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LATHAM & WATKINS LLP

October 17, 2018

VIA EMAIL & OVERNIGHT MAIL

Richard Corey
Executive Director
California Air Resources Board
1001 I Street
Sacramento, California 95814

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File No. 053624-0027

RE: Adjustments to Table 9-2 of the Cap-and-Trade Regulations Required by AB 32

Dear Mr. Corey:

Thank you for the opportunity to comment on the amendments to the Cap-and-Trade Regulations, 17 Cal. Code Regs. § 95800 *et seq.* (the “**Regulations**” and the “**Proposed Amendments**”) proposed by the California Air Resources Board (“**CARB**”) on September 4, 2018.

On behalf of Guardian Industries Kingsburg Operation (“**Guardian**”), we are writing to request that flat glass manufacturing (NAICS code 327211) be added to the list of industries in Table 9-2 of the Regulations receiving a slower declining cap adjustment factor for industrial assistance. As further described in this letter, the record for the Proposed Amendments clearly establishes the flat glass industry is among those most exposed to environmental and economic leakage risks but has limited options for emissions abatement. AB 32 requires CARB to address leakage through rulemaking on an ongoing basis, and CARB can do so in this case by adding NAICS code 327211 to Table 9-2. This change can be made through a 15-day notice in the current rulemaking because it is not a substantive or material change to any regulatory requirement, but rather merely applies the existing requirements based on new information received through the public comment process and AB 32’s statutory directives.

1. The Record Establishes that Guardian and Flat Glass are Among the State’s Companies and Industries the Most Exposed to Environmental and Economic Leakage

In previous meetings, and in comments submitted to you including the enclosed letter and PowerPoint presentation communicated to your staff on August 23, 2018 (attached hereto as Exhibit 1) and a second letter dated October 15, 2018, Guardian has established that the flat glass industry faces a significant risk of leakage and has limited options to abate emissions due to the high temperatures required to manufacture flat glass. These points were also made by the

California Manufacturers & Technology Association in a letter dated October 16, 2018. Guardian's letters note that "[t]he flat glass industry in California has been decimated over the past 20 years with multiple plant closures and the migration of economic activity and production capacity out of state, despite a growth in demand in California." The Powerpoint Presentation accompanying Guardian's August 23, 2018 letter hereto further illustrates that flat glass manufacturing requires higher temperatures than any of the industries currently receiving the Special Factor, and that application of the Standard Factor (also defined below) will result in tens or potentially hundreds of millions of dollars in additional compliance costs over the 20-year life of a flat glass furnace.

These facts establish that flat glass manufacturing faces a particularly high risk of leakage under the Proposed Regulations. As described in Exhibit 1 hereto and in Guardian's letters, Guardian will need to decide in 2021 or 2022 whether to rebuild its furnace at the Kingsburg facility or to relocate production outside California. The other two flat glass facilities currently operating in California will face the same decision when their current furnaces need to be replaced. If CARB does not address the unique circumstances of the flat glass manufacturing industry, this situation could result in the loss of hundreds of jobs and leakage of hundreds of thousands of tons of emissions outside the program.

2. CARB Has an Ongoing Duty under AB 32 to Minimize Leakage

The Global Warming Solutions Act of 2006, CAL. HEALTH & SAFETY CODE § 38501 et. seq. ("AB 32"), which created the authority for CARB to establish the Cap-and-Trade Program, creates ongoing obligations for CARB to update its plans to achieve the maximum feasible and cost-effective emissions reductions, and specifically provides that ARB may amend and revise the Regulations to further the provisions of AB 32. *See* Cal. Health & Safety Code §§ 38561(h), 38562(g). In initially adopting the Regulations, and in making amendments, CARB is required to, among other things, "minimize leakage." *See* Cal. Health & Safety Code § 38562(b)(8). Together, these provisions of AB 32 create an ongoing duty for CARB to consider the potential for the Cap-and-Trade Program to create or encourage leakage (including on the basis of information received from compliance entities), and to adjust the Regulations as appropriate to minimize such leakage.

3. CARB is Required to Add Flat Glass to Table 9-2

A. The Footnote in Table 9-2 is Descriptive, not Prescriptive

Table 9-2 in the Regulations sets out the cap adjustment factor used in calculating the number of allowances that eligible covered entities receive each year through the program's industrial assistance provisions. The cap adjustment factor applied to "standard activities" declines by an average of 5.07% per year (the "**Standard Factor**") between 2020 and 2031, but a separate cap adjustment factor that declines at an average of 1.96% per year between 2020 and 2031 (the "**Special Factor**") is applied to activities with NAICS codes 325311, 327210 and 327410. A footnote to Table 9-2 notes that these are "activities with over 50 percent of total emissions from process emissions, high emissions intensity and a high leakage risk classification in Table 8-1."

The regulatory record for the Regulations shows that CARB identified flat glass manufacturing as being at high risk of leakage, but that it decided not to apply the Special Factor because flat glass has process emissions that are less than 50% of total emissions.¹ We have carefully reviewed the regulatory record for the Regulations and are unable to find any scientific, economic or ecological basis supporting the adoption of 50% as a hard threshold or cutoff for the application of the Special Factor. The record suggests that CARB merely selected the 50% level as an indicative proxy or short-hand benchmark to suggest a likelihood that the Special Factor would be warranted. But there is no evidence in the record to support the disqualification or ineligibility of industries likewise subject to material leakage risk based on aspects inherent to their manufacturing process that are not be amenable to cost-effective control. It may be, for example, that CARB will automatically (*i.e.*, presumptively) add any industry with process emissions in excess of 50%. The 50% threshold, however, cannot and should not be used to exclude industries with process emissions that the record shows are subject to a high risk of leakage. Arguably, doing so would be contrary to AB 32 because it would not minimize leakage and it would be arbitrary and capricious because it is not supported by the administrative record. Indeed, given AB 32's unqualified directive for CARB to "minimize leakage," it is an open question whether CARB has the authority to establish *any* threshold for excluding an industry with high leakage risk from application of the Special Factor. *See* Cal. Health & Safety Code § 38562(b)(8).

This interpretation is fully consistent with the text of the Regulations. Indeed, the footnote to Table 9-2 is descriptive, not prescriptive. It says only that the specified activities have over 50% process emissions, not that 50% process emissions are required or that facilities with material process emissions under the 50% could not likewise be eligible for comparable treatment upon a reasonable demonstration of leakage risk. The footnote to Table 9-2 is thus illustrative of CARB's process in drafting the Regulations, but is not a requirement of the Regulations. This conclusion is supported by the public comment record for the Regulations, which shows that the 50% threshold was never presented to or addressed by the public as a regulatory requirement.

Accordingly, based on information now in the record regarding the flat glass process emissions and the related material leakage risk, CARB should clarify its use of the 50% threshold as merely a presumptive indicator and confirm that other facilities may qualify for similar treatment in appropriate circumstances. We believe such a clarification best reflects the administrative record to date and would best accommodate the directives of AB 32.

B. Adding Flat Glass to Table 9-2 as Part of the Pending Rulemaking

As a result of the multiple submissions identified above, CARB now has information that it previously lacked, which clearly establishes that application of the Standard Factor rather than the Special Factor will likely lead to economic leakage—which AB 32 instructs CARB to minimize. Based on the foregoing, CARB has the duty under AB 32 to apply the Special Factor

¹ *See* Final Statement of Reasons, Oct. 27, 2011, at 1952, available at <https://www.arb.ca.gov/regact/2010/capandtrade10/fsor.pdf>.

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to flat glass manufacturing, and to make the necessary clarifications to Table 9-2 of the Regulations.

One approach available to CARB is to add NAICS code 327211 to the Special Factor column of Table 9-2 and to make the following clarifications to the footnote to Table 9-2 (new changes shown in double-underline):

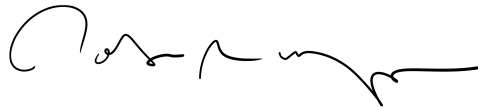
#These are activities with a material percentage ~~over 50 percent~~ of total emissions (e.g. over 50 percent, or other facts demonstrating materiality) from process emissions, high emissions intensity and a high leakage risk classification in Table 8-1. The activities are coke calcining under the NAICS code 324199, ~~nitric acid production activities under the~~ (NAICS code 325311), ~~cement manufacturing activities under the~~ (NAICS code 327310), activities under the NAICS code 327211 and ~~dolime manufacturing the activities under the~~ (NAICS code 327410).

CARB can make this change in the next 15-day notice for the current rulemaking, because it is a change to a footnote for which modifications were already included in the Proposed Amendments, and is therefore “sufficiently related to the original text that the public was adequately placed on notice that the change could result from the originally proposed regulatory action.” *See* Cal. Gov. Code § 11346.8(c). Also, and for the reasons described above, it is a change that simply reflects CARB’s application of a requirement already contained in the Regulations based on new information available to CARB in the record rather than a substantive or material change to the requirement itself.

* * *

Thank you for your consideration. We would be happy to provide any further factual background that CARB may need regarding the materiality of the leakage risk faced by the flat glass industry.

Respectfully submitted,



Robert A. Wyman



JP Brisson

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cc: Rajinder Sahota, Assistant Division Chief
Jason Gray, Cap-and-Trade Program Chief
Mark Sippola, Program Development Section Manager

Exhibit 1



See what's possible™

August 23, 2018

Richard Corey
Executive Director
California Air Resources Board
1001 I Street
Sacramento, California 95814

RE: Comments on the June 21st Workshop to Continue Informal Discussion on Potential Amendments to the Cap and Trade Regulation

Dear Mr. Corey:

In response to the request for comments in connection with the Air Resources Board's workshop held on June 21, 2018, on behalf of Guardian Industries Kingsburg Operation, I submit the enclosed presentation.

The flat glass industry in California has been decimated over the past 20 years with multiple plant closures and the migration of economic activity and production capacity out of state, despite a growth in flat glass demand in California.

The Proposed Regulation applies a special cap-adjustment factors for Lime, Cement and Calcine Coke manufacturing. Flat Glass Manufacturing relies on the same type of emissions intensive, fixed and unavoidable calcination process. In addition, flat glass manufacturing is at high risk for leakage. Guardian requests that ARB add the industrial activity of Flat Glass Manufacturing (327211) to the list of NAICS codes receiving special cap-adjustment factors (in Table 9-2).

Thank you for your consideration.

Sincerely,

Kevin W. Baird
President & CEO, Guardian Glass, LLC

cc:

Rajinder Sahota, Assistant to Division Chief
Jason Gray, Cap and Trade Manager



Presentation to the California Air Resources Board
Sacramento, August 21, 2018

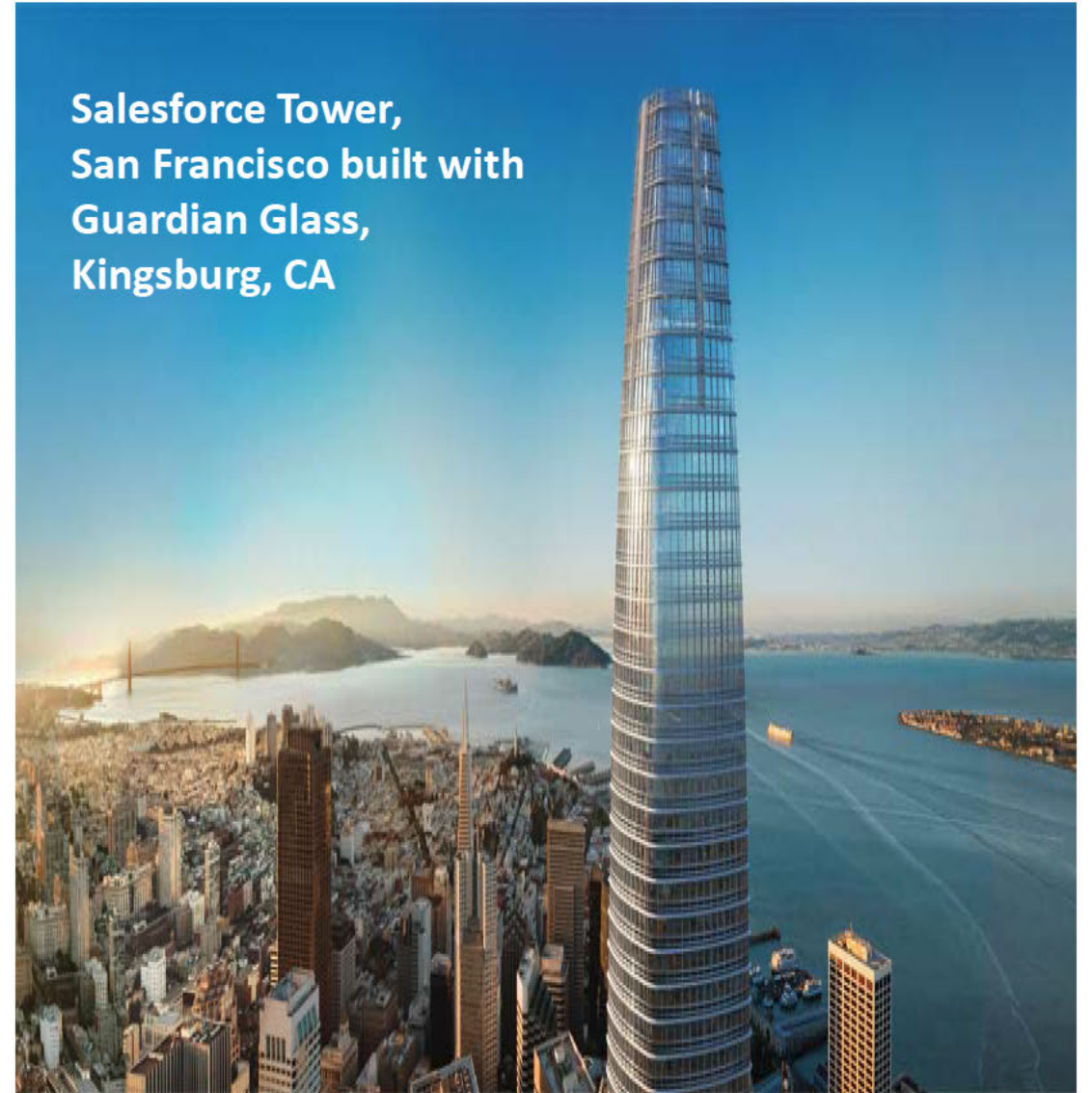
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About

Guardian Industries is a global company headquartered in Auburn Hills, Michigan. Guardian companies manufacture high-performance float, coated and fabricated glass products for architectural, residential, interior, transportation and technical glass applications; and high-quality chrome-plated and painted plastic components for the automotive and commercial truck industries.



**Salesforce Tower,
San Francisco built with
Guardian Glass,
Kingsburg, CA**



Kingsburg Float Glass Plant

Established 1978 as Guardian's second float glass plant. Approximately, 300 employees.

Guardian's process is **Energy Intensive and Trade Exposed (EITE)** and is classified as a **high leakage risk industry** by the ARB.

Guardian took proactive and **early action** to transition from fuel oil to clean natural gas to supply heat for the calcination process.

Extreme heating requirements of Guardian's processes' **necessitates** the use of the most efficient and high performing equipment



Current Operations

- Furnace runs
 - 24hrs/day – 7 days/wk **for 20 yrs**
 - Furnace is not designed to be “turned down” as it can cause substantial damage and shorten the life of the site
- 80% of raw material is imported from out of state
 - 50% NV silica sand
 - 30% WY soda ash

Due to the nature of the operation, Flat Glass manufacturing either operates at designed capacity (0% leakage) or it moves to a location where it can operate (100% leakage)

Furnace Rebuild Overview

- 2007 – 2008: Kingsburg invested about \$150 million in new furnace (current operation)
 - State of the art technology with projected 15 -20 yr lifespan
- 2021 – 2022: Decision point for investment in new furnace
 - Uncertainty around the cap and trade program factors into the decision
- In 2018, Guardian announced construction of a greenfield plant in Poland with a budget of approximately \$240 million

Cost of C&T Compliance

- Over the life of the rebuilt furnace (20 years, 2026-2046), the estimated aggregate emissions of the facility are 2.5 million metric tons.

		Current Cap Adjustment Factor		
Allowance Price Scenario	Allowance Price Range 2026-2046	Quantity of Allowances Required	Total Cost over 20 Years (nominal dollars)	
Price Floor	\$24 - \$96	1,483,916	\$84,807,600	
SRIA Lower Range Second Speed Bump	\$75 - \$178	1,483,916	\$186,087,782	
SRIA Upper Range Price Ceiling	\$106 - \$1,026	1,483,916	\$670,932,088	

Industrial Similarities

Industrial Activity	Flat Glass Manufacturing	Lime Manufacturing	Cement Manufacturing	Nitrogenous Fertilizer Manufacturing	Coke Calcining
NAICS Code	327211	327410	327310	325311	324199
EITE Status	High Leakage Risk	High Leakage Risk	High Leakage Risk	High Leakage Risk	High Leakage Risk
Process Emissions (%) of Total Emissions	Over 50% when normalized for extreme heat conditions	Over 50%	Over 50%	None to over 50%, depending on inclusion of Ammonia combustion	Over 50%
Simplified Calcination Process Fundamentals	Heat + Sand + Carbonates → flat glass + CO_2	Heat + Calcium Carbonate → lime + CO_2	Heat + Calcium Carbonate → cement + CO_2	Heat + Ammonia + Catalyst → Nitrates Nitrates + H_2O → Nitric Acid + N_2O	Heat + Carbonate → calcined coke + CO_2
Calcination Process Temperature	2,900°F	1,800°F	2,600°F	N/A	2,300°F
Process Fuel Type	Natural Gas	Coal, Fuel Oil or Natural Gas	Coal, Fuel Oil or Natural Gas	Ammonia	Coal, Fuel Oil or Natural Gas
Uncontrolled Carbon Dioxide Emission Factors	1,000 – 1,100 lb/ton of float glass equivalent	2,400 – 3,200 lb/ton of lime produced	1,800 – 2,100 lb/ton of clinker produced	2,440 lb/ton (includes NH_3 production)	6000 lbs CO_2 /ton in combustion of coal coke, coke calcining is expected to be lower

Comparison: California vs. Europe

	California	Europe
Starting Benchmark	0.453 mtCO _{2e} /mt flat glass pulled (based on 90% of the industry average)	0.519 mtCO _{2e} /mt flat glass pulled (based on top 10% of industry)
Cap Decline Factor (2013-2020)	1.9% per year	1.74% per year
Cap Decline Factor (2020-2030)	3.4% per year	2.2% per year (potentially going to 2.4%)

Reduction in Allocation of Free Allowances between 2013 and 2030:

- California's current decline factor would result in a **51% reduction**
- Europe's current decline factor would result in a **33.5% reduction**
- Application of the special cap decline factor set forth in Table 9-2 of the Regulations would result in a **25% reduction**

Proposed Changes to Cap Adjustment Factors for Allowance Allocation, Table 9-2

Budget Year	Cap Adjustment Factor, c	
	Standard Activities	Industrial Activities with NAICS codes 325311, 327310, and 327410, <u>and</u> <u>327211</u> *
2013	0.981	0.991
2014	0.963	0.981
2015	0.944	0.972
2016	0.925	0.963
2017	0.907	0.953
2018	0.888	0.944
2019	0.869	0.935
2020	0.851	0.925

Proposed Changes to Cap Adjustment Factors for Allowance Allocation, Table 9-2

Budget Year	Cap Adjustment Factor, c	
	Standard Activities	Industrial Activities with NAICS codes 325311, 327310, and 327410, <u>and</u> <u>327211*</u>
2021	0.817	0.909
2022	0.783	0.892
2023	0.749	0.875
2024	0.715	0.858
2025	0.681	0.841
2026	0.647	0.824
2027	0.613	0.807
2028	0.579	0.790
2029	0.545	0.773
2030	0.511	0.756

*These are activities with over 50 percent of total emissions from process emissions, high emissions intensity and a high leakage risk classification in Table 8-1. The activities are coke calcining under the NAICS code 324199, flat glass manufacturing under the NAICS code 327211, activities under the NAICS code 325311, activities under the NAICS code 327310, and the activities under the NAICS code 327410

Summary

1. Kingsburg Float Glass Plant is a vibrant contributor to the Fresno economy because it has contributed more than 300 stable jobs for the past 40 years
2. The flat glass industry in California has been decimated over the past 20 years with multiple plant closures and the migration of economic activity and production capacity out of state, despite a growth in the California demand
3. In 2021-2022, Guardian will need to decide whether to rebuild the furnace at the Kingsburg plant or relocate its activities out of state. Cap-and-trade compliance costs are a material expense going forward and a key consideration in this investment decision.
4. Proposed Regulation applies special cap-adjustment factors for Lime, Cement and Calcine Coke manufacturing. Flat Glass Manufacturing relies on the same type of emissions intensive, fixed and unavoidable calcination process and regulations should be applied consistently.

Guardian requests that ARB add the industrial activity of Flat Glass Manufacturing to the list of NAICS codes receiving special cap-adjustment factors (in Table 9-2).

US Flat Glass Plant Operations





Guardian Industries is poised to meet the challenges of the coming decades.

To learn more, visit guardian.com