in the GOI fee. There are only three EfW facilities in the state that this fee would apply and this places an undue burden on these facilities. It is surprising that while the ARB advances policies, like mandatory organics diversion, to reduce the amount of waste going to landfills, that landfills remain exempt from the GOI fee. From a GHG perspective, EfW has been identified as a preferential way to manage waste by the international scientific community and the 2012 CalRecycle study.

ARB staff has indicated that they are trying to create equity within the electric sector with changes to these fees. While EfW facilities generate electricity, this is not their primary purpose. These facilities are regulated by CalRecycle as solid waste facilities and not as generators of electricity. This proposed change would create further inequities in the solid waste sector and make landfilling a more preferential and less expensive option for cities and counties.

Finally, the Fifth Assessment Report of the Intergovernmental Panel on Climate Change (IPCC) has updated the 100 year global warming potential of methane to 34 times as potent as CO<sub>2</sub> when climate-carbon feedbacks are included. The new data shows that the methane emitted by landfills and other sources is even more damaging than previously thought. Recognizing this, Germany, Denmark and the rest of the EU have adopted policies that have moved to phase out landfills and increase recycling and recovery of energy from waste. As a result of the EU waste policies, the largest relative reduction in EU greenhouse gas emissions has been achieved in the waste

sector, with a relative reduction of 34%. This is due largely to the avoidance of the methane that is generated by landfills.

This new data, and the shorter term perspective on methane, further demonstrates the positive characterization of EfW versus landfill from a GHG perspective and provides a sound basis to keep the existing regulations that do not include the three EfW facilities in the GOI fee. [Covanta]

**Response:** The Response to Comment #2 is incorporated herein.

4. **Comment:** The City of Long Beach opposes the proposed COI Fee Regulation amendments, as they apply to waste to energy facilities. As demonstrated in the 2012 report entitled, CalRecycle Review of Waste-to-Energy and Avoided Landfill Methane Emissions, waste-to-energy facilities reduce greenhouse gas emissions, when compared to landfills. Waste-to-energy facilities also have the capacity to reduce municipal solid waste (MSW) volume by 90 percent, and produce base-load energy as a byproduct. In comparison, landfills do not have the capacity to reduce waste volume prior to burying the materials. Waste-to-energy facilities are essential to bridging the gap between traditional landfills and the next generation of MSW processors.

Amending the adopted COI Fee Regulation to capture waste-to-energy facilities dis-incentivizes the use of this technology. Though California has adopted an aggressive Cap and Trade Program to reduce greenhouse gas emissions to 1990 levels by 2020, State regulations still make landfills the economically preferable option. If waste-to-energy facilities are forced to pay additional fees that are not required of landfills, then the price discrepancy between these two MSW processing options will grow even larger. By 2018, it may be economically infeasible to operate the waste-to-energy facility in Long Beach.

Shutting down the waste-to-energy facility in Long Beach will negatively impact the goals of the State's Cap and Trade Program. Inevitably, greenhouse gas emissions will increase as landfilling increases. Waste generated by over 500,000 residents and business in Long Beach, in addition to waste from various cities including Los Angeles, Culver City, Torrance, and Compton will instead go landfills where nearly 100 percent of the waste volume will be buried. Long Beach does not view increased landfilling as a positive result. The City strongly prefers that State regulations treat landfills and waste-to-energy facilities equitably, or at least continue to provide allowances to waste-to-energy facilities consistently throughout the implementation of the Cap and Trade Program so that Long Beach can continue operating our waste-to-energy facility. It is essential for there to be an economically viable environment for this facility to operate in, so that it may continue to be a part of State discussions to help further reduce greenhouse gas emissions in California. [Long Beach]

**Response:** The Response to Comment #2 is incorporated herein.

5. **Comment:** ARB proposes that, in lieu of a separate Cost of Implementation (COI) Fee report, local distribution companies report the annual energy in MMBtu delivered to each of the following end-use categories, as reported in the Energy Information Agency EIA-176 report: residential consumers, commercial consumers, industrial consumers and electricity generating facilities. However, ARB will not be able to use these data to accurately determine the COI fee for PG&E since a) Sacramento Municipal Utilities District deliveries are included in the EIA-176 report and b) PG&E's compressor stations are not included in the EIA-176 report. PG&E requests ARB to modify the proposed language to assure accuracy of the COI fee invoice from LDCs. [PGE]

**Response:** Staff agrees and conforming clarifying modifications were proposed in Section 95122(d)(2)(E) of the MRR.

6. **Comment:** PG&E owns and operates the Humboldt Bay Generating Station (HBGS) that uses ten California diesel and natural gas dual-fuel reciprocating engines with a nominal output of 163 megawatt (MW). HBGS pays a COI fee for every gallon of diesel received and for each megawatt-hour (MWh) of net power generated by the facility. This results in excess COI fees being paid annually by the facility. Although normal operation only results in 1 to 2 percent of the power being generated from diesel fuel, there may be situations when natural gas supply is curtailed and electricity generating units will operate for an extended period on diesel fuel. To ensure that the appropriate fee is being paid, PG&E recommends that ARB include language that allows dual-fuel electricity generating facilities to account for the net power generated by the facility from California diesel fuel. [PGE]

**Response:** This comment is not directed at the proposed amendments. However, section 95201(a)(4) of the AB 32 Cost of Implementation Fee Regulation states: "...Fees shall be paid for each megawatt-hour of net power generated by combustion of natural gas, coal or other fossil fuels (except California diesel) at a grid-dedicated, stand-alone electricity generating facility in California, and reported pursuant to section 95112 of the Mandatory Reporting Regulation..." Pursuant to this section, no fees should be assessed for power generated from California diesel. In the case where an entity believes that fees were improperly calculated, the commenter should contact ARB staff to correct the error in the amount of fees they were assessed.

7. **Comment:** The MRR and COI record retention requirements should be made consistent. Section 95204(i) should just reference MRR (Section 95105) which specifies a 10 year retention requirement, but requires submittal within 20 days following a request, instead of 5, and allows the records to be kept out of state. There is no need for the COI regulation to be different, much less more restrictive in these areas.  
**Recommendation:** Modify this section to read, "Entities subject to this sub-article must maintain copies of the information reported pursuant to the

applicable sections of the Mandatory Reporting Regulation and provide them to an authorized representative of ARB within five business days upon request. Records must be kept at a location within the State of California for five years.” [WSPA1]

**Response:** Comments noted. Section 95105(a) of the MRR states “Reporting entities with a compliance obligation under the cap-and-trade regulation in any year of the current compliance period must maintain all records specified in 40 CFR §98.3(g), and records associated with revisions to emissions data reports as provided under 40 CFR §98.3(h), for a period of ten years from the date of emissions data report certification... Reporting entities that do not have a compliance obligation under the cap-and-trade regulation during any year of the current compliance period must maintain such records for a period of five years from the date of certification.”

We believe that any inconsistencies do not pose significant problems because the two regulations are largely consistent, and because fee-payers are already complying with the more restrictive requirements of the Fee Regulation, and so will not experience any new compliance requirements. Specifically, Section 95204(i) of the Fee Regulation is generally consistent with MRR for reporting entities that do not have a compliance obligation under the Cap-and-Trade regulation, though we acknowledge that the Fee Regulation continues to require in-state record storage and has a tighter record request turn-around time. Any reporting entity with a compliance obligation under the Cap-and-Trade Regulation maintaining records for ten years will comply with the Fee Regulation’s requirement to maintain records for five years, provided they store records within California and respond to record requests within the mandated time.

Nevertheless, staff will consider amending Section 95204(i) of the Fee Regulation to align with MRR Section 95105(a), in a future rulemaking.

8. **Comment:** Any amendments related to implementation (effective date) of new regulations covering data collection, calculation, processing, etc. for all three regulations must be attached to a feasible implementation schedule. For example, regulations adopted in 2014 covering annual data collection and reporting requirements should apply to data collected in 2015 and reported to ARB in 2016. This lead time is necessary to allow the regulated entity to implement any changes to data collection and reporting procedures that may be necessary to comply with the new requirements. In many cases, technology must be acquired and adopted, labor resources must be on-boarded, and training must be performed to adequately and competently implement the requirements of these rules. A minimum 1 year implementation period should follow all adopted rules. Recommendation: For changes in the regulation that affect data collection and reporting for purposes of compliance or record-keeping, such provisions will apply to data collected and reports submitted during the calendar year following the effective date of the regulation. For example, regulatory

changes that take effect January 1, 2015 shall apply to data collected in 2015 and reports submitted in 2016. [WSPA1]

**Response:** Comments noted. Section 9520(d) states that “the fees associated with this subarticle shall be based upon the reported data from the most recent calendar year for which” mandatory reported emissions data verification has been completed. Nevertheless, staff proposed modifications to Section 95201(d) to clarify that regulated entities must comply with the regulation as amended in 2014, with fees calculated in 2015.

9. **Comment:** As a practical matter, a truncated process that involves Board adoption of proposed regulatory changes during the same week the formal 45-day public comment period closes, and then relies on post-hearing changes to address issues identified during the public comment period, will inevitably lead to confusion and failure to resolve important issues. This is certainly not the process envisioned in the California Administrative Procedures Act (APA). While informal, pre-rulemaking dialogue is helpful to identify and resolve some issues in advance of the formal rulemaking process, it should not be used as a substitute for a meaningful formal rulemaking process. Both ARB and the regulated community need to have adequate time to analyze proposed changes, understand their potential impact on facility operations and identify additional changes that may be necessary to mitigate those impacts. For future rulemakings, WSPA urges ARB to adhere to the formal rulemaking process established by the APA and allow sufficient time to address public comments in advance of Board adoption rather than through abbreviated post-hearing changes.

Recommendation: ARB should establish a consistent practice of incorporating technical changes to existing regulations through the formal rulemaking process. This would allow needed improvements to be implemented in a more transparent fashion. [WSPA1]

**Response:** This rulemaking complies with the full requirements of the Administrative Procedures Act. Staff held a public workshop on June 5, 2014, to discuss draft regulatory changes released prior to the workshop. Staff crafted the proposed amendments submitted in the 45-day regulation based on stakeholder feedback as a result of that workshop and extensive stakeholder outreach. In addition, staff has made itself available for one-on-one meetings and teleconferences with affected stakeholders to discuss the requirements reflected in the proposed amendments. Staff also provided draft concept language to stakeholders prior to final publications, and made every effort to address all concerns prior to the release of regulatory documents.

9. **Comment:** Section 95201(c) references B100 and R100 for biodiesel and renewable diesel, respectively. The terms in the MRR have been changed to recognize that these may be B99+ and R99+ in section 95121(d), Table 2. The MRR terms are more accurate and the COI regulation should be further amended to incorporate the MRR terms. [WSPA1]

**Response:** Staff agrees and proposed clarifying modifications to section 95204(b) in the 15-day public comment period.

10. **Comment:** The emission factors in section 95203(d) are proposed to be removed and instead Table MM-1 is referenced for entities reporting pursuant to section 95204(e) – fuel providers. An averaging technique is mentioned, but it is unclear which fuel grades will be included from Table MM-1, how they link to gasoline and diesel, and how these grades will be averaged. This process needs to be explicitly described so that regulated parties understand how ARB will use the data. [WSPA1]

**Response:** Staff agrees and proposed clarifying modifications to section 95203(d) in the 15-day public comment period.

11. **Comment:** Section 95204(b) specifies that all entities subject to this sub-article are required to certify reports pursuant to the requirements of MRR. ARB should be specific as to which sections in MRR are being incorporated by reference. [WSPA1]

**Response:** Staff agrees and proposed clarifying modifications to section 95204(b) in the 15-day public comment period.

12. **Comment:** What is the justification for the significant increase in the emission factor and corresponding fee for catalyst coke? We see no basis for the change since the regulation was first adopted. [WSPA1]

**Response:** We assume that the commenter is referring to the amendment to correct the petroleum coke emission factor as the Fee Regulation does not contain an emission factor for catalyst coke. Amendments were proposed to the petroleum coke emission factor in the Staff Report because the emission factor in the regulation was simply incorrect. The Staff Report identified that this amendment is expected to affect 12 out of 250 fee payers. The average petroleum coke fee for the facilities that combust the fuel, is approximately \$12,000 and the average increase would be approximately \$2,500 per facility. The increase in fees for these facilities would result in fee decreases for the remaining fee payers.

13. **Comment:** We ask that CARB strike the requirement to maintain the records in CA as this is inconsistent with the MRR regulations. Recommendation: Strike the phrase in 95204 (l) "Records must be kept at a location within the State of California for five years." [Tesoro]

**Response:** The Response to Comment #7 is incorporated herein.

14. **Comment:** CCEEB supports the positions of our members with whom your staff has been working diligently to find practical, feasible solutions on the remaining outstanding issues regarding amendments to the Regulation for the Mandatory Reporting of Greenhouse Gas Emissions and, the Cost of

Implementation Fee Regulation. We ask for that work to continue and hope we can continue to work with ARB staff to make the necessary changes that will ensure these regulations are both technologically sound and economically feasible. [CCEEB]

**Response:** Comment noted. We look forward to continue to work cooperatively with CCEEB and its member companies.

15. **Comment:** WSPA appreciates ARB's proposed changes in the 15-day language in response to our comments, including changes to section 95201(c) to exclude biodiesel and renewable diesel fuels consistent with the MRR regulation, removal of the term "catalyst coke" from the definition of petroleum coke in section 95202(a)(111) and the clarification in section 95203(d) that fuel emission factors will be calculated using an arithmetic average of fuel grades from column C of 40 CFR 98 Table MM-1. [WSPA2]

**Response:** Comment noted. Thank you for your support.

16. **Comment:** WSPA notes that the proposed changes in section 95204(i), intended to align the records retention provisions in the fee regulation with those in the MRR, only corrected one of the inconsistencies. We request that ARB also strike the requirement to maintain records in California to achieve conformity with the MRR regulation:

Recommendation: Modify this section to read: "Entities subject to this subarticle must maintain copies of the information reported pursuant to the applicable sections of the Mandatory Reporting Regulation. ~~Records must be kept at a location within the State of California for five years.~~" [WSPA2]

**Response:** The Response to Comment #7 is incorporated herein.

17. **Comment:** In the October 2013 revision to the Cap-and-Trade regulations, ARB included a definition specific for public wholesale water agency which recognizes that Metropolitan is not an EDU, and requires a new definition that more accurately reflects its actual activities as a public water agency. This definition of public wholesale water agency, which should refer to the Statutes of 1969, instead of the Statutes of 1960, aligns with Metropolitan's inclusion in and use of the NAICS Code for Water Treatment and Distribution in its MRR submittals. Although ARB states that the proposed amendments to the regulations for Cap-and-Trade, MRR, and COI Fee are designed to align definitions, ARB has not included the definition of public wholesale water agency in the MRR and COI Fee regulations. Metropolitan requests ARB to add the definition of public wholesale water agency to both the MRR and COI Fee regulations. [MWD]

**Response:** Staff does not believe it is necessary to add the definition of public wholesale water agency to the Fee Regulation. The September 4, 2013 Staff Report for Proposed Amendments to the Cap-and-Trade Regulation contained staff's proposal to add the definition of public wholesale

water agency to the Cap-and-Trade Regulation to define a type of entity that will be eligible for an allowance allocation. It is not necessary to define public wholesale water agency in the Fee Regulation as allocation is not a component of the Fee Regulation. Additionally, fees are not assessed for water distribution, but rather for electricity distribution. Any entity that distributes electricity pursuant to the Fee Regulation is assessed fees accordingly.

## **V. Peer Review**

Health and Safety Code Section 57004 sets forth requirements for peer review of identified portions of rulemakings proposed by entities within the California Environmental Protection Agency, including ARB. Specifically, the scientific basis or scientific portion of a proposed rule may be subject to this peer review process. Here, ARB determined that the rulemaking at issue does not contain a scientific basis or scientific portion subject to peer review, and thus no peer review as set forth in Section 57004 was or needed to be performed.