



September 27, 2011

The Honorable Mary Nichols
Chair, California Air Resources Board
1001 I Street
Sacramento, CA 95814
cc: Clerk of the Board, Air Resources Board
1001 I Street, Sacramento, California 95814

RE: CalChamber's Comments & Suggested Amendments for the California Air Resources Board's Second 15-day Modifications to the AB 32 Mandatory Reporting Regulation of the Greenhouse Gas Emissions

Dear Chairwoman Nichols:

On August 11, 2011, the California Chamber of Commerce (CalChamber) submitted comments on Air Resources Board (CARB) 15-day modification to the AB 32 Mandatory Reporting Regulation of the Greenhouse Gas Emissions (MRR). Following the release of the **Second** 15-Day Modifications to the MRR on September 12th, CalChamber would like to submit additional comments.

The CalChamber is the largest, broad-based business advocate in the state, representing the interests of nearly 15,000 California businesses, both large and small. Many of CalChamber's members are subject to CARB's AB 32 MRR regulation, and thus would be directly impacted by the proposed 15-day modifications. CalChamber has been a constructive voice in development of the AB 32 program, including the MRR, and continues to participate in this rulemaking to ensure an adequate balance in the reporting requirements without unnecessary costs and resource burdens. CalChamber is committed to ensuring greenhouse gas (GHG) reductions are achieved while maintaining the competitiveness of California businesses and the health of the economy.

As we approach the deadline for submitting the rule to the Office of Administrative Law, we would like to emphasize the need for further rule changes and updates next year. This rule is extremely complex and it will have a large impact on the California economy. In that regard, CalChamber requests that CARB includes in the Final Statement of Reasons (FSOR) a schedule by which workshops and needed revisions will occur so public can schedule and provide feedback and for the staff to hear and incorporate reasonable changes to the rule.

In our previous letter, CalChamber identified the following areas of concern with the First MRR 15-day modifications:

New Reporting and Verification Deadlines (Section 95103):

ARB had proposed to change both the Reporting and Verification time deadlines to April 1st and September 1st, respectively. This change significantly compresses the time allowed for those entities that need to prepare their MRR reports and more importantly, eliminates three months of time that is critical for facilities to work with their verifiers to obtain required positive or qualified positive verification statements. It is imperative that facilities are given ample time to work on developing their reports and to work with their verifiers to obtain required positive or qualified positive verifications, especially since the facility MRR reports serve as the foundational basis of the cap-and-trade program. *The **Second 15-Day MRR modifications made only a modest change in the reporting date deadline from April 1st to April 10th. This change is minor and does nothing to alleviate the reporting/verification concern expressed in our August 11th letter. Therefore, the CalChamber maintains the recommendation that CARB re-set the reporting and verification timelines back to the proposed original dates of June 1st and December 1st.***

Enforcement Penalty Provisions (Section 95107)

CalChamber expressed concern with certain provisions in the Enforcement section that would essentially allow CARB unilateral authority to assess penalties for any GHG ton or data measure or collection failure as a separate penalty. Specifically, CalChamber raised concern with subparts (b) and (c) of Section 95107 and suggested modifications to these sections that would alleviate enforcement concerns and create parity between the MRR Enforcement Provision and the cap-and-trade's penalty or 'Violation' provision of the regulation (See Attachment 1)

CalChamber acknowledges some positive changes were made to the **Second 15-day MRR modifications** as it relates to the Enforcement Section. We appreciate that subpart (a) was added to give CARB the ability to consider an entity's 'pattern of violation' when assessing a penalty. Compliance history is an important factor that must be given consideration and CalChamber is pleased to see this inclusion in the second MRR modification.

CalChamber does have concerns with some changes to the **Second 15-day modifications**, which are in addition to the comments/concerns raised in our first 15-day MRR modification (see Attachment 1). We request clarification to subpart (c) of Section 95107 to clarify that CARB *may* initiate enforcement action in the event of under-reported emissions data only after the verification deadline and if CARB determines that the entity has a pattern of under-reporting. CalChamber recommends the following revisions to subpart (c):

Each metric ton of CO₂e emitted but not reported as required by this article is a separate violation. ARB will not ~~may~~ initiate enforcement action under this subparagraph until ~~alleging that emissions were under-reported in an emissions data report only~~ after any applicable verification deadline for the pertinent report and if ARB determines that there is a recurring pattern of under-reporting.

Additionally, we request that CARB provides clarification on subpart (d) to ensure facilities that the MRR rule is read as a whole, and a violation does not occur when an operator complies with an alternative provision applicable under the circumstances. For example, information will be considered to be 'measured, collected, recorded and preserved in the manner required by this article' and no violation will occur when an operator complies with the pertinent missing data substitution or interim data collection procedures specified in Section 95129 of the MRR. CalChamber requests that the clarification to subpart (d) be included in the FSOR.

Finally, CalChamber remains concerned that under the current MRR, CARB continues to base penalties on a "per ton" metric. Our first 15-day comment letter recommended that the penalty metric be based on the specificity of the violation. It is inappropriate for CARB to base penalties on a per ton metric given the massive amount of GHG emissions involved in the AB 32 program. Assigning a "per ton" penalty for each GHG ton that is not reported can result in a penalty of tens if not hundreds of thousands of dollars to a facility, despite the fact that a facility's MRR report carries a positive or qualified positive verification determination. It is simply unfair to impose such excessive penalties and costly burdens upon facilities.

For these reasons, we continue to recommend that the penalty metric be based on the specificity of the violation.

Monitoring and Reporting Requirements above Federal EPA MRR Program

While CalChamber understood CARB's stated reasons for adopting a more stringent reporting program (i.e.: the need for an accurate inventory for the cap-and-trade program), we were very concerned with the lack of a thorough and transparent cumulative and individual cost analysis of impacts of the requirements that exceeds the Federal MRR program. In addition to such cost impact analysis, there should be an analysis of the difference in overall emission estimates as a result of more stringent requirements compared to the emission estimates based on the Federal EPA MRR reporting program. CalChamber therefore, respectfully requested that CARB conducts an analysis comparing the more stringent MRR requirements to the Federal EPA MRR program, with consideration of all costs and showing the difference in emission estimates.

Dispute Resolution Process

Currently, CARB's Executive Officer (EO) retains sole authority of program implementation of both the cap-and-trade and the mandatory reporting regulations, including determining whether regulated parties have complied with regulations and setting the penalties for such program violations. These important decisions will be made unilaterally without a public process and will have an impact on California businesses. It is important for these regulated entities to have a fair and transparent process through which to appeal a decision.

CalChamber supports the adoption of a formal autonomous dispute resolution process that would enable facilities to challenge and resolve disagreements prior to potential enforcement actions through an equal process for all parties involved in any dispute. We believed this program should use an unbiased mechanism to resolve disputes, variances and penalty disagreements with the EO.

For a copy of CalChamber's First 15-day modification comment letter, please see Attachment 1 (enclosed).

We appreciate your consideration and the opportunity to comment on the **Second** 15-day modifications to the AB 32 Mandatory Reporting Regulation of Greenhouse Gas Emissions.

We look forward to further communication as CARB continues to work on this important element of the AB 32 program.

Should you have any questions, please feel free to contact me at (916) 444.6670.

Sincerely,



Brenda Coleman
Policy Advocate

Attachment 1

August 11, 2011

The Honorable Mary Nichols
Chair, California Air Resources Board
1001 I Street
Sacramento, CA 95814
cc: Clerk of the Board, Air Resources Board
1001 I Street, Sacramento, California 95814

RE: CalChamber's Comments & Suggested Amendments for the California Air Resources Board's 15-day Modifications to the AB 32 Mandatory Reporting Regulation of the Greenhouse Gas Emissions

Dear Chairwoman Nichols:

The California Chamber of Commerce (CalChamber) appreciates the opportunity to comment on the California Air Resources Board (CARB) 15-day modifications to the AB 32, Mandatory Reporting Regulation of Greenhouse Gas Emissions ("MRR")

The CalChamber is the largest, broad-based business advocate in the state, representing the interests of nearly 15,000 California businesses, both large and small. Many of CalChamber's members are subject to CARB's AB 32 MRR regulation, and thus would be directly impacted by the proposed 15-day modifications. CalChamber has been a constructive voice in development of the AB 32 program, including the MRR, and continues to participate in this rulemaking to ensure an adequate balance in the reporting requirements without unnecessary costs and resource burdens. CalChamber is committed to ensuring greenhouse gas (GHG) reductions are achieved while maintaining the competitiveness of California businesses and the health of the economy.

CalChamber has identified the following areas of concern in the MRR 15-day modifications:

New Reporting and Verification Deadlines (Section 95103):

ARB has proposed to change both the Reporting and Verification time deadlines to April 1st and September 1st, respectively. This change significantly compresses the time allowed for those entities that need to prepare their MRR reports and more importantly, eliminates three months of time that is critical for facilities to work with their verifiers to obtain required positive or qualified positive verification statements. While we understand CARB's stated reasons for compressing the timelines due to the needed time to true-up for the pending cap-and-trade program, we respectfully disagree. Taking time away at the expense of the regulated parties who are responsible for ensuring accurate reports is simply inequitable. It is imperative that facilities are given ample time to work on developing their reports and to work with their verifiers to obtain required positive or qualified positive verifications, especially since the facility MRR reports serves as the foundational basis of the cap-and-trade program.

Additionally, further time constraints creates additional pressure on regulated parties, especially given that CARB is proposing additional reporting requirements that are above and beyond what is required under the EPA 40 CFR MRR program.

Given these reasons, CalChamber recommends that CARB re-set the reporting and verification timelines back to the original dates of June 1st and December 1st.

Enforcement Penalty Provisions (Section 95107)

While CalChamber recognizes that some of the 15-day revisions to the penalty enforcement provisions in both the MRR and cap-and-trade regulations are positive changes, we remain concerned with certain provisions that essentially allow CARB unilateral authority to assess penalties for any GHG ton or data measure or collection failure as a separate penalty.

Specifically, subparts (b) and (c) of Section 95107, allows CARB to penalize operators if it has determined there was a failure to report “each” metric ton of CO₂e emitted, or “each” failure to measure, collect, record or preserve information required for the report, regardless of whether the operator has obtained a positive or qualified positive (\pm 5% accuracy level) verification from its verifier. The MRR allows CARB to assess penalties for “any” ton of GHG emissions found to not be reported, despite the fact that the amount of GHG tons are well below the level of accuracy required by the MRR and verification process requirements. Thus, penalties could be assessed in the amount of tens if not thousands of dollars, even though the operator maintains a positive verification of their report.

CalChamber requests CARB to revise Subparts (b) & (c) to reflect that the penalties would only be applicable if it is determined that the amount of emissions that the facility under-reported exceeded the \pm 5% accuracy level, and even then, the penalty should only apply to the amount that was above 5%. For emissions below the 5% verification accuracy level, CalChamber recommends that no penalty be assessed, unless the Executive Officer determines that the facility engaged in falsifying, concealing or covering up the information, resulting in the under reporting of emissions. Incorporating these suggested revisions to Section 9107 of the MRR will create parity and consistency with the cap-and-trade’s penalty or “Violation” provision of the regulation, Section 96104 (c) (1-3), which is intended to capture the bad and fraudulent actors under the cap-and-trade program.

Additionally, CalChamber remains very concerned that ARB continues to base penalties on a “per ton” metric. It is inappropriate for CARB to base penalties on a per ton metric given the huge amount of GHG emissions involved in the AB 32 program. Assigning a “per ton” penalty for each GHG ton that is not reported can result in a penalty of tens if not hundreds of thousands of dollars to a facility, despite the fact that a facility’s MRR report carries a positive or qualified positive verification determination. It is simply unfair to impose such excessive penalties and costly burdens upon facilities. For these reasons, we recommend that the penalty metric be based on the specificity of the violation.

Lastly, CalChamber requests that CARB clarifies that during the period when the facility is working with their verifier on their report, any corrections, edits, clarifications, etc., NOT be subject to any penalties or violations during this period.

Monitoring and Reporting Requirements above Federal EPA MRR Program

CARB has identified several areas that specifically require additional monitoring, record keeping, and data collection procedures, including more stringent meter calibration requirements that go above and beyond what is currently required under the Federal EPA Mandatory Reporting program. While CalChamber understands CARB’s stated reasons for adopting a more stringent reporting program (i.e.: the need for an accurate inventory for the cap-and-trade program), we are very concerned that CARB has not done a thorough and transparent cumulative and individual cost analysis of impacts, of the AB 32 MRR requirements that exceeds the Federal MRR program. In addition to such cost impact analysis, there should be an analysis of the difference in overall emission estimates as a result of a more stringent requirements compared to the emission estimates based on the Federal EPA MRR reporting program.

CalChamber understands the importance of ensuring accurate emission data. However, it is just as important to have a balance between time, resources and costs incurred by facilities prior to determining whether more stringent criteria requirements, above the Federal EPA MRR program are necessary and whether these more stringent criteria will result in any measurable GHG reporting difference. Additionally,

it is imperative to assess the ability of California businesses to continue to operate and remain competitive with the rest of the nation under CARB's proposed reporting requirements. CalChamber therefore, respectfully requests that CARB conducts an analysis comparing the more stringent MRR requirements to the Federal EPA MRR program, with consideration of all costs and showing the difference in emission estimates.

Dispute Resolution Process

Currently, CARB's Executive Officer (EO) retains sole authority of program implementation of both the cap-and-trade and the mandatory reporting regulations, including determining whether regulated parties have complied with regulations and setting the penalties for such program violations. These important decisions will be made unilaterally without a public process and will have an impact on California businesses. It is important for these regulated entities to have a fair and transparent process by which to appeal a decision.

CalChamber supports the adoption of a formal autonomous dispute resolution process that would enable facilities to challenge and resolve disagreements prior to potential enforcement actions through an equal process for all parties involved in any dispute. We believe this program should use an unbiased mechanism to resolve disputes, variances and penalty disagreements with the EO.

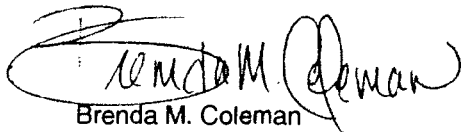
Without a fair, independent process, an entity's options are limited. Currently, an entity's only recourse is to challenge the decision in court, which requires significant resources and time. Lawsuits are not only costly but rarely solve the underlying problem. We are proponents of a transparent process that helps reduce money and time spent defending lawsuits so that regulated entities can instead focus their time and efforts on job creation and economic stimulation. Without a fair and transparent dispute resolution process, issues that could be resolved relatively quickly could become time-consuming litigation that could hinder the goals of AB 32.

Again, we appreciate your consideration and the opportunity to comment on the 15-day modifications to the AB 32 Mandatory Reporting Regulation of Greenhouse Gas Emissions.

We look forward to further communication as CARB continues to work on this important element of the AB 32 program.

Should you have any questions, please feel free to contact me at (916) 444.6670.

Sincerely,

A handwritten signature in black ink, appearing to read "Brenda M. Coleman". The signature is written in a cursive style with a large, looping initial "B".

Brenda M. Coleman
Policy Advocate