

## **REQUEST FOR EARLY EFFECTIVE DATE**

Pursuant to Government Code section 11343.4(b)(3), the California Air Resources Board (CARB or Board) requests that the Office of Administrative Law (OAL) prescribe an “earlier effective date” for the amendments to the Regulation for the California Cap on Greenhouse Gas Emissions and Market-Based Compliance Mechanisms (Cap-and-Trade Regulation or Regulation) that were approved for adoption by the Board at the December 13, 2018, public hearing and are submitted to OAL for review and approval on February 14, 2019. The following demonstrates “good cause” for OAL to allow the amendments to be effective on April 1, 2019.

### **DEMONSTRATION OF GOOD CAUSE**

In this rulemaking, the Board adopted amendments to the Cap-and-Trade Regulation to accomplish a number of objectives. This rulemaking amends the Regulation to reflect Assembly Bill 398 (AB 398, Chapter 135, Statutes of 2017) requirements, and responds to direction provided by the Board in Board Resolution 17-21 (July 27, 2017).

Amendments include new price containment points and a price ceiling, limits on offset use, new industrial facility leakage assistance factors for 2018 and beyond, clarifications on electric and gas utility use of allowance value, compliance provisions for Energy Imbalance Market (EIM)-related greenhouse gas (GHG) emissions, offset invalidation clarifications, streamlining implementation requirements, and adjustments to linkage reflecting Ontario’s actions to revoke its participation in the cap-and-trade market.

The amendments to the Regulation explicitly indicate that the accounting mechanism for EIM emissions, which comes from the Regulation for the Mandatory Reporting of Greenhouse Gas Emissions (Cal. Code. Regs., tit. 17, § 95100 et seq.) (MRR) – the regulation that generates the data utilized in the Cap-and-Trade Program, changes on April 1, 2019, which is why the amendments must be effective as of that date.

By way of background, in 2014, the California Independent System Operator (CAISO) implemented an EIM, which allows out-of-state entities to participate in trading of “imbalance” energy in CAISO’s real-time energy markets. When importing out-of-state electricity to serve California load, the EIM market identifies, or “deems,” electricity from certain out-of-state sources as dispatched to serve California load in part on the basis of the deemed sources’ GHG emissions intensity.

Under Assembly Bill (AB) 32 (Chapter 488, Statutes of 2006), CARB must account for statewide GHG emissions, including all emissions resulting from the generation of electricity delivered to and consumed in California, whether that electricity is generated in-state or imported to California to serve California load and minimize emissions leakage. In 2015, CARB found that the design of EIM does not account for the full GHG emissions experienced by the atmosphere from imported electricity under EIM and

results in emissions leakage. In amendments that became effective in 2017 for the Regulation and MRR, CARB implemented a “bridge solution” to account for the full GHG emissions experienced by the atmosphere from imported electricity under EIM. CARB refers to these emissions as EIM Outstanding Emissions.

Currently, CARB retires state-owned allowances that have remained unsold at auction for greater than 24 months to account for EIM Outstanding Emissions (i.e., secondary emissions from EIM dispatch that are not deemed delivered). The present amendments contemplate that allowances will be retired to account for EIM Outstanding Emissions from 2018, and first quarter (i.e., January 1-March 31) 2019, from the allowance budget two years after the year for which the unsurrendered obligation was due. See Cap-and-Trade Amendments § 95852(l)(2). Starting on April 1, 2019, the amendments state that EIM Purchasers will be responsible for EIM Outstanding Emissions. *Id.* EIM Purchasers are current electric distribution utilities (EDU) that receive a free allocation of allowances from CARB and that serve California load with EIM purchases. To determine EIM Purchaser Emissions, CARB will multiply total EIM Outstanding Emissions by the product of (EIM Purchaser’s Retail Sales/Total EIM Purchasers’ Retail Sales). CARB will then retire allowances that would have been provided to the EDUs for free in proportion to EIM Purchaser Emissions for each EDU. As a result, the EDUs will be allocated a proportionally smaller number of free allowances.

If CARB were unable to apply the amendments’ provision regarding the allocation of responsibility for EIM Outstanding Emissions starting on April 1, 2019, it would create market uncertainty and confusion for participants in the Cap-and-Trade Program. For instance, if the effective date were delayed after April 1, 2019, an EDU may assert that it is not responsible for EIM Outstanding Emissions for the period starting on April 1, 2019 until the delayed effective date. While CARB would dispute such an interpretation, ensuring the amendments are effective on April 1, 2019 would avoid any potential conflict entirely. Therefore, such a delay in the effective date would adversely affect the functioning of this critically important regulatory program.

More specifically, if CARB were unable to apply the amendments’ provision regarding the allocation of responsibility for EIM Outstanding Emissions starting on April 1, 2019, it would create uncertainty for all entities participating in the Cap-and-Trade Program regarding the number of allowances that would be available for compliance and the number that would be available through auctions. The amendments indicate that CARB will continue to account for EIM Outstanding Emissions with future vintage allowances through March 31, 2019. To the extent the effective date of the amendments were delayed and if an EDU successfully asserted that it was not responsible for EIM Outstanding Emissions for the period starting on April 1, 2019 until the delayed effective date, then CARB may need to account for the shortfall in EIM Outstanding Emissions using additional future vintage allowances rather than making those allowances

available through auction. This type of uncertainty would adversely affect the overall Cap-and-Trade Program.

Alternatively, because the present amendments only contemplate that CARB can retire future vintage allowances to account for EIM Outstanding Emissions to a date certain (i.e., March 31, 2019), one could argue that CARB lacks authority to retire any allowances to account for EIM Outstanding Emissions for the period starting on April 1, 2019 until the delayed effective date. In this case, if no entity accounted for EIM Outstanding Emissions for this period, then emissions resulting from the generation of electricity delivered to and consumed in California would not be fully accounted for, which one could argue is contrary to AB 32. Therefore, an early effective date is needed to ensure that CARB accounts for EIM Outstanding Emissions.

For the foregoing reasons, CARB hereby requests that OAL approve these amendments to be effective on April 1, 2019.

A handwritten signature in blue ink, consisting of a stylized 'B' followed by a horizontal line and a small flourish.

Ben Carrier, Attorney, Air Resources Board

DATE: 2/11/19