California Environmental Protection Agency

Air Resources Board

Final Statement of Reasons for Rulemaking,
Including Summary of Comments and Agency Response

AB 32 COST OF IMPLEMENTATION FEE
AND
AMENDMENT TO THE REGULATION FOR THE MANDATORY REPORTING OF GREENHOUSE GAS EMISSIONS

Public Hearing Date: **September 25, 2009**
Agenda Item No.: **09-6-5**

May 2010

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I. INTRODUCTION

In this rulemaking, the Air Resources Board (ARB or Board) adopted a new regulation that requires a fee to be paid by sources of greenhouse gas emissions (GHG) to support the implementation of Assembly Bill 32 (AB 32; Chapter 488, Statutes of 2006) and adopted an amendment to the existing Regulation for the Mandatory Reporting (Mandatory Reporting Regulation or “MRR”) of GHG emissions.

The fee regulation specifies the types of affected parties, fee structure, loan repayment details, and modifications to the MRR. The regulation was developed pursuant to the requirements of AB 32. The regulation is codified at sections 95200 to 95207, title 17, California Code of Regulations (CCR). The amendment to the Mandatory Reporting Regulation affects section 95104, title 17, CCR.

A. Action Taken in This Rulemaking

This rulemaking was initiated by the May 8, 2009 publication of a Notice for Public Hearing stating that this regulatory action would be considered at a June 25, 2009 Board hearing. A Staff Report, or Initial Statement of Reasons (ISOR), entitled "Proposed Regulation to Implement the AB 32 Cost of Implementation Fee Regulation and Proposed Amendment to the Regulation for the Mandatory Reporting of Greenhouse gas Emissions" was also made available for public review and comment starting May 8, 2009. The Staff Report, which is incorporated by reference herein, contains an extensive description of the rationale for the proposal. The originally proposed text of new sections 95200 through 95207, and proposed amendments to section 95104, title 17, CCR were included as Appendix A to the Staff Report. These documents were also posted on May 8, 2009 on ARB's Internet Web site for this rulemaking at: [http://www.arb.ca.gov/cc/adminfee/adminfee.htm].

At its meeting on June 25, 2009, the Board received staff's presentation in which staff discussed the proposed regulatory action. Oral and written comments from stakeholders were presented to the Board at the meeting. The Board made no decision with respect to the proposal, and directed staff to continue working with stakeholders to address how the regulation assessed fees on the electricity sector. The 45-day comment period was extended.

On July 13, 2009, ARB issued a Notice of Public Hearing stating that the proposed regulatory action would be considered at the Board's September 25, 2009 meeting. On September 25, 2009, the Board conducted a public hearing and considered staff's proposal as set forth in the Staff Report, along with various modifications to the original proposal. During the comment period, the Board received 61 separate written comments and multiple copies of form letters, totaling 1,414 submittals in all. At the hearing the Board received oral testimony from 23 persons and one written submission.

At the conclusion of the September 25 hearing, the Board adopted Resolution 09-36 (Resolution), in which it approved the adoption of the originally proposed fee regulation and amendment to the Mandatory Reporting Regulation, with a number of modifications. All comments received between May 8, 2009 and September 25, 2009, and the comments received during the two 15-day Notices of Modifications are summarized and responded to in this FSOR.

The modifications suggested by staff in response to public comments made after issuance of the original proposal, but before the September Board meeting, are included with text or a narrative description of each modification. These are contained in a document: "Staff Suggested Modifications Presented at the September 25, 2009 Hearing of the Air Resources Board." This document was distributed at the beginning of the hearing and included as Attachment B to the Resolution.

The Resolution directed the Executive Officer to incorporate the modifications described in Attachment B into the originally proposed regulatory text, with such other conforming modifications as may be appropriate. The Executive Officer was directed to make the modified regulation (with the modifications clearly identified) and any additional documents or information available for a supplemental public comment period of at least 15 days. He was also directed to consider any comments on the modifications received during the supplemental comment period. The Executive Officer was then directed to either (1) adopt the modified regulation as it was made available for public comment, with any appropriate additional nonsubstantial modifications; (2) make additional modifications available for public comment for an additional period of at least 15 days; or (3) present the regulation to the Board for further consideration if he determines that this is warranted.

In preparing the modified regulatory language, the staff made various revisions in order to reflect the intent of the Board at the hearing. The staff also identified several additional modifications to make the regulation work effectively. These post-hearing modifications were incorporated into the text of the proposed regulation, along with the modifications specifically identified in Attachment B to the Resolution.

The text of the proposed modifications to the regulation, with the modified text clearly indicated, was made available for an extended public comment period by issuance of a Notice of Public Availability of Modified Text and Supporting Documents and Information. This notice and its two attachments – Resolution 09-36 with attachments and a "Modified Regulation Order" containing the modified regulatory text – were posted on February 25, 2010 on ARB's Internet Web site for the rulemaking. A total of 18 written comments were received during the supplemental comment period ending March 15, 2010.

In light of the supplemental comments received during the 15-day comment period, the Executive Officer determined that additional modifications were appropriate. ARB staff released a second Notice of Public Availability of Modified Text and Supporting Documents and Information. This notice and its attachment – "Modified Regulation Order" containing the modified regulatory text – were posted on March 18, 2010, on ARB's Internet Web site for the rulemaking. A total of six written comments were received during the supplemental comment period ending April 2, 2010. The Notices of Public Availability of Modified Text and Modified Regulation Orders can be found on ARB's web site for this rulemaking action at:
[http://www.arb.ca.gov/regact/2009/feereg09/feereg09.htm].

Staff determined that three typographical errors were made in the reference material that was released along with the first "Notice of Public Availability of Modified Text and Supporting Documents and Information." The errors were:

1) Contract #08-325 (page 5, third item) was listed as a "University of California, Los Angeles" contract, but the linked contract incorrectly showed "University of California, Davis" on the cover page.
2) The California Board of Equalization's Monthly Motor Vehicle Fuel Distributions Reports (2002-July 2009) (page 6, seventh item) did not include the July 2009 report; and,

3) The first Department of Finance CalSTARS (06 Aug 2007, page 1) report (page 7, first item) incorrectly shows it as a Cal/EPA report, but it is an ARB report.

Staff corrected these errors in the material released on ARB's Internet Web site.

The notice of modified text, the notices and all attachments were mailed to 16 parties identified in section 44(a), title 1 CCR, for whom ARB staff did not have electronic mail addresses. At the same time, the notices and all attachments were electronically distributed to all other parties identified in section 44(a), title 1, CCR, in accordance with Government Code section 11340.85, and to all persons that have subscribed to ARB's "Climate Change" or "Mandatory Reporting Regulation" list serves for notifications of postings pertaining either to rulemaking actions. The "Climate Change" list serve has approximately 7,240 subscribers, and the "Mandatory Reporting Regulation" list serve has approximately 3,180 subscribers.

After considering the comments received during the supplemental comment periods, the Executive Officer determined that the regulation was complete and ready for adoption.

This Final Statement of Reasons (FSOR) updates the Staff Report by identifying and providing the rationale for the modifications made to the originally proposed regulation. The FSOR also contains a summary of the comments received on the proposed new regulation during the formal regulatory process and ARB's responses to those comments.

B. Incorporation of Materials by Reference

No documents are incorporated by reference.

C. Fiscal Impacts

Fiscal Impacts on Local Government and School Districts

The Executive Officer has determined that the proposed regulatory action will result in nondiscretionary costs for local agencies, and may impose a mandate, as defined in Government Code section 17514. However, the mandate is not reimbursable by the state pursuant to part 7 (commencing with section 17500), division 4, title 2 of the Government Code, because the costs would apply to all operators of covered entities, not just local agencies. The Board has also determined that this regulatory action will not create costs or impose a mandate upon any school district, whether or not it is reimbursable by the State pursuant to Part 7 (commencing with section 17500), division 4, title 2 of the Government Code.

ARB staff considered the effects of the Fee Regulation on local government and school districts. On the Economic and Fiscal Impact Statement (STD. 399), staff noted that this regulation imposes direct compliance costs on municipal gas and electric utilities. Municipal utilities are not expected to impose a cost burden on local government agencies, such as cities and counties. While municipal utilities can absorb these costs from their own resources, over the long term, they are expected to recover their costs from ratepayers through their normal rate setting mechanism.

The local public agencies that will be affected include approximately 50 municipal gas and/or electric utilities. Annual reporting costs to local agencies are expected to decline after the first year or two of the initial implementation after the agencies establish internal procedures for reports.

D. Consideration of Alternatives

Regulatory alternatives were analyzed in the Staff Report, and ARB considered four different approaches to the regulation. Other alternatives proposed by commenters are discussed in this Final Statement of Reasons. ARB has considered all of these potential alternatives and has determined that no reasonable alternative considered or that has otherwise been identified and brought to the attention of ARB would be more effective in carrying out the purpose for which the regulations are proposed, or would be as effective and less burdensome to affected private persons and businesses than the proposed regulations.

<u>Adding Fee Component to Each Regulation</u>
Staff considered analyzing each greenhouse gas-related regulation with the intent of adding a fee component to each regulation to cover costs required to carry out the goals of AB 32. However, this alternative would mean that ARB would not have the funds to start up each program and would need to borrow money to develop the regulation. Once the regulations were adopted, the Fee could cover the costs of carrying out the implementation of the regulation, but the borrowed money, including interest, would need to be repaid. This would increase costs, considering that each regulation would require borrowing money and repaying those loans with interest.

In addition, the complexity required for implementation of a regulation may not be proportional to the amount of emissions reductions achieved by that regulation. This could create an equity issue, in that some regulations may only decrease a small amount of greenhouse gas emissions but require a large number of resources to develop and carry out the reduction of those emissions, while other regulations may achieve a relatively large amount of emissions reductions, but have lower costs due to a lower level of complexity. In addition, every regulation would have an increased level of complexity due to the need to include the analysis to determine the appropriate fee levels required from each entity to cover the costs of carrying out the regulation. This would increase the cost of carrying out each regulation, thereby compounding total costs to affected entities, compared to the costs associated with the staff's proposed approach.

Furthermore, because California's greenhouse gas emission reduction program, as described in ARB's Climate Change Scoping Plan (Dec. 2008), includes regulatory measures that are not intended to be adopted by ARB, as well as non-regulatory measures, pursuing a regulation-by-regulation approach would mean that some sectors or source categories may not by subject to fees while ARB-regulated sectors would have associated fees which would create inequity among the various sectors.

Downstream Alternative

ARB staff considered assessing the Fee on the ultimate consumer of products that emit greenhouse gases. Under this alternative, ARB would assess fees on residential, commercial, and industrial users of natural gas; the owners or operators of cars, trucks and other equipment that combust gasoline and diesel fuel; and the end-users of electricity. This general approach was rejected as being administratively infeasible.

For natural gas, the Fee would be assessed on residential, commercial and industrial users. Although the largest industrial users of natural gas are already reporting their greenhouse gas emissions under the Mandatory Reporting Regulation, this alternative would dramatically increase the number of points of assessment by including residential and commercial customers, increasing record-keeping and collection costs. In addition, because the largest industrial users of natural gas would already be billed for their greenhouse gas emissions through the Mandatory Reporting Regulation, this downstream alternative adds a layer of complexity in that a method would need to be developed to extract their natural gas combustion quantities from the aggregate amount of natural gas reported by the public utility gas corporations. Without this extraction of data, the largest industrial users of natural gas would be billed twice for the same natural gas.

For gasoline, the Fee could be assessed at the pump but because the amount of the fee that is required to implement AB 32 is less than one-tenth of a cent per gallon, the purchase of ten gallons would generate a fee of only a penny, excessively increasing administrative costs. ARB also considered assessing the Fee at the “rack,” formally known as the terminal rack. The rack is the location in the fuel distribution system where fuel is blended with oxygenates and other additives and then distributed to gas stations. Fuels that are imported into the state can be transported directly to racks and are therefore not accounted for at the refinery level. A fee at the rack would increase administrative burden by doubling the number of collection points – increasing the administrative burden while still being upstream of the end user.

For electricity, the Fee would be assessed at the consumer-level and would necessarily apply to all electricity consumed, whether generated in-state or out-of-state. This approach would apply the Fee to consumers of electricity without regard to whether that electricity was a source of greenhouse gas emissions or not, thereby adding an undue burden on some consumers. In addition, this option would tremendously increase the number of regulated entities, increasing administrative burden, and therefore administrative costs.

ARB chose not to pursue the downstream alternative due to the increase in administrative burden, increased record-keeping and fee collection costs, which would increase the overall cost of carrying out AB 32 mandates.

Alternatives Considered for Electricity

ARB staff considered four alternatives to assessing a fees on electricity: no fee on imported electricity with fees assessed on fuels or emissions for in-state electricity generation; assessing the fee on the suppliers of electricity-generation fuels; assessing the fee on in-state electric retail providers; and assessing the fee on both imported electricity and on fuels or emissions associated with in-state electricity generation.

No Fee on Imported Electricity with Fees Assessed on Fuels or Emissions Associated with In-State Electricity Generation – Staff considered the option of not applying the fee to imported electricity. However, this option was rejected because this would mean that sources of approximately 10 to 13 percent of California's greenhouse gas emissions would not be covered by the Fee, which would make the Fee regulation less equitable, increasing costs on remaining fee payers. Additionally, at workshops held by ARB several stakeholders asked ARB to include imported electricity if at all possible.

Assessing the Fees on the Suppliers of the Electricity Generation Fuels – ARB considered applying the Fee to fuel suppliers for both in-state and out-of-state generation facilities. However, it is not possible for fees to be applied to out-of-state suppliers of electricity generation fuels, or to use the generation facility located out of state as the point of regulation, because California does not have jurisdiction over these entities.

Assessing a Fee Solely on In-State Electric Retail Providers – Assessing a fee solely on in-state electric retail providers, based on the imported electricity they use, would require that the retail provider identify the generating facilities that are the sources of the electricity. Each generation source has a distinct emissions factor. When the source is identified, ARB can then calculate a source emissions factor and accurately determine a fee rate. However, retail providers may not be able to identify the sources of electricity purchased from marketers, even though the marketers may have that information. In such cases, the emissions factor would be unknown, and a fee could not be accurately calculated. Therefore, by solely assessing fees on retail providers, some information would be lost, reducing the accuracy of the application of the Fee. Assessing the Fee on both the retail providers and the marketers results in fewer unspecified sources of electrical generation. The recommendation by the California Energy Commission and the California Public Utilities Commission was to obtain such information from the first deliverer, which includes the marketers.

Assessing the Fees On Imported Electricity and On Fuels or Emissions Associated with In-state Electricity Generation – Staff initially proposed this approach, which is described in the ISOR. However, several commenters indicated that they believe that this approach would discriminate against imported electricity, and would violate the Dormant Commerce Clause of the United States Constitution. Regardless of whether the original approach would have been subject to challenge under the Commerce Clause, staff rejected this approach in favor of a "first deliverer" approach to electricity, to clearly treat all electricity the same, whether it is generated in-state or our-of-state.

None of the rejected alternatives would have met ARB's objectives for the regulation as well as the first deliverer approach adopted by the Board. The first deliverer approach is feasible, relatively uncomplicated to administer, and results in the broadest coverage of 85 percent of California's Statewide greenhouse gas emissions. With this approach, all regulated electricity entities are within California's jurisdiction. Furthermore, the adopted approach is unlikely to be challenged based on the Commerce Clause.

Expanding Coverage of Fee to Additional Sources
ARB staff considered expanding the Fee to cover the remaining 15 percent of greenhouse gas emissions. Staff rejected this alternative for three primary reasons. First, some of the greenhouse gas emissions that are not proposed to be covered under the Fee are fugitive emissions (such as methane emissions from dairy operations and landfills) that are difficult to accurately measure in order to assess an equitable fee. Second, some types of emission sources (such as jet fuel and kerosene) contribute a small proportion of greenhouse gas emissions, so the administrative burden of including those emissions outweighs the potential increase in revenue. Third, staff opted not to pursue a fee on high global warming potential (GWP) gases because ARB is considering developing a regulation to assess mitigation fees on high GWP gases. If the Board adopted a high GWP fee, some portion of that fee would be dedicated to program implementation costs, and the high GWP mitigation program would be administratively self-supporting.

II. MODIFICATIONS MADE TO THE ORIGINAL PROPOSAL

The following discussion addresses all substantive modifications made to the originally proposed regulatory text. It does not include modifications to correct typographical and citation errors, numbering errors, grammar errors, or the rearranging of sections and paragraphs for structural improvements, nor does it include all of the minor revisions made to improve clarity.

Summary of Proposed Modifications in the First Notice of Public Availability of Modified Text and Supporting Documents and Information" included the following modifications:

A. Modifications section 95201. Applicability

In response to public comments regarding imported electricity, the regulation was modified to calculate the fee for in-state and imported electricity in the same manner by using the "first deliverer" approach now specified in section 95201(a)(4). Modifications and clarifications were also made in other sections of the fee regulation to implement this approach, as discussed below.

Changing to the "first deliverer" approach for electricity means that changes were also needed in how fees are assessed on natural gas and coal to avoid "double charging" electrical generating facilities that will now be paying fees on the electricity that they generate from natural gas and coal. Accordingly, the regulation was modified to exempt payment of fees on natural gas or coal that is delivered to or consumed by electrical generating facilities.

Using the “first deliverer” approach also means that modifications were made to the point of regulation as it applies to refinery process emissions. Previously, the point of regulation for by-products of the refining process (petroleum coke, catalyst coke and refinery gas) was at the refinery. However, the refinery by-products responsible for process emissions may be used as fuel at electrical generating facilities. Therefore, the regulation was modified to treat these by-products as separate fuels and feedstocks, and the point of regulation was moved to the facility that combusts or consumes these fuels. As with natural gas and coal, petroleum coke, catalyst coke and refinery gas used at electricity generating facilities are exempt from the fee. This modification eliminates the potential for “double charging” with respect to these fuels.

Additional modifications were also made with respect to the natural gas sector. The regulation was modified so that the fee will now apply to publicly-owned natural gas utilities, as well as public utility natural gas corporations. Also, the point of regulation for natural gas delivered by interstate natural gas pipelines was modified. The originally proposed regulation assessed the fee on owners or operators of interstate natural gas pipelines. Due to interstate commerce concerns and because interstate pipeline owners or operators may have difficulty passing along the cost of the fee to end users, ARB shifted the point of regulation to the end users of natural gas delivered by interstate pipelines. Owners and operators will still be required to report the end users to which they supply natural gas, however, so that ARB will know the identities of the end users that are required to pay the fee.

To be consistent with the timing of data submittal for mandatory reporting, section 95201(c) was modified. Data from the most recent calendar year for which the mandatory reporting data verification process is completed will be used to determine the fees, except for fiscal year 2010-11. Data on emissions from 2008 will be used for fiscal year 2010-11.

B. Modifications to section 95202. Definitions

A number of definitions were added or modified. Many of the new or modified definitions are necessary to implement the “first deliverer” approach for the electricity sector. Definitions were also added or modified to improve clarity and to ensure that the terms used in the fee regulation are consistent with those used in ARB’s Mandatory Reporting Regulation.

C. Modifications to section 95203. Calculation of Fees

Section 95203 specifies how the fees are calculated. Two modifications were made to section 95203(a). The first modification specifies that the debt (i.e., the loans obtained by ARB to carry out AB 32) will be repaid at the rate of $27 million for each of fiscal years 2010-11, 2011-12, and 2012-13, and the remaining debt will be repaid in fiscal year 2013-14. This modification is necessary because many different repayment schedules are possible and the originally proposed regulation did not specify the amount of the debt that would be repaid in each fiscal year. The modified language ensures that roughly equal amounts of the debt would be repaid in each of the first three years with the remainder paid off in the fourth and final year of repayment. The modified language does not identify the exact amount that will be repaid in fiscal year 2013-14, because the exact amount is unknown at this time due to variations that may occur due to timing of the loan payments and interest rates in the previous fiscal years.

The second modification to section 95203(a) clarifies that if ARB does not expend or encumber the full amount authorized by the California Legislature for any fiscal year, the amount not expended or encumbered in that fiscal year shall be carried over and deducted from the next year's calculation of the Total Revenue Requirement (TRR). While ARB has always intended to do what this new language requires, the originally proposed regulation did not clearly state this. The new language uses the word "encumber" because ARB may enter into contracts where all of the work is not performed in the fiscal year that the contract is signed. Some of the payments on such contracts may not be made until future fiscal years even though ARB is legally obligated to pay the full monetary amount specified in the contract. In these limited situations, this amount should not be carried over and deducted from next year's calculation of the Total Revenue Requirement.

Section 95203(b) was modified to reflect the shift to the "first deliverer" approach for the electricity sector. This shift required identifying the individual fuels used in calculating emissions at electricity generating facilities. Because the fees typically apply to fuels or emissions, it was necessary to exclude fuels or emissions associated with electricity generation to avoid potential "double charging." Due to the shift to the "first deliverer" approach, it was also necessary to modify other related subsections in the regulation.

Section 95203(b) was modified to be consistent with the use and meaning of the term "Quantity Refinery Gas Adjusted" (Qrga) as it is used in 95204(f)(4). Subsection (d) was modified to reflect the emission factors from the additional individual fuels, and subsections (e) and (f) were modified to reflect a change from imported electricity to all (imported and in-state) electricity. Subsection (f)(1) was clarified to identify precisely which emissions would be used in calculating emission factors for specified sources of electricity, and subsection (g) was modified to be consistent with subsection (f).

Subsection (i) was added because, to accommodate the change to the first deliverer approach, it is necessary to apply the fee to each fuel specifically. Subsection (j) was modified to reflect the change from imported electricity to all delivered electricity to be consistent with the changes to section 95201.

Various other minor and non-substantive clarifications were also made to section 95203.

D. Modifications to section 95204. Reporting and Recordkeeping Requirements

Subsection (a) was clarified and modified to be consistent with the changes to section 95104(e) that are described below in “I. Modifications to section 95104(e).”

Subsection (b)(1) was modified to ensure that ARB sends the fee invoice to the party responsible for payment.

Subsection (c) was modified to reflect the timing changes that are described below in “E. Modifications to section 95205. Payment and Collection.”

Parts of subsection (d) were modified to account for the shift to the “first deliverer” approach for electrical generating facilities, and to avoid the potential for “double-charging” of fee payers. Subsection (d)(1) was modified to add the of publicly-owned natural gas utilities as a fee-paying entity. Subsection (d)(2) was modified and clarified to address the change in the point of regulation for natural gas delivered by interstate pipelines. Subsections (d)(3) and (d)(4) were added to account for the change in the point of regulation for natural gas delivered by interstate pipelines directly to end users.

Subsection (f)(4) was modified to be consistent with 95203(b) and to avoid potential for “double-charging” at refineries, to be consistent with 95203(i), and to account for the shift to the “first deliverer” approach for electrical generating facilities.

Subsection (g) was modified to reflect the change to first deliverer for electricity and to remove redundant language.

Subsection (h) was deleted to be consistent with 95203(i). Since the fee would apply to specific fuels at their point of use, these fuels would no longer be counted as process emissions at the refinery level.

New subsection (h) (subsection (i) in the originally proposed regulation) was edited for clarity.

E. Modifications to section 95205. Payment and Collection

Section 95205(a) of the originally proposed fee regulation specified that by February 1, 2010, the Executive Officer would provide a written fee determination notice to each affected entity of the amount due for 2010. Section 95205(b) further provided that beginning in 2011, the Executive Officer would send out fee determination notices no later than 30 days after the end of each calendar year of the amount due for the current calendar year. An additional modification to this section was added that relieves ARB of the obligation to send a fee determination to affected entities whose fee, as calculated pursuant to section 95203, would be equal to or less than $50 per year. This new language avoids an otherwise fiscally inefficient process for ARB and the fee payer.

Section 95205 was modified to specify that beginning in fiscal year 2010-11, and thereafter, fee determination notices will be provided to each affected entity within 30 days after the State Budget has been signed by the Governor. This modification shifts the date of fee collection from spring to fall for 2010 and each year thereafter. Once the budget is passed each summer and the Required Revenue is known, ARB will send out timely invoices as soon as possible, without delaying action until the next calendar year.

These provisions were modified because due to delays in the administrative process the fee regulation will not become legally effective by February 1, 2010 as assumed originally when the Staff Report was published. In addition, the modifications allow the state to receive funds needed to pay for the ongoing implementation of AB 32 earlier in the fiscal year, thereby avoiding potential cash flow problems at ARB and the other state agencies that will receive some of the fee revenues.

F. Modifications to section 95206. Enforcement

No modifications were made to section 95206.

G. Modifications to section 95207. Severability

Subsection (b) was added to ensure that ARB will be able to collect the full amount of fees necessary to carry out AB 32, in the event that any fee payer or group of fee payers is determined to be ineligible, by a court of law or statute, to pay the fees imposed by the regulation. If this occurs, subsection (b) specifies that the remaining fee paying entities are responsible to pay the entire amount of the fees to make up for the deficit. This is accomplished by using the formula contained in section 95203 to calculate the fees, without including the emissions associated with the ineligible fee payer or group of fee payers in the calculation.

H. Modifications to section 95104(e)

Section 95104 is part of ARB's Mandatory Reporting Regulation. Staff's original proposal was to modify section 95104 by adding a new subsection (e), which would require that ARB's web-based Greenhouse Gas Reporting Tool be used to electronically submit all data reports required by the Mandatory Reporting Regulation and the Cost of Implementation Fee Regulation. In response to public comments from the local air districts, proposed new subsection (e) was modified to allow the use of any other reporting tool approved by the Executive Officer, if the other reporting tool would guarantee transmittal and receipt of data required by ARB's Mandatory Reporting Regulation and Cost of Implementation Fee Regulation.

<u>Additional Documents Added to the Rulemaking Record</u>
During the comment period for this regulatory action, some commentors asserted that the rulemaking record did not contain sufficient information to substantiate the expenditures and costs incurred by ARB to implement AB 32. In response, staff added several documents to the rulemaking record in accordance with Government Code

sections 11346.8(d) and 11347.1. In interest of completeness, staff also added documents to the record supporting other aspects of the proposed action, such as the regulatory approach used for the electricity sector and for producers and importers of gasoline and diesel fuels. AB 32 related expenditures for contracts and equipment were updated based upon more current information, which is also now included in the record. The complete list of documents added is attached to the first 15 day Notice of Modifications.

The Second “Notice of Public Availability of Modified Text and Supporting Documents and Information” included the following modifications:

J. Modifications to section 95202. Definitions

In response to public comments: section 95202(a)(10)(A) was modified to correct a typographical error; section 95202(a)(11) was modified to clarify the definition and make it consistent with other definitions including section 95202(a)(68); and section 95202(a)(71) was modified to make the definition of “Operational Control” identical to that in the Mandatory Reporting Regulation for clarity purposes.

K. Modifications to section 95204. Reporting and Recordkeeping Requirements

Section 95204(b)(3) was modified in response to comments to correct the reference for certification purposes to reflect the fee regulation instead of the Mandatory Reporting Regulation. The words “AB 32 Cost of Implementation Fee Regulation” were also added for clarity purposes.

III. SUMMARY OF COMMENTS AND AGENCY RESPONSE

ARB received comments during an extended public review period in response to the May 8, 2009 public hearing notice. The following table depicts the identification code that correlates directly with the web ID posting, the date of post, an acronym or affiliation, and the commenter, the extended public comment period, as well as written and oral testimony provided at the June and September public hearings.

General Comments

Comment letters of support were submitted throughout the public comment period. ARB acknowledges and appreciates the letters and testimony at the Board hearings.

The following table shows an alphabetical listing of all commenters.

Commenter Abbreviation	Comment Number*	Commenter/ Testimony
A&K	22	Kahl, Evelyn; Alcantar & Kahl, LLP; Independent Producers
ABat	36	Batteate, Albert

AmLung	BHJ-O14 BHS-O16	Homes-Gen, Bonnie; Callahan, Colleen; American Lung Assoc.
ASte	41	Stein, Andrew
BAAQMD	BHS-O17	Bateman, Brian; Bay Area Air Quality Management District
BCed	35	Cedar-blade, Brenda
BFel	42	Fell, Bill
BFox	55	Fox, Bernie
BP	11 FF18	Moran, Ralph J., BP America Inc.
CaIPL	BHS-O3	Druffel, Allis; CA Interfaith Power And Light
CalC	BHJ-O5	Erika Frank, Cal Chamber
CAPCOA	57	Zeldin, Mel, California Air Pollution Control Officer’s Assoc.
CBEA	48	Malinowski-Ball, Julee, California Biomass Energy Alliance
CBPA	BHS-O9	Priest, Todd; CA Business Properties Association
CCA	BHS-O22	Schlageter, Martin; Coalition for Clean Air
CIOMA	BHS-O11	McKeeman, Jay; CA Independent Oil Marketers Assoc.
CIPA	BHJ-O11 BHJ-W3	Plotkin, Norman, California Independent Petroleum Assoc.
CMA	20	Hansen, Stephen, Cal. Med. Assn.
CMar	FF2	Mariotta, Claudio
CMTA	BHJ-O12	Rothrock, Dorothy; CA Manufacturers and Technology Assoc.
CMUA	BHJ-O13 BHJ-W4	McLaughlin, Bruce, California Municipal Utilities Assoc.
CPUC	24	Fitch, Julie A., California Public Utilities Commission
CRRC	FS5	Ryan, Paul; California Refuse Recycling Council
CSE	BHS-O23	Marquez, Jesse; Coalition for Safe Environment
CSte	FF4	Stelck, Craig
ElPaso	2	Richardson, Craig, El Paso Nat Gas Co & Mojave Pipeline Co EPNG and Mojave Pipeline Co
EnvE	39	Epstein, Bob, Environmental Entrepreneurs
EPUC	46	Srinivasan, Seema, Alcantar & Kahl, LLP; Energy Producers and Users Coalition and Cogeneration Association of California
Fam	16	Goldsborough, Susan, Families for Clean Air AB 32
Flee	12	Frank, Lee
GBro	33	Brownton, Glenn
GdeL	29	de Long, Gale
IEP	43	Riesenhuber, Amber, Independent Energy Producers Assoc.
JBian	28	Bianchi, Jim
JCor	10	Cortez, Jan
JDod	FS2	Dodds, John
JHan	40	Hancock, Jim,

JHan	FF6	Hancock, Jim, AB 32 Bad for California
JLoc	18	Lochner, Jan
JSch	25	Schell, Jon
KBig	56	Biggs, Kenneth
KernOil	47 W4	Frost, Jerry, Kern Oil & Refining Co.
KernRiv	27 BHJ-W5 FF8	French, Patricia M, Kern River Gas Transmission
KPer	21	Perez, Kirsten
KWal	FF1	Wallace, Kirstin
LACSD	BHS-O1	Caponi, Frank; Los Angeles County Sanitation Districts
LADWP	34	Parsons, Cindy, Los Angeles Department of Water & Power
LPfe	FF3	Pfeffinger, Landrus
LUng	23	Ungar, Luci
MBla	1	Black, Michael
MDen	15	Denton, Michael
MID	31 44 FF9	Warren, Joy, Modesto Irrigation District Modesto Irrigation District
MidAm	BHJ-O4	Cathy Woollums, Mid-American Holdings Company
MReb	7	Reback, Mark
MSR	FF15	Hopper, Martin, M-S-R Public Power Agency
MTsu	6	Tsutsui, Michelle, et al
MWD	30 FF12-MWD	Stites, Catherine M and Lambeck, Jon; Metropolitan Water District of Southern CA
NCPA	38 50 BHJ-O6 BHS-O6 FF14	Berlin, Susie; Northern California Power Agency (NCPA and MSR Public Power Agency)
NRDC-1	51	Grenfell, Kristin, Natural Resources Defense Council; Derek, Walker, Environmental Defense Fund; Magavern, Bill, Sierra Club California; Bautista, Nidia, Coalition for Clean Air; Holmes-Gen, Bonnie, American Lung Association in California; Busch, Chris, Center for Resources Solutions; Katz, Andy, Breathe California; Del Chiaro, Bernadette, Environment California & Environment California Research & Policy Center
NRDC-2	59 BHJ-O3	Grenfell, Kristin Grenfell, Long, Noah, Natural Resources Defense Council; Holmes-Gen, Bonnie, American Lung Association of California; Busch, Chris; Center for Resource Solutions; Vander Sluis, Matt, Planning and Conservation League; Del Chiaro, Bernadette, Environment California; Ansar, Jasmin, Union of Concerned Scientists;

		Chabot, Warner, California League of Conservation Voters; Goldberg, Lenny, California Tax Reform Association; Prasad, Shankar, Coalition for Clean Air; Druffel, Allis, California Interfaith Power and Light; Magavern, Bill, Sierra Club; Walker, Derek, Environmental Defense Fund; Sandler, Mike, Climate Protection Campaign
NTel	FS1	Tellier, Nils
PacC	BHJ-O8 FF5	Brown, Andy; Davis, Kyle, PacifiCorp
PAnd	37	Andersen, Paul
PCL	BHJ-O10	Fink, Art; Planning and Conservation League
PGE	FF10	Busterud, John, Pacific Gas and Electric Company
Pills	61 62 BHS-O4 BHS-O8	Sommer, Scott; Hansen, John, Pillsbury Winthrop Shaw Pittman LLP
RBer	8	Berg, Ricardo U.
RBra	9	Brandin, Robert
RVin	26	Vinetz, Robert
RZam	BHS-O19	Zambrano, Rosa
SBA	BHS-O5	Rozsa, John; Stonebridge Assoc.
SCAQMD	BHJ-W2 BHJ-W7 BHJ-O1 BHJ-O2 BHS-O13	Whynot, Jill
SCE	52 FF11	McCawley, Joe, Southern California Edison
SCPPA	5 53 60 BHJ-W1 BHJ-O7 BHS-O20 FF16	Pedersen, Norman; Mitchell, Lily; Southern California Public Power Authority
SDAPCD	BHS-O12	Kard, Robert; San Diego Air Pollution Control District
Sempra	FF13 FS6	Rasberry, Tamara, Sempra
SierraC	3 BHJ-O15 BHS-O10 BHS-O14	Stearns, Geoffrey, et al; Magavern, Bill; Stewart, Jim; Sierra Club
SJAPCD	BHS-O7	Sadredin, Seyed; San Juan Air Pollution Control District
SMAQMD	58	Greene, Larry; Sacramento Metropolitan Air Quality Management District
SWICS	54	White , Charles, Solid Waste Industry for Climate Solutions

TBat	FS3	Battle,Thomas
TdeG	13	de Guzman, Tom
TMea	4	Meagher, Thomas
UCS	BHS-O18	Carney, Chris; Union of Concerned Scientists
VICA	BHS-O21	McMillan, Jackie; Valley Industry and Commerce Assoc.
WAPA	FS4	Kawamura, Koji; Western Area Power Administration
WBar	32	Barrett, Will
WJam	BHS-O15	James, Wendy; (representing several public interest groups)
WKus	14	Kuschner, Ware, Stanford University
WPTF	FF7	Breidenich, Clare, Western Power Trading Forum
WSPA	17 45 BHJ-O9 BHS-O2 FF17	Mason, Michaeleen, Reheis-Boyd, Catherine, Western States Petroleum Association
WWei	19	Weikel, Wendy

Comment Numbering*

#	45 Day Comment Period
BHJ-O#	Board Hearing, June 25, 2009, Oral Testimony
BHJ-W#	Board Hearing, June 25, 2009, Written Comments
BHS-O#	Board Hearing, Sept. 25, 2009, Oral Testimony
FF#	First 15 Day Changes/Modifications
FS#	Second 15 Day Changes/Modifications

*The comment numbers (#) correspond to the order of submission and are posted on ARB's Web site (with the exception of oral comments at the Board hearings), at: [http://www.arb.ca.gov/lispub/comm/bccommlog.php?listname=feereg09].

The Initial Statement of Reasons (ISOR) staff report for this regulatory item was published on May 8, 2009, opening the 45-day comment period. Comments received during this time are indicated by their comment number.

At its June 25, 2009 Board Hearing, the Board received oral testimony (indicated by BHJ-O#) and written testimony (indicated by BHJ-W#).

At the June 25, 2009 Hearing, the Board also continued consideration of the item until the September 25, 2009 Board Hearing. Written comments received between the June and September Board Hearings are part of the 45-day comment period.

At its September 25, 2009 Board Hearing, the Board approved the regulation. Oral testimony from this hearing is indicated by BHS-O#. Written testimony from this hearing are also part of the 45-day comment period.

The Responses to Comments are organized in order of comment period. That is, comments from the 45-day comment period are followed by written and oral comments from the June Board Hearing. Within each comment period, the comments are NOT necessarily organized by comment number. Instead, major comments appear first, and comments requiring no response appear at the end of the section.

For the 45 day comment period, comments and responses from September 2009 are presented first because they are the comments on the proposal approved by the Board. Many parties offered more detailed comments during June 2009, and in some cases more detailed Agency Responses appear in responses to the June 2009 comments.

Comments that require multiple responses are generally broken up to individual comments and responses and numbered as X.1, X.2, etc.

Footnotes in *Agency Responses* appear as footnotes. Footnotes in *Comments* appear at the end of each comment.

A. 45-Day Comments

Comment 53: SCPPA, September 3, 2009

Note: This is SCPPA's comment on the final proposal. SCPPA's June Comments (Comment 5 SCPPA) address many of the same points, but in greater detail. Because of this, many of staff's more detailed responses appear in Comment 5 SCPPA.

53.1 Comment: The staff's proposal to "treat both in-state and imported electricity the same" is clearly intended to address a concern about the legality of the May 8, 2009 proposal to assess an administrative fee on electricity imported into California from other states but not on electricity generated in California. Such discriminatory treatment may violate the Commerce Clause of the United States Constitution. See SCPPA June 18, 2009 Comment at 8-14.

However, the proposal to "treat both in-state and imported electricity the same" does not address other concerns about applying an administrative fee to imported electricity. One of these additional concerns is that applying an administrative fee on imported electricity would be inconsistent with Health & Safety Code ("HSC") section 38597, the section that authorizes the ARB to assess administrative fees. That section specifically provides for fees to be paid by sources of greenhouse gas emissions. Imported electricity is not a source of emissions. See SCPPA June 18, 2009 Comment at 4-7. Another concern is that assessing the fee on imported electricity "at the first point of delivery of electricity" would be preempted under the Federal Power Act. See SCPPA June 18, 2009 Comment at 14-16. Insofar as SCPPA discussed these additional concerns in its June 18, 2009 comment, SCPPA does not address them further here, but SCPPA urges the Board to consider the issues.

Agency Response: As noted by the commenter, at the August 25, 2009 workshop staff explained the plan to modify the regulation and adopt a first deliverer approach in order to treat in-state and imported electricity the same. A description of the first deliverer approach is provided in our response to Comment 5.1 SCPPA, and further details on the treatment of electricity are provided in our response to Comment 5.5 SCPPA. With the modifications approved by the board, there is no discriminatory treatment, and no Commerce Clause issue, as explained in the responses to Comments 5.13 to 5.18 SCPPA.

With regard to SCPPA's concerns about HSC section 38597 and the question of sources of greenhouse gas emissions (GHGs), gasoline, diesel, natural gas and coal are all sources of GHG emissions when combusted as fossil fuels.

As discussed on Page 35 of the ISOR:

> Health and Safety Code section 38597 provides that ARB may adopt a regulation imposing fees on "sources of greenhouse gas emissions" regulated pursuant to

> AB 32. The proposed regulation imposes fees on upstream suppliers of natural gas and transportation fuels. Some stakeholders have argued that these upstream suppliers are not “sources” of greenhouse gas emissions within the meaning of section 38597, but that “sources” are the end users who actually burn the natural gas and transportation fuel (e.g., individual business, households, motorists, etc), and thereby directly emit greenhouse gases into the atmosphere. ARB staff does not agree with this argument. Staff believes that the proposed regulation is consistent with section 38597 for the following reasons. First, some of the entities on which fees are imposed are clearly “sources” of greenhouse gas that are directly emitted into the atmosphere. These entities include refineries and cement producers (who generate process emissions from their operations) and facilities that burn coal. Stakeholders have not suggested otherwise.
>
> Second, to address emissions from natural gas and transportation fuels, the proposed regulation is simply an administrative mechanism for efficiently collecting fees on downstream “sources” of greenhouse gas emissions based on the assumption that the costs of the fees will be passed on to downstream end users who actually combust the natural gas and transportation fuel. Gasoline and diesel fuels are burned by millions of individual motorists, as well as millions of individuals who operate small combustion sources such as construction and farm equipment, water pumps, lawn mowers, chainsaws, stoves and water heaters in homes, boats, off-highway all-terrain vehicles, snowmobiles and many others. Equipment that burns natural gas, gasoline, or diesel fuel is owned and operated by virtually every household and business in California. It would be inefficient, impractical and overly burdensome to impose fees on all of the individuals who own or operate such equipment. To do this, a fee would need to be imposed on essentially every person who resides in California. [Footnotes omitted.]

ARB believes that imported electricity is a “source” of greenhouse gas emissions because it is California’s demand for, and use of, that imported electricity that causes greenhouse gases to be emitted. California’s demand for imported electricity results in out-of state power plants burning fossil fuels to supply the demand. In some cases, California utilities obtain needed fossil electricity through the electricity market, from whatever power plants are available to generate power at the time of need. Historically, in order to meet this need for electricity, California utilities have invested in fossil fuel power plants outside California’s borders. A number of the large, high-emitting coal plants that serve California electricity demand are either partially owned by California utilities or California utilities have a long term contractual share of the output of the power plant.

For example, six California utilities (Los Angeles Department of Water and Power, City of Anaheim, City of Riverside, City of Pasadena, City of Burbank, and City of Glendale) joined with 23 Utah entities and entered into the IPP Membership and Study agreement, to jointly invest in a coal power plant to serve the power needs of their citizens and customers[1]. The Scoping Plan, Appendix C, pages C95-C96, discusses the specific California utilities that either have ownership shares or long term contracts with high-emitting power plants, and lists the power plants associated with each utility (ARB Scoping Plan, Dec. 2008). If it were not for the demand in California for imported electricity, the power plants serving that demand may not have been built, and would in any event not be emitting the quantity of greenhouse gases that they do now to serve California's demand.

SCPPA's concerns regarding the Federal Power Act are addressed in our response to Comment 5.19 SCPPA.

53.2 Comment: The staff's White Paper also fails to address other issues that were raised in SCPPA's June 18, 2009 comment on the ISOR. First, the staff does not propose any modifications to the proposed regulation to assure that the administrative fee would not be applied to arrangements in which electricity is transmitted through California under buy/sell arrangements without being consumed in California.

SCPPA proposes that the proposed regulation be modified to assure that there will be no imposition of the administrative fee on electricity that is wheeled through California under buy/sell arrangements…

…SCPPA recommends that the definition of "imported electricity" as proposed by the staff be revised to assure that the administrative fee will not be applied to electricity that is transmitted through California under arrangements for the simultaneous purchase and sale of electricity. There are several ways in which electricity may be transmitted through California from one state to another without being consumed in California. The electricity might be wheeled through California without title passing to the California retail provider that provides the transmission service. In this case, the electricity that is transmitted through California is reported as "power wheeled through California" rather than as an import and export. The ARB's Mandatory Reporting Regulation provides:

(C) **Power Wheeled Through California**. When reporting power transactions involving imports into California or exports out of California, the retail provider or marketer shall exclude the amount of power imported into California that terminates in a location outside of California, as measured at the first California point of delivery.

17 Cal. Code of Regs. §95111(b)(1)(C).

Consistently with the Mandatory Reporting Regulation, the definition of "imported electricity" in section 95202(a)(45) of the proposed administrative fee regulation

[1] Intermountain Power Agency. *About Intermountain Power Agency. IPA Intermountain Power Agency, Energy for Today & Tomorrow*. [http://www.ipautah.com/about/]. Web accessed 3 Dec. 2009.

provides that power that is wheeled through California shall not be considered to be “imported electricity” within the meaning of the regulation:

“Imported electricity” means electricity that is generated outside of California and delivered into California. Imported electricity does not include power wheeled through California, which is power that is imported into California that terminates in a location outside of California.

ISOR at 73. Thus electricity that is “wheeled through” California by a retail provider without the retail provider taking title to the electricity at any point is excluded from being reported as “imported power” under the Mandatory Reporting Regulation, and the electricity would be excluded from being “imported electricity” for purposes of assessing the administrative fee.

A second way in which electricity may be transmitted through California without being consumed in California is through a simultaneous purchase and sale or “buy/sell” transaction. In such an arrangement, a retail provider or marketer might buy electricity from a party at a first point of delivery in California, transmit the power through California, and simultaneously sell the electricity to the same or even a different party at a different delivery point outside of California. Such transactions are sometimes called “virtual transmission” because they are functionally equivalent to wheeling power.

Under the May 8, 2009 proposed administrative fee regulation, it appears that “wheeling through” under a buy/sell arrangement would be exposed to the administrative fee even though they are the functional equivalent of wheeling and the electricity is not consumed in California. Section 95201(a)(5) of the proposed administrative fee regulation provides that the fee applies to “a retail provider or marketer that is a purchasing/selling entity at the first point of delivery in California of imported electricity.”

The ARB’s mandatory reporting staff has provided oral guidance that for purposes of reporting under the Mandatory Reporting Regulation, all transactions that are the functional equivalent of wheeling power through California should be excluded from being reported as “imported electricity.” Under this oral guidance, electricity that is transmitted through California under a buy/sell arrangement would not be reported as imported electricity. Likewise, electricity that is transmitted through California under a buy/sell arrangement should be excluded from application of the administrative fee.

However, proposed section 95201(a)(5) appears to compel application of the fee in situations in which a retail provider or marketer transmits power through California under a buy/sell arrangement. To avoid any confusion, SCPPA recommends that the definition of “imported electricity” in the proposed administrative fee be modified so it will be clear that all power that is transmitted through California will be excluded from being treated as imported electricity for purposes of applying the administrative fee. SCPPA's proposed modification of the definition in section 95202(a)(45) of the proposed regulation is as follows:

> "Imported electricity" means electricity that is generated outside of California and delivered into California. Imported electricity does not include power wheeled through California, which is power that is imported into California that terminates in a location outside of California <u>regardless of whether the import into California and simultaneous export to a location outside of California is performed without title passing to the retail provider or marketer that provides the wheeling service or is performed through a buy-sell arrangement in which title does pass to the retail provider or marketer</u>.
> SCPPA June 18, 2009 Comment at 18.

Agency Response: The commenter alleges that "The staff's White Paper also fails to address other issues that were raised in SCPPA's June 18, 2009 comment on the ISOR." The commenter then brings up several issues. In this response, we respond to the first issue raised; other issues are dealt with separately below.

We agree that the fee should not be applied to wheeling arrangements, to virtual wheeling, or to simultaneous buy/sell arrangements that essentially amount to virtual wheeling, and under which the imported electricity is not meaningfully consumed in California. See also our response to Comment 5.21 SCPPA.

Staff modified the regulation by expanding the definition of imported power to exclude all wheeled power. The definition now reads:

> "Imported electricity" means electricity that is generated outside of California and delivered to a first point of delivery into California with a final point of delivery in California. Imported electricity does not include:
>
> (A) Power wheeled through California, which is power that is imported into California that terminates in a location outside of California; or
>
> (B) Power transactions in which imported power is simultaneously exchanged for exported power.

Part B above specifically excludes power transactions in which there is a simultaneous exchange. Thus, when electricity comes into California under the buy portion of a buy/sell arrangement, and the same amount of electricity leaves under a simultaneous sell transaction, then that electricity is not imported electricity for the purpose of the fee regulation. Informal discussions with SCPAA have led to staff's understanding that the above definition resolves SCPPA's concerns on this point.

53.3 Comment: Second, the staff's White Paper fails to propose any modifications to the proposed regulation to avoid the fee being assessed on both the importation of electricity and the subsequent exportation of electricity under economic exchange agreements.

SCPPA proposes that the proposed regulation be modified to... avoid the imposition of the fee on both sides of an exchange arrangement.

…**The Proposed Regulation Should Be Modified so that the Administrative Fee Would Not Be Applied to Both the Import Side and the Export Side of Energy Exchange Arrangements.** Emissions associated with electricity that is imported under an energy exchange agreement should not be subject to the administrative fee to the extent to which the emissions are offset by the emissions associated with subsequently returned electricity that are subject to the fee.

Agency response: We disagree with SCPPA's proposal. We make a distinction between simultaneous exchanges, in which the import part of the exchange is not consumed in California, and non-simultaneous exchanges. See our response to Comment 5.22 SCPPA for details. SCPPA makes a number of comments in support of its position; we respond to those below.

53.4 Comment: Energy exchanges are socially beneficial

As SCPPA explained in its June 18, 2009 comment, energy exchanges are important tools that are used by retail providers to reduce the cost of electricity for the benefit of California electricity consumers. Exchanges often involve counterparties that are located outside of California in, for example, the Pacific Northwest ("PNW"). It might be more costly for a California party to generate electricity at a time when it is less costly for the PNW party to generate electricity. Conversely, it might be less costly for a California party to generate electricity when generation is more costly for the PNW party.

An exchange arrangement enables the PNW party to generate when its costs are lower and permits the California party to generate when its costs are lower. The result is a more efficient use of society's generation resources. The increase in efficiency benefits society as a whole.

Thus, economic exchange agreements should be encouraged by policy makers. They should certainly not be discouraged.

Agency response: We do not disagree that energy exchanges may be socially beneficial, however this comment does not directly address provisions of the regulation. However, as explained in the response to Comment 5.22 SCPPA, we believe it is unlikely that this fee regulation would discourage energy exchanges.

53.5 Comment: The Proposed Administrative Fee Regulation Could Discourage Socially Beneficial Energy Exchanges.

Unfortunately, as proposed by the staff, the administrative fee regulation could discourage socially beneficial exchange arrangements by assessing the administrative fee on both the import and export legs of exchange transactions. An administrative fee would be assessed when a California party imports electricity under an exchange arrangement from, for example, the PNW. An additional fee would be assessed on electricity that is generated in California and returned at a later time to the out-of-state exchange partner.

Agency response: Our response to Comment 5.22 SCPPA explains why we believe that the fee will not discourage socially beneficial exchange agreements, and why there is no "additional fee" on electricity generated in California. As explained in that response, electricity cannot be stored and must be consumed virtually simultaneously with its generation.

53.6 Comment: It would be both unwise public policy and unfair to charge an administrative fee twice by charging the fee on the imported electricity and also charging the fee on the returned electricity. The fee should be charged only once, not twice. If the fee is charged on the emissions associated with the in-state generation of the returned electricity, those emissions should be subtracted from the emissions associated with the imported electricity in computing the fee on the imported electricity.

Agency response: The commenter appears to misunderstand the staff proposal. There is no case of the administrative fee being charged twice on the same electricity. In the case cited by the commenter, the fee is charged once to the power plant within the state of California for the emissions that occur upon electricity generation at the power plant in California.

With a non-simultaneous exchange, there is a separate event in which, at some other time, a fossil fuel electricity generating facility emits GHGs to produce power that is imported into California under the terms of a non-simultaneous exchange agreement. That second emissions event is necessary to serve the needs of California consumers, and produces electricity for consumption in California. Thus, there are two fees charged pursuant to two emitting events, at two separate times, that both produce emissions that are part of the total of California statewide emissions.

53.7 Comment: Adopting a single charge for exchanges would be consistent with AB 32 policy.

Adopting a single charge for exchanges instead of a double charge would be consistent with the AB 32 policy of covering both in-state emissions and emissions associated with imported electricity. Consider what happens functionally in an economic exchange. Typically, if a retail provider in, for example, Oregon has a kilowatt hour of demand in its service territory, the retail provider needs to produce a kilowatt hour to meet that demand, and the kilowatt hour must be produced at the instant of demand. Likewise, if a retail provider in California has a kilowatt hour of demand, the retail provider needs to produce a kilowatt hour to meet that demand, and the kilowatt hour must be produced at the instant of the demand.

All that happens under an exchange arrangement is that the timing of generation is changed so that instead of each retail provider being required to generate electricity at precisely the same time that demand occurs in its service territory, it can generate electricity at a different time when it is cheaper for it to generate electricity. Thus, an exchange arrangement permits each retail provider to maximize the efficient use of generating resources by generating electricity non-coincidentally with demand in its service territory instead of generating coincidentally with demand. Even though the timing of generation is changed so that generation occurs at a time that is non-coincidental with demand, each retail provider still produces only one kilowatt hour of electricity to meet one kilowatt hour of demand in a typical exchange situation.

Imposing a single charge on exchanges would recognize that only one kilowatt hour of electricity is generated in California or is imported into California to meet a kilowatt hour of demand in California. Consistent with AB 32, the administrative fee would cover in-state emissions and emissions associated with imported electricity *with recognition that some generation occurs at a moment that is non-coincidental with demand as a result of an exchange arrangement being in place*.

Agency response: There is no case of the administrative fee being charged twice on the same electricity. In fact, the commenter shows why it is appropriate under AB 32 to charge the fee on both parts of a non-simultaneous exchange, and why such application of the fee is not a double charge. To better elucidate this point, we use the commenter's example. If Oregon has a kilowatt hour of demand, then generation somewhere must supply that need. If that need is supplied from a fossil fuel power plant in California, the ensuing emissions are subject to the fee.

In sum, it is important that a fee be charged both on the emissions from all emitting California power plants (whether the electricity is used in or out of state) and also on the emissions from fossil power plants out of state that emit in order to produced electricity consumed in California.

53.8 Comment: Adopting a double charge leads to absurd results. If California were to apply administrative fees on both the import leg and the return leg of energy exchanges and, for example, Oregon were to do the same thing, the result would be absurd as well as unjust. Two kilowatt hours would be produced to meet two kilowatt hours of demand, one in California and one in Oregon. However, *four* charges would be assessed on exchange electricity, two by Oregon and two by California. Regulations that have absurd as well as unjust consequences should be avoided.

Agency response: Oregon does not currently assess greenhouse emissions fees on electricity from power plants in Oregon, nor on imported electricity. Only California charges fees on greenhouse gas emissions from electricity and we are not aware of any plan of Oregon to do so. As discussed above, when this regulation is implemented, there will be no double charges.

53.9 Comment: SCPPA Has Recommended that the Mandatory Reporting Regulation Be Amended to Permit Reporting of Exchanges.
In order to avoid the unfair double imposition of administrative fees on exchanges of electricity, SCPPA has recommended to the staff that the ARB's Mandatory Reporting Regulation be amended to permit the reporting of exchanges as a separate category of transactions. Specifically, SCPPA has recommended to the staff that section 95111(b)(1)(A) of the Mandatory Reporting Regulation be modified so as to read as follows:

> 9. **Energy Exchanges between California and Out-of-State Entities.** ~~Specify~~ Report energy exchanges that involve importing and exporting electricity to and from California by counterparty, aggregated on an annual basis as follows: 1) electricity received under exchange agreements (as measured at the point of receipt, specifying the source if known or the region of origin), ~~as purchases~~ and 2) electricity delivered under exchange agreements (as measured at the point of delivery, specifying the source if known or the region of origin). ~~as wholesale sales~~. The retail provider or marketer shall retain, for purposes of verification, exchange agreement contracts, NERC e-tags, settlement data, or other information to confirm the transactions. Energy exchanges that do not involve importing and exporting electricity to and from California are not subject to reporting.

This modification to the Mandatory Reporting Regulation would permit reporting of imports and exports under exchange arrangements as linked transactions so that the staff would have available to it data that would permit the staff to subtract emissions associated with exchange exports from emissions associated with exchange imports. If that data were available to the staff, the staff could calculate administrative fees so that there would not be a payment of fees on both the emissions associated with exchange exports and emissions associated with exchange imports.

Agency response: ARB is aware of SCPPA's recommendations with respect to the Mandatory Reporting Regulation (MRR). The suggested change does not relate to this rulemaking. Revisions to the MRR other than the revision of Section 95104 have not been considered, noticed, discussed or otherwise made part of this rulemaking pursuant to the Administrative Procedure Act (Gov Code Section 11340 et seq).

53.10 Comment: At the August 25, 2009 workshop, the staff stated unequivocally that any modification of the Mandatory Reporting Regulation as proposed by SCPPA would have to await a more comprehensive revision of the Mandatory Reporting Regulation after the ARB finalizes its cap-and-trade program. Thus, a revision of the Mandatory Reporting Regulation that would permit the submission of data that would be adequate to offset the emissions associated with exchange exports against the emissions associated with exchange imports would not occur until, possibly, 2011 or even later.

Agency response: With the exception of section 95104, modification of the MRR is not under consideration in this rulemaking. The MRR is expected to be modified for consistency with the cap-and-trade program regulation that is being developed by ARB.

53.11 Comment: An Interim Measure Is Necessary if the Staff Defers Revising the Mandatory Reporting Regulation.
The imposition of an administrative fee on both the emissions associated with exchange imports and the emissions associated with exchange exports until such time as the Mandatory Reporting Regulation can be amended would be unfair, unjust, and unreasonable. To avoid the inequity, SCPPA proposes that the ARB adopt an interim measure that could be implemented without any change in the current Mandatory Reporting Regulation.

SCPPA proposes that for the period between the implementation of the administrative fee regulation and the effectiveness of a revision of Mandatory Reporting Regulation that would permit the precise offset of exchange export emissions against exchange import emissions, emissions associated with a retail provider or marketer's gross exports as reported under the current Mandatory Reporting Regulation should be subtracted from the emissions associated with the reporting party's gross imports for purposes of billing the administrative fee.

Offsetting gross export emissions against gross import emissions would be a reasonable proxy for the more precise offset of exchange export emissions against exchange import emissions that could be calculated after revising the Mandatory Reporting Regulation as proposed by SCPPA. For SCPPA members, exchange exports are most if not all of their total exports during a given year. For example, 100 percent of Riverside's exports are made under exchange agreements. Over 95 percent of Pasadena's exports are made under exchange arrangements. For the largest SCPPA member, the Los Angeles Department of Water and Power ("LADWP"), approximately 84 percent of all exports are made under exchange agreements, based on 2008 data. Thus, total exports are a reasonable substitute to use for exchange exports for the period of time until the Mandatory Reporting Regulation can be revised to permit a precise offset of exchange export emissions against exchange import emissions.

There may be other interim measures that could be adopted . . . Absent any such other remedies being proposed, SCPPA recommends that the Board adopt the interim measure that SCPPA has proposed to avoid the unfair double assessment of the administrative fee on energy exchanges.

Agency response: As explained in our responses to Comment 5.22 SCPPA, it is appropriate to assess the fee on all electricity generated in California from fossil fuels, and on imported electricity that is a source of statewide greenhouse gas emissions. We do not agree with the commenter's premise that imposition of a fee on both legs of a non-simultaneous exchange would be unfair, unjust, or unreasonable. Therefore, it is not necessary to adopt an interim measure as recommended by SCPPA.

53.12 Comment: SCPPA questions staff's White Paper proposal to treat cogeneration facilities as industrial facilities instead of as electrical generation facilities.

Cogeneration facilities should be treated like other generation facilities with fees being assessed directly on the basis of total emissions. At the August 25, 2009 workshop, although the staff proposed to "treat both in-state and imported electricity the same" so that the administrative fee would apply directly to emissions associated with electricity generated at California power plants, the staff proposed in the White Paper that cogeneration facilities "would be treated as industrial facilities, with fees assessed to their fuels or on their emissions, but not on their electricity.

Agency Response: The White Paper referred to by the commenter was prepared for staff's August 25, 2009 workshop while staff were still developing modifications to be proposed at the September 25 Board meeting. The Board adopted modifications that define precisely how different entities, including both industrial facilities of many kinds and electricity generating facilities, are and are not subject to the fee.

Some cogeneration facilities are not first deliverers, and therefore cannot be treated the same as other electricity generators, as explained in our response to Comment 53.14 SCPPA below. ARB does not agree that cogeneration facilities should be "treated like other generation facilities" in the sense that all types of facilities that generate electricity should pay the fee on the same unit, that is, megawatt-hours. However, the regulation ensures that cogeneration facilities and other types of generation facilities pay equivalent fees on the basis of carbon dioxide emissions attributable to the unit (of fuel, emissions or electricity) for which it is most equitable, feasible and simple to assess the fee. The regulation treats all entities subject to the fee equitably, through the mechanism of the Common Carbon Cost, described in our response to Comment 46.1 EPUC. However, entities are not treated exactly the same, because the Common Carbon Cost merely allows ARB to administratively assign equitable fee shares across the broad spectrum of entities for which the fee must be ultimately assessed on quantities of different units. We provide a more detailed discussion of the rationale for distinguishing between cogeneration and other generation in our response to Comment 53.14 SCPPA.

53.13 Comment: As a result, electricity that is delivered to the grid by generators would bear the burden of a direct imposition of the administrative fee, but electricity that is delivered to the grid by cogenerators would not bear the burden of the administrative fee except to the extent that upstream fuel suppliers elected to bill cogenerators to recover the supplier's cost of paying the fee to ARB.

Agency Response: The first part of this comment is correct in that the regulation was modified such that electricity that is delivered to the grid by first deliverers, including in-state electricity generating facilities, is subject to a per megawatt-hour fee. However, the second portion of the comment is not correct. Some cogenerators will pay the fee directly on emissions, some will pay directly on fuels consumed, and some will pay indirectly on fuel whose price has been increased to include the fee by the deliverers of the fuel.

Cogeneration facilities pay the fee either directly on fuel consumed or directly on reported emissions (pertinent sections of the regulation are Section 95201(a)(1) and 95201(a)(5)). Sections 95201(a)(5) and 95201(a)(1)(F) make it clear how facilities (except electricity generating facilities) that combust or consume coal, catalyst coke, petroleum coke, refinery gas, or associated gas will pay.

Facilities that combust coal and catalyst coke pay the fee as a fee rate per reported short-ton of those fuels. Section 95203(c) explains the calculation of these fee rates, based on fuel emission factors provided in the table in section 95203(d). In contrast, for facilities that combust petroleum coke or refinery gas, the Common Carbon Cost is the effective fee rate, and is assessed per MTCO2 emissions reported pursuant to the MRR. Facilities (except electricity generating facilities) that use natural gas delivered by interstate pipelines will pay fees for each therm of natural gas delivered to the facility. Facilities, including cogeneration facilities but not electricity generating facilities, that consume natural gas produced on site will pay the fee on each therm of natural gas produced and consumed on site (Section 95201(a)(E)).

Only facilities (including cogeneration facilities, but not including electricity generating facilities) that receive natural gas from pipelines that are owned by natural gas utilities or from owners or operators of intrastate pipelines not included in subsection 95201(a)(1)(A), indirectly pay the fee when it is passed through by the natural gas deliverers. We are not aware of any natural gas deliverers that could not pass through the fee. ARB's staff worked with the California Public Utilities Commission (CPUC) and the largest natural gas utilities while developing the regulation to ensure that utilities would be able to pass through the natural gas fees to users of natural gas, including cogeneration facilities, but not to electricity generating facilities. Comment 24 CPUC, a letter from the CPUC's Energy Division Director to Chairman Nichols states: "Regarding the recovery of the fee costs, Energy Division believes that the CPUC can easily accommodate the gas utilities ' need to recover the costs of the fee from ratepayers." (Comment 24 CPUC is fully responded to below.)

Cogeneration facilities are among the ratepayers that pay for natural gas delivered by utilities. Representatives of the utilities have indicated that they intend to pass through the fees using one of various mechanisms available to them under the regulation of the CPUC. Additionally, natural gas utilities not regulated by the CPUC (publicly-owned gas utilities) are governed by their elected officials, and are also expected to pass through costs. We expect that intrastate pipelines will also pass through costs and have heard nothing to the contrary from any commenter. Thus, we are confident that cogenerators receiving natural gas from natural gas suppliers will pay their fair share of fees.

53.14 Comment: Staff has not presented any cogent rationale for discriminating between cogenerators and generators. Just as the fees can be directly assessed on the emissions from generation facilities, fees could be directly assessed on emissions from cogeneration facilities.

Agency Response: At the time of this comment, staff had not yet determined precisely how to modify the regulation in response to earlier comments, and was still deliberating over the application of the fee to various types of entities. With the modifications approved by the Board, the fee is not "directly assessed on emissions" from electricity generating facilities, and, except for cogeneration facilities that combust catalyst coke or refinery gas, the fee is also not directly assessed on emissions from cogeneration facilities. To cogently provide our rationale for our treatment of cogenerators and non-cogeneration electricity generators, we first briefly review modifications made in the overall approach to electricity. Then we discuss the regulatory modifications that affect various kinds of facilities including cogeneration facilities, and then we explain how these modifications ensure equitable treatment of various entities that produce electricity.

As discussed above in our response to Comment 5.1 SCPPA, after reviewing comments regarding potential legal challenges to the treatment of electricity, the fee regulation was modified to treat in-state and imported electricity the same, using a first deliverer approach. Prior to that modification, the intent had been to assess no per megawatt-hour fees on in-state generation, but instead to assess fees "upstream" on fuels that are used for in-state generation, or directly on metric tons of carbon dioxide emissions by certain entities in cases where fuels have significantly variable carbon content per unit of fuel.

Because ARB modified the regulatory approach to electricity, it was necessary to ensure that each entity that was subject to a per megawatt-hour fee for delivered electricity was not also subject, directly or indirectly through the pass-through of cost from a fuel deliverer, to a fee on fuels used for, or emissions emitted in the process of, electricity generation. This made necessary careful consideration of the approach to cogeneration, which uses fuel and causes emissions due to both the generation of electricity, and to the production of heat or other useful non-electricity forms of energy. Modifications to the regulation were made to prevent any inequity in the approach to any kind of generation, and to simultaneously ensure that there would be no double exposure to the fee.

Specifically, staff proposed and the Board approved modifications of the following sections to ensure equity for all electricity generation and prevent double exposure to the fee:

- Definitions in Sections 95202 (26), (27), (34), and (52).

- Natural gas applicability in Sections 95201(a)(1)(A), 95201(a)(1)(B), 95201(a)(1)(D), and 95201(a)(1)(E),
- Applicability to first deliverers of electricity in section 95201(a)(4)
- There is no longer applicability of the fee to refineries as refineries *per se*; instead the fee applies to “facilities that combust or consume coal, catalyst coke, petroleum coke or refinery gas”, be they refineries, cogeneration facilities, or other types of facilities. Section 95201(a)(5).

There are two main reasons that cogeneration and other electricity generation cannot be treated the same:

First, cogeneration facilities cannot be charged an equitable fee as first deliverers, on the basis of their deliveries of electricity to the California grid. Some cogeneration facilities cannot be assessed an equitable fee based on first deliveries of electricity to the grid because they use all electricity onsite and deliver no electricity to the California transmission and distribution grid. Others may deliver some electricity to the grid, and use some of the electricity onsite without it ever being delivered. Cogeneration facilities that deliver no electricity to the California grid could not be subject to fees as first deliverers. Cogeneration facilities that use some generation on site and deliver some electricity to the grid also would not be subject to a full equitable share of the fee if they paid the fee only on the portion of electricity delivered. The fact that cogeneration emissions are not always associated with deliveries to the grid means that ARB must treat cogeneration facilities differently than electricity generating facilities to apply an equitable carbon based fee. It was necessary to apply the fees to cogeneration facilities based on something other than electricity delivered to the grid. If not, then cogeneration would not be paying its fair share leaving more to be paid by electricity generating facilities, fuel providers and importers, and other entities subject to the fee.

Second, a portion of the total fuels used and total emissions emitted by cogeneration facilities provide a useful service (such as heat) other than electricity. If ARB attempted to treat cogeneration facilities as first deliverers to the extent that they deliver electricity to the grid, staff would need a methodology and a set of engineering assumptions to attribute fuel use, or emissions emitted, among the several outputs, including electricity delivered to the grid, electricity not delivered to the grid, and non-electrical useful energy output(s) of cogeneration systems and facilities. Staff would essentially need to treat a single cogeneration facilities as more than one entity; i.e., a first deliverer and as an industrial facility. Following this path would have unnecessarily added additional complexity to the regulation, and it would be difficult to obtain all data needed for a thorough and accurate fee determination. To avoid these complexities, ARB does not apply the fee for cogeneration facilities to electricity. The fee is instead applied to fuels or emissions, similar to other industrial facilities.

For the two reasons above, it is reasonable and necessary to treat the assessment of fees to cogeneration facilities differently than to first deliverers that are electricity generating facilities. Rather than attempt a more complex, and potentially infeasible approach or attempt to develop an alternate, vetted methodology for emissions and fuel attribution for cogeneration facilities, we chose the more straightforward approach of treating cogeneration as we do other facilities, which either pay fees, or are indirectly subject to pass through of fees, pursuant to sections 95201(a)(1) and 95201(a)(5).

As described, each electricity generating facility will pay fees only on electricity first delivered to the grid. In contrast, every cogeneration facility above the regulatory threshold will pay fees either directly on fuels consumed or emissions emitted, or will indirectly pay the fee through fuel costs passed through by deliverers of natural gas.

53.15 Comment: The staff has expressed a desire to limit the number of entities that might be directly billed for the administrative fee to reduce the administrative burden on the ARB. The staff proposed at the August 25, 2009 workshop to limit the direct application of the administrative fee so that it would apply only to larger generators: "The fee would not be charged on electricity from any facility that either emitted less than 2,500 MTCO2e during the reporting year, or has less than 1 megawatt of capacity." White Paper. Just as that provision can limit the number of generation facilities that are directly billed by the ARB, the same provision could be applied to limit the number of cogeneration facilities that are directly billed by the ARB. That would alleviate the administrative burden of directly billing generators and cogenerators while maintaining parity treatment of the two.

Agency Response: This comment was made before the modified regulation had been finalized. The fee regulation was modified and applies to first deliverers of electricity to the California grid, including electricity generating facilities as defined. It is correct that the fee is not applied to megawatt-hours delivered from facilities below the threshold mentioned by the commenter. For other types of facilities in general (including cogenerators), the fee applies to facilities that are subject to Mandatory Reporting Regulation. Because only cogeneration facilities that emit more than 2,500 MTCO2e during the reporting year and have more than 1 megawatt of capacity are subject to the fee, the same threshold applies to cogeneration as to electricity generating facilities. Thus there is parity in threshold for applicability of the fee to both types of facilities.

Staff also note that although first deliverers of electricity and industrial facilities below the thresholds are not directly billed, they are expected to pay the fee when it passed through by the natural gas utility.

53.16 Comment: For the reasons set forth above, SCPPA recommends that the ARB direct the staff to revise the proposed administrative fee regulation…(3) to treat generators and cogenerators similarly.

Agency Response: This comment was made before staff had finalized the modifications that were approved by the Board. As previously discussed in responses to Comments 53.12 SCPPA, 53.13 SCPPA, and 53.14 SCPPA above, the regulation as modified treats electricity first deliverers and cogeneration facilities equitably.

53.17 Comment: Assessing the fee on imported electricity "at the first point of delivery of electricity" would be preempted under the Federal Power Act. The FPA grants exclusive jurisdiction over wholesale sales of electricity in interstate commerce to the Federal Energy Regulatory Commission ("FERC"). Federal preemption of the field of wholesale transactions goes well beyond pricing issues. The FERC regulation of wholesale power attaches to all aspects of a jurisdictional seller and a jurisdictional transaction. The application of the administrative fee to wholesale sales of electricity "at the first point of delivery in California of imported electricity" would intrude into a federally occupied field and would be unlawful.

Agency Response: See response to Comment 5.19 SCPPA.

<u>Comment 60: SCPPA, September 23, 2009</u>

60.1 Comment: The White Paper and Revised Draft Regulations attempt to treat in-state and imported electricity more consistently than proposed in the ISOR. However, some problems remain with the application of the proposed fees to imported electricity. First, the proposed fees would be assessed on both the emissions associated with electricity that is imported into California under exchange agreements and the emissions associated with electricity that is exported under exchange agreements. Assessing fees on both exchange import emissions and exchange export emissions would discourage parties from entering into arrangements to benefit electricity consumers and society as a whole by reducing the cost of generating electricity, and it conflicts with the Commerce Clause of the U.S. Constitution. Second, it remains unclear whether the proposed fees would apply to arrangements in which electricity is transmitted or "wheeled" through California under buy/sell arrangements without being consumed in California.

Agency Response: We have responded in detail to these comments, except for the Commerce Clause issue for exchange agreements, in responses to Comments 53.3 to 52.11 SCPPA. See responses to Comments 60.5 SCPPA, and 5.13, 5.14 and 5.15 SCPPA regarding the Commerce Clause.

60.2 Comment: The White Paper and Revised Draft Regulations do not address several other issues which SCPPA has raised in its previous comments. Insofar as SCPPA discussed these concerns in its prior comments, SCPPA does not address them further here, but SCPPA urges the Board to consider the issues:

- Applying an administrative fee on imported electricity would be inconsistent with Health & Safety Code ("HSC") section 38597, the section that authorizes the ARB to assess administrative fees. That section specifically provides for fees to be paid by sources of greenhouse gas emissions, but neither imported electricity nor the act of importing electricity are a source of emissions. Although the AB 32 definition of "statewide greenhouse gas emissions" in HSC § 38505(m) includes emissions associated with imported electricity, the

Legislature elected not to write HSC section 38597 so as to authorize fees to be assessed on “statewide greenhouse gas emissions.” Rather, HSC section 38597 was written to authorize “fees to be paid by the sources of greenhouse gas emissions regulated pursuant to this division…” The difference is significant and should be recognized by limiting the fees to sources. See SCPPA June 18, 2009 Comment, pp. 4-7.

- Assessing the fee on imported electricity “at the first point of delivery of electricity” would be preempted under the Federal Power Act. The FPA grants exclusive jurisdiction over wholesale sales of electricity in interstate commerce to the Federal Energy Regulatory Commission (“FERC”). Federal preemption of the field of wholesale transactions goes well beyond pricing issues. The FERC regulation of wholesale power attaches to all aspects of a jurisdictional seller and a jurisdictional transaction. The application of the administrative fee to wholesale sales of electricity “at the first point of delivery in California of imported electricity” would intrude into a federally occupied field and would be unlawful. See SCPPA June 18, 2009 Comment, pp. 14-16.

- Cogeneration facilities should be treated like other generation facilities, with fees assessed directly on the basis of total emissions. The White Paper proposed that cogeneration facilities “would be treated as industrial facilities, with fees assessed to their fuels or on their emissions, but not on their electricity.” This is reflected in the Revised Draft Regulations at section 25201(a)(4)(C): “No fee shall be paid for any megawatt-hour of electricity generated at a cogeneration facility.” As a result, electricity that is delivered to the grid by generators would bear the burden of a direct imposition of the administrative fee, but electricity that is delivered to the grid by cogenerators would not bear the fee except indirectly the extent that upstream fuel suppliers elect to bill cogenerators to recover the supplier’s cost of paying the fee to ARB. Staff has not presented any cogent rationale for discriminating between cogenerators and generators. Just as the fees can be directly assessed on emissions from generation facilities, fees could be directly assessed on emissions from cogeneration facilities. See SCPPA September 3, 2009 Comment, pp. 11 – 12.

Agency Response: For our response to the comment about sources of greenhouse gas emissions, see our responses to Comments 5.10, 5.11, 5.12, and 53.1 SCPPA. For our responses regarding the Federal Power Act, see our responses to Comment 5.19 SCPPA. For our responses regarding cogeneration, see our response to Comment 53.12 to 53.16 SCPPA.

60.3 **Comment:** The Board should set a cap on the revenues that would be collected through the administrative fee. Section 95303(a) defines the “Total Required Revenue” (“TRR”) that would be recovered annually through the administrative fee. It appears from section 95303(a) that the primary parameter for determining the TRR would be “the number of personnel positions, including salaries and benefits and all other costs, as approved in the California Budget Act for that fiscal year." Appendix C to the ISOR lists a plethora of programs for which funding would be provided through the administrative fee. The list and the accompanying staffing requirements could grow substantially in the future unless there were some reasonable constraint on the TRR that could be recovered each year through the administrative fee. SCPPA encourages the Board to adopt a provision for a reasonable cap that would apply to administrative fees. *See* SCPPA June Comment, p. 20

Agency Response: Capping the fee is not appropriate because it may constrain full implementation of the AB 32 program, thereby jeopardizing the State's ability to meet its AB 32 goals. The Total Required Revenue (TRR) for each fiscal year is based on the amount appropriated by the Legislature in the California Budget Act for that fiscal year. It is appropriate that the Legislature make this decision: it should not be made by ARB in advance by arbitrarily imposing a cap on the fee amount. The normal budgeting process is the most appropriate forum for interested parties to review and provide input on funding for the AB 32 program. For additional detail, see response to comment 43.3 IEP.

60.4 Comment: The proposed regulation should be modified so that the administrative fee would not be applied to both the import side and the export side of energy exchange arrangements.
SCPPA recommends that the Board revise the proposed fee regulation and make appropriate conforming changes to the Mandatory Reporting Regulation so that the emissions that are associated with electricity that is imported under an exchange agreement with an out-of-state counterparty would not be subject to the fee to the extent that the emissions are offset by the emissions associated with electricity that is exported to the counterparty under the exchange agreement. The application of the proposed fees to interstate exchange arrangements would discourage arrangements that benefit society by reducing the cost of electricity generation.

Charging the Fee on Both the Import Side and Export Side of Exchange Arrangements Would Discourage Arrangements That Benefit Society.
Electricity exchanges are important tools that are used by retail providers to reduce the cost of electricity for the benefit of electricity consumers and ultimately society as a whole. Exchange arrangements between retail providers are contractual tools that permit the timing of generation by each retail provider to be changed so that each retail provider can generate electricity at a time when it is cheaper for the retail provider to generate electricity. In the absence of an exchange agreement, each retail provider is required by the laws of physics to generate electricity at precisely the same time that demand occurs in its service territory. An exchange arrangement permits each retail provider to maximize the efficient use of generating resources by generating electricity non-coincidentally with demand in its service territory instead of generating coincidentally with demand. Even though the timing of generation is changed so that generation

occurs at a time that is non-coincidental with demand, each retail provider still produces only one kilowatt hour of electricity to meet one kilowatt hour of demand in a typical exchange situation.

Exchanges often involve counterparties that are located outside of California in, for example, the Pacific Northwest ("PNW"). It might be more costly for a California party to generate electricity at a time when it is less costly for the PNW party to generate electricity. Conversely, it might be less costly for a California party to generate electricity when generation is more costly for the PNW party. An exchange arrangement enables the PNW party to generate when its costs are lower and permits the California party to generate when its costs are lower. The result is a more efficient use of generation resources by both retail providers.

As proposed by the staff, the administrative fee would tend to discourage California retail providers from entering into exchange agreements with out-of-state counterparties. If a California retail provider meets a kilowatt hour of its local demand using its own local generation then a fee would be imposed on the emissions associated with generating only one kilowatt hour of electricity.

However, a California retail provider enters into an exchange arrangement with a PNW counterparty, the California retail provider would be charged two fees, once when electricity is delivered to California from the PNW and again when electricity is returned to the PNW from California. The double assessment of administrative fees would discourage retail providers from realizing the efficiencies that can be gained from entering into exchange agreements. Discouraging retail providers from realizing efficiencies for the benefit of electricity consumers and society as a whole would be poor public policy.

Agency Response: As explained in our responses to Comments 5.21, 5.22, and 53.1 to 53.11 SCPPA, there is no double assessment of the fee under the regulation approved by the Board. These responses explain why ARB has applied the fee to both the import and export sides of non-simultaneous exchanges.

60.5 Comment: The Proposed Regulation As Applied To Interstate Exchange Arrangements Would Discriminate Against Interstate Commerce In Violation Of The Commerce Clause Of The U.S. Constitution.
Charging the fee on emissions on both sides of interstate exchange arrangements discriminates against interstate exchange arrangements as opposed to intrastate arrangements. If a California retail provider enters into agreement with a California counterparty, the California retail provider would pay an administrative fee only when it generates electricity for delivery to its California counterparty. However, if a California retail provider enters into an exchange agreement with an out-of-state counterparty, the California retail provider would pay two administrative fees, once on the exchange import emissions and again on the exchange export emissions.

The burden on interstate commerce is further illustrated by assuming that other states follow California's lead and adopt similar administrative fees. If California were to apply administrative fees on both the import leg and the export leg of energy exchanges and, for example, Oregon were to do the same, Oregon would impose fees on exchange import emissions as well as exchange export emissions, and California would do the same. Thus, if two kilowatt hours were produced to meet two kilowatt hours of demand, one in California and one in Oregon, four charges would be assessed on exchange electricity, two by Oregon and two by California. If the California and Oregon retail providers avoided interstate exchange agreements and limited themselves to exchange agreements with counterparties in their own states, they would pay a total of two fees instead of four.

Thus, the proposed regulation would discriminate against interstate commerce by imposing additional fees upon interstate exchange arrangements in contrast to intrastate exchange arrangements. This would be unconstitutional.

The applicable constitutional principles were outlined in SCPPA's June 17, 2009 comments on the proposed regulation. In summary, the "dormant" Commerce Clause (U.S. Constitution, article I, §8, cl. 3) limits the power of a state to regulate or tax interstate commerce, even in the absence of federal legislation on the subject. State statutes and regulations which impose taxes or administrative fees on interstate commerce, including interstate transmission of electricity, are subject to Commerce Clause scrutiny. If a state law discriminates on its face against businesses operating in interstate commerce, the law is subject to strict scrutiny that the Supreme Court has described as "virtually *per se* invalid". *Oregon Waste Systems, Inc. v. Dep't of Environmental Quality*, 511 U.S. 93, 99, 114 S. Ct. 1345, 128 L. Ed. 2d 13 (1994). "When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry." *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579, 106 S. Ct. 2080, 90 L. Ed. 2d 552 (1986).

The proposed fee regulation, by imposing more fees on interstate exchanges than intrastate exchanges, facially discriminates against interstate commerce. Consequently, the rule of virtual per se invalidity applies. The proposed regulation will be invalid unless it "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *Oregon Waste Systems*, 511 U.S. 93, 100-101, quoting *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 278, 108 S. Ct. 1803, 100 L. Ed. 2d 302 (1988).

In this case, there are reasonable nondiscriminatory alternatives. In order to avoid the unfair double imposition of administrative fees on exchanges of electricity, SCPPA has recommended to the staff that the ARB's Mandatory Reporting Regulation be amended to permit the reporting of exchanges as a

> separate category of transactions. See SCPPA's September 3, 2009 Comment at pp. 9 – 11. An interim remedy is also available to the Board, pending revision of the Mandatory Reporting Regulations. These changes, described in greater detail below, would allow for a more evenhanded treatment of interstate and intrastate exchange arrangements. Thus, there are reasonable nondiscriminatory alternatives to the proposed regulation, and the proposed regulation as applied to interstate exchange arrangements would not survive strict scrutiny under the dormant Commerce Clause.

Agency Response: We have responded to other comments (5.13 to 5.19 SCPPA) regarding the Commerce Clause, and respond here to the question of the Commerce Clause with respect to exchange agreements.

It is not correct that "If a California retail provider enters into agreement with a California counterparty, the California retail provider would pay an administrative fee only when it generates electricity for delivery to its California counter party." Exchanges involving imported and exported electricity and exchanges of California electricity only would be subject to the fees to the exact same extent.

Any California counterparty that provides electricity to a retail provider must be either an electricity generating facility, or an entity such as a marketer, or another retail provider, that has purchased electricity from an electricity generating facility or from another marketer. Since electricity generating facilities pay fees on in-state electricity delivered to the California transmission and distribution grid, any California retail provider that enters into an exchange agreement for such electricity will be receiving electricity on which a fee has already been paid. We expect electricity generating facilities to pass through the cost of the fee to their counterparties who purchase the electricity they generate. Thus, the California retail provider indirectly pays the fee on electricity acquired through an in-state exchange agreement, and, if the retail provider generates the electricity that they provide, they directly pay the fee on that electricity. The retail provider could also be exchanging electricity that it previously purchased; in that case the retail provider would also indirectly pay the fee because its cost would be passed on in the price of purchased electricity. Thus, with an in-state exchange, fees are paid for both legs of the exchange.

Also, the retail provider may or may not directly pay the fee on the import leg of an exchange. If the retail provider purchases the electricity out-of-state and is the first deliverer of the imported electricity, then the retail provider pays the fee directly. However, if the counterparty is the first deliverer, then the counterparty pays the fee directly. We would expect the counterparty to pass along the cost of the fee to the retail provider.

Thus, whether an exchange agreement is an in-state exchange agreement or an exchange agreement that involves export and import of electricity to and from California, there is always a fee paid on both halves of the exchange. Therefore, there is no discrimination against electricity imported under an exchange agreement.

In the event other states follow California's lead in imposing a similar fee, ARB would consider re-evaluating the application of this fee on electricity imported from those states.

60.6 Comment: In order to avoid the imposition of the fee on both interstate exchange export emissions and interstate import emissions the Mandatory Reporting Regulation should be amended to permit reporting of exchanges. Specifically, SCPPA proposes that section 95111(b)(1)(A) of the Mandatory Reporting Regulation be modified so as to read as follows:

9. Energy Exchanges between California and Out-of-State Entities. ~~Specify~~ Report energy exchanges that involve importing and exporting electricity to and from California by counterparty, aggregated on an annual basis as follows: 1) electricity received under exchange agreements (as measured at the point of receipt, specifying the source if known or the region of origin), ~~as purchases~~ and 2) electricity delivered under exchange agreements (as measured at the point of delivery, specifying the source if known or the region of origin). ~~as wholesale sales.~~ The retail provider or marketer shall retain, for purposes of verification, exchange agreement contracts, NERC e-tags, settlement data, or other information to confirm the transactions. Energy exchanges that do not involve importing and exporting electricity to and from California are not subject to reporting.

This modification to the Mandatory Reporting Regulation would permit reporting of imports and exports under exchange arrangements as linked transactions which would enable ARB staff to subtract emissions associated with interstate exchange exports from emissions associated with interstate exchange imports. If that data were available to the staff, the staff could calculate administrative fees so that there would not be a payment of fees on both the emissions associated with interstate exchange exports and emissions associated with interstate exchange imports. See SCPPA's September 3, 2009 comments, at p. 9.

Agency Response: This comment repeats SCPPA's recommendation in comment 5.21 SCPPA; see our response to that comment.

60.7 Comment: Staff has objected to modifying the Mandatory Reporting Regulation in this proceeding. See SCPPA September 3, 2009 Comment, pp. 9-10. Thus, SCPPA proposes an interim measure that should be taken until the Mandatory Reporting Regulation can be amended. To avoid the discriminatory impact on interstate exchanges, SCPPA proposes that for the period between the implementation of the administrative fee regulation and the effective date of a revision of the Mandatory Reporting Regulation, emissions associated with a reporting party's gross exports as reported under the current Mandatory Reporting Regulation should be subtracted from the emissions associated with the reporting party's gross imports for purposes of billing the administrative fee.

For SCPPA members, exchange exports are most if not all of their total exports during a given year. Thus, total exports would be a reasonable substitute to use for exchange exports for the period of time until the Mandatory Reporting Regulation can be revised to permit a precise offset of exchange export emissions against exchange import emissions.

Agency Response: As explained in our response to Comment 60.5 SCPPA, there is no discriminatory treatment of interstate exchanges, and there is no reason for an interim measure, or to change the Mandatory Reporting Regulation as proposed by the commenter.

60.8 Comment: The proposed regulation should be modified to assure that the administrative fee will not be applied to arrangements in which electricity is wheeled through California under buy/sell arrangements without being consumed in California.

SCPPA recommends that the definition of "imported electricity" as proposed by the staff be revised to assure that the administrative fee will not be applied to electricity that is transmitted (wheeled) through California under arrangements for a simultaneous purchase and sale of electricity. See SCPPA's June 18, 2009 Comment, pp. 17 – 18, and SCPPA's September 3, 2009 Comment, pp. 3 – 6.

It appears clear that electricity that is wheeled through California by a retail provider without the retail provider taking title to the electricity at any point is excluded from being reported as "imported power" under the Mandatory Reporting Regulation, 17 Cal. Code of Regs. §95111(b)(1)(C), and that wheeled electricity would be excluded from being counted as "imported electricity" for purposes of assessing the administrative fee, pursuant to section 95202(a)(54) of the Revised Draft Regulations. See SCPPA's September 3, 2009 Comment, pp. 3 – 4.

However, a second way in which electricity may be transmitted through California without being consumed in California is through a simultaneous purchase and sale or "buy/sell" transaction. In such an arrangement, a retail provider or marketer might buy electricity from a party at a first point of delivery in California, transmit the power through California, and simultaneously sell the electricity to the same or even a different party at a different delivery point outside of California. Such transactions are sometimes called "virtual transmission" because they are functionally equivalent to wheeling power.

The ARB's mandatory reporting staff has provided oral guidance that for purposes of reporting under the Mandatory Reporting Regulation, all transactions that are functionally equivalent to wheeling power through California should be reported as "wheeled power" rather than as "imported electricity." Likewise, electricity that is transmitted through California under a buy/sell arrangement should be treated as wheeled electricity and should be excluded from application of the administrative fee. See SCPPA's September 3, 2009 Comment, p. 5.

However, the proposed section titled "First Deliverers of Electricity" appears to compel application of the fee in situations in which a retail provider or marketer transmits power through California under a buy/sell arrangement. To avoid any confusion, SCPPA recommends that the definition of "imported electricity" in the Revised Draft Regulations as circulated by staff on September 14, 2009 be modified so it will be clear that all power that is wheeled through California will be excluded from being treated as imported electricity for purposes of applying the administrative fee. SCPPA's proposed modification of the definition in section 95202(a)(54) of the Revised Draft Regulations is as follows:

> (54) "Imported electricity" means electricity that is generated outside of California and delivered to a first point of delivery in California or electricity having a final point of delivery in California. Imported electricity does not include:
>
> (A) Power wheeled through California, which is power that is imported into California that terminates in a location outside of California; or
> (B) Power transactions ~~exchanges~~ in which imported power is simultaneously exchanged for exported power.

Agency Response: We have incorporated the commenter's recommended modification to the definition in section 95202(a)(54) to clarify that imported electricity includes neither wheeled power, nor simultaneous power exchanges. See our response to Comment 53.2 SCPPA for further discussion of the modification.

Comment 45: WSPA, September 2, 2009

Note: Comment 45 WSPA incorporates Comment 17 WSPA as an attachment. Responses to Comment 17 WSPA are not repeated here.

45.1 Comment: Transportation Fuels – Gasoline and Diesel Fuel: The workshop materials included a one page discussion document on how the fees would be applied to gasoline and diesel fuel. WSPA endorses the change to measuring the quantity of fuel removed from terminal racks with California delivery destinations as a practical solution to a number of problems WSPA has previously identified.

This approach avoids the need to expand the proposed regulations dramatically to address exemptions and exceptions from the fees if they were to be imposed upon the in-state refineries as well as imports.

Agency Response: In this comment, and many that follow, the commenter suggests that the fee should be applied at the terminal rack instead of at the refinery. ARB disagrees. As industrial sources, refineries must pay the fee for their facility emissions anyway. Applying the fee at the rack for gasoline and diesel fuel would increase the number of fee payers, and the administrative complexity of the regulation.

Applying the fee at the terminal rack would, in essence, apply the fee to gasoline and fuel distributors, which include more small businesses. These businesses often experience significant year-to-year variation in sales, and could have difficulty passing the fee through to their customers, raising equity and competitiveness concerns.

With regard to this comment, the commenter states that moving the point of regulation to the gasoline and diesel terminal rack "avoids the need to expand the proposed regulations dramatically to address exemptions and exceptions." Staff believes that the commenter is referring to the same exemptions as those granted by the Board of Equalization for users that may have tax exempt status such as embassies, some government entities, etc. This fee is not applied in the same manner as a tax. If the fuel is intended for use in California, no exemptions or exceptions apply.

45.2 **Comment:** There were comments made by some participants of the workshop about additional parties needing to file reports with CARB. However, the number of such parties should be modest. Since the data is already compiled by these same commentators for mandatory reporting to the Board of Equalization, this burden should be both limited and narrow in scope. Accordingly, WSPA urges the CARB to adopt the "at the rack" point of measurement for AB 32 fees on transportation fuels.

Similarly, some of the comments and discussion around this point of imposition of the AB 32 fees illustrated some confusion about terminals versus terminal inventory position holders. WSPA contends that it would be the inventory position holders at the terminals, not the terminals themselves, whom would be responsible for the fee.

In some cases the terminal operator and the inventory position holder are the same legal entity, but that is not universally true. Yet again, verifying terminal rack removals from the Board of Equalization data would be through the terminal inventory position holders, also known as "licensed suppliers."

Agency Response: See responses to comments BHJ-O9.1 and BHJ-O9.2 WSPA.

45.3 **Comment:** **<u>Electricity</u>** Many of WSPA's members operate cogeneration facilities in California. WSPA members believe that these operations should not be disadvantaged, relative to other forms of electricity generation, due to the differences in the method of assessing the administrative fee.

In addition, WSPA members have three concerns regarding the revised regulation: (1) the method of assessment lacks clarity; (2) the regulation could expose industrial facilities to duplicative regulation; and (3) the method for allocating administrative costs should not prejudge the allocation method for GHG allowances under a cap-and-trade program.

Each issue is discussed below.

Comparable Treatment.
As a general matter, CARB should make certain that efficient cogeneration operations are not penalized financially relative to other forms of electricity generation. All generation except cogeneration will pay the fee based on MWh delivered to the grid, regardless of the fuel they use or the heat rate of their facility.

Cogeneration, however, will pay its fees based on fuel input or emissions, as discussed below. To prevent a disadvantage, CARB should cap the effective charge per MWh for a cogeneration facility at the charge imposed on other electricity generators.

Agency Response: See our response to Comment 53.14 SCPPA for how cogeneration and electricity are treated equitably. Because the fee per MWh for electricity is based on the Common Carbon Cost and varies by source based on the carbon content of electricity from each source, cogeneration and electricity are treated equitably, and there is no need to cap the charge per MWh for cogeneration at a charge paid by electricity generators. In fact, each electricity generator will pay a unique fee per MWh based on emissions per MWh.

45.4 Comment: Clarifying the Cogeneration Regulation
In its electricity sector concept paper, CARB notes that:

Cogeneration facilities would be treated as industrial facilities, with fees assessed through their fuels ***<u>or</u>*** *on their emissions, but not on their electricity.*
As a preliminary matter, it is not clear under which circumstances each approach would apply. Would the facility choose which method to employ, or would CARB make the choice? Clarity is required to avoid duplicative fees. If, for example, CARB decided that fees would be based on emissions, it would be necessary to ensure that the pipeline delivering natural gas to the cogenerator did not also include a charge in its transportation rate under the Electric Generation schedule.

In addition, the relative impact of applying the fee to the “fuel” combusted by a cogenerator versus its “emissions” is unclear. This ambiguity is due, in part, to a lack of clarity regarding the method of allocation of CARB’s administrative costs between the fuel-based and emissions-based fees it has estimated.

Agency Response: See response to Comment 53.13 SCPPA, which explains how the regulation was modified to clearly identify which facilities pay the fee based directly on emissions, and which pay the fee applied to fuels. In cases in which cogenerators receive natural gas from a pipeline, they are not subject to fees on emissions. Section

95203 provides the methodology for calculating fees for emissions, fuels, and electricity. As discussed in the response to Comment 46.1 EPUC, the use of the Common Carbon Cost ensures that fees on fuels, emissions, and electricity are equitable because they are based on CO_2 emissions per unit of fuel, emissions or electricity.

45.5 Comment: Avoiding Duplication for Multiple Fuel Inputs

Beyond clarifying the regulation, CARB should consider carefully the types of fuel inputs to cogeneration to avoid duplicative fee assessment. A cogeneration facility may operate on a combination of natural gas and refinery gas.

Under the proposed regulation, although it is not entirely clear, it appears that a cogeneration facility would pay part of its administrative fees through a surcharge on its natural gas transportation rate. The treatment of the refinery gas portion of its fuel input is not clear.

The concept paper states:

> *Fees would still be charged on fuels (emissions from combusting fuel) from coal, natural gas, coke, and refinery gas, when the fuels are used for cogeneration or any use other than electricity generation.*

The June regulations for refineries, however, also contemplate placing the fee on emissions from refinery fuel consumption. It is thus important that CARB establish a methodology to avoid recovering the fee twice for the use of refinery gas in cogeneration.

Moreover, the revised regulation does not make clear how the fee for refinery gas would be calculated. WSPA submits that the fee should be the same as for natural gas, since the fee for other generation is not based on carbon intensity of the fuel.

Agency Response: See responses to Comments 46.2 and 46.3 EPUC.

45.6 Comment: Limited Application of Fee Methodology

WSPA also notes that CARB should not use the AB 32 administrative cost allocation methodology to shape or prejudge the greenhouse gas (GHG) allowance allocation protocol. The methodology for allocating administrative costs is limited and is geared to promote administrative efficiency.
The heavy involvement of stakeholders in the rulemaking used to develop the CPUC's electricity sector GHG recommendations reveals that there are many more factors that need to be considered when CARB develops its GHG allowance allocation method.
Consequently, as with the GHG reporting regulations for cogeneration, the administrative fee allocation methodology should be limited to this purpose.

Agency Response: The AB 32 administrative cost allocation methodology will not be used to prejudge the greenhouse gas (GHG) allowance allocation protocol.

45.7 Comment: <u>Collection Dates and Funding</u>

WSPA is aware of the difficulties CARB is having in developing its fee program and in understanding and documenting its permissible reimbursable costs. WSPA and other workshop commentators have suggest (sic) the fee structure for non-stationary sources could be modified in order to commence the collection of the fees more currently through a forward collection regime rather than a nearly three year in arrears lump sum billing regime.

This would be a practical solution to current fiscal year funding issues and would allow for the repayment of various loans from other state “cookie jar funds” such as the Beverage Container Recycling Fund. It would reduce the overall cost of the program by some proposed $40 million resulting in a more efficient and rational fee program (see page 26 of the workshop PowerPoint materials).

While this forward-looking fee regime on non-stationary sectors of the fee program is a significant paradigm shift for the staff, the benefits identified by the feepayers are obvious and were discussed to some degree during the workshop. There are numerous examples within other state agencies of fee programs that should be reviewed. The underground storage tank fees are just one example of fees collected on a current basis.

If CARB were to embrace a change to the existing regulation proposal, the agency’s current funding difficulties could be reduced. This would be accomplished by collecting a significant portion of the fees on a current basis while data on stationary sources and non-stationary sources is collected, verified and analyzed for a reconciliation of amounts paid versus amounts due to the agency.

WSPA once again requests that CARB look to these examples as a way of making the fee program more manageable and to address the climate change program’s current difficult financial situation.

This would also address the workshop concerns of the American Lung Association and the Natural Resources Defense Council about the continued delay in implementing a fee program that would lead toward shifts in consumer behavior away from products that create carbon emission.

WSPA urges CARB to look at adopting a more current fee structure to avoid the risk of litigation over such a fee program that may now be several years in arrears. The <u>Sinclair Paint</u> case and other more recent cases illustrate the need to keep some rationale nexus between the imposition of fees and those feepayers whom are engaged in commerce in the regulated area.

Agency Response: The time between when the emissions occur and the when fees are collected is necessary to ensure that emissions are based upon data that has been both certified by the affected parties and verified under the MRR. Without this process, ARB can not be assured that emissions reporting is accurate and affected parties are not over or under paying. See also response to Comment BHS-O21 WSPA.

45.8 Comment: CARB faces the real problem of having feepayers cease operations or enter bankruptcy during what would be the two or three year period over which it is collecting data and with the equity of "reallocating" the program costs over a smaller emissions base of the remaining feepayers.

Clearly, this risk and associated financial problem would be mitigated through a more current collection regime for non-stationary sources. A number of the workshop attendees addressed similar concerns about the structure of the fee programs and the proposal for an even later billing period.

Agency Response: ARB needs to have accurate data, for which fee revenue is based upon. Because of this, there is an inherent lag between when the emissions are generated and the fee collection. While it is true that some businesses may cease operation in the interim, there is no effective alternative. See also the response to Comment BHS-O2.1 WSPA.

45.9 Comment: Finally, WSPA continues to have concerns with CARB's proposed administrative fee regulation as a whole, to the extent that our objections have not been addressed in the proposed changes.

In WSPA's view, the state's AB 32 administrative fee program should have the following key characteristics:

- the fee program must be broad-based and economy-wide;
- the fee program must be equitable;
- the fee should be emissions-based;
- program costs to be recovered by the fee must be reasonable, direct and prospective, with the actual costs accurately determined and documented, and transparent; and,
- the fee must be transparent to the ultimate GHG emitter.

Agency Response: See responses to comment 17.1.

<u>Comment 50, NCPA, September 2, 2009</u>

50.1 Comment: The Fee Should be Limited to the Net of Imported Electricity
During the June 25, 2009 Board Meeting and in written comments submitted the previous day, NCPA expressed concern about how the Fee would be applied to imported electricity and the potential to adversely impact the safe and reliable operation of the State's electric transmission system. At the Board Meeting, Staff was directed to further review aspects of the Proposed Regulation – particularly portions pertaining to the treatment of imported electricity – and work with stakeholders to resolve outstanding issues.[2] Since that time, Staff and

stakeholders, including NCPA and its members, have diligently pursued resolution to some of these complex issues.

One such concern involves application of the Fee to all electricity produced in California, as well as electricity imported into the State without recognition of electricity exported. Imposing the Fee on both types of transactions, not just the net imports (which focus on the actual electricity consumed in California), adversely burdens the electricity sector by resulting in payment of the Fee on electricity not consumed in California. This outcome is clearly inconsistent with the stated purpose of the Fee in the Initial Statement of Reasons (ISOR)[3] and the treatment of other sources of emissions.[4]

One potential resolution to this concern is to net electricity imports and exports to ensure that the Fee is only applied to electricity consumed in California. Specifically, NCPA and other stakeholders have proposed the netting of electricity imports and exports that are associated with "energy exchange agreements" or seasonal transactions with a particular region. As more fully explained below, this change is necessary to avoid duplicative and burdensome imposition of the Fee on a single sector.

If the Fee is imposed on all electricity imports without recognition of the electricity actually consumed in California, CARB risks jeopardizing the efficient and reliable provision of electricity throughout the State. The purpose of multiple transactions that allow for the purchase and sale of electricity between states and regions is to allow entities to leverage the most effective operation of the entire western electric transmission system, based on transmission constraints, differing peaks, and facility operations. These transactions promote efficiency not only in California, but throughout the entire western region. If entities know that they are going to be assessed an additional Fee on certain electricity transactions, they may adjust their transactions to avoid the unwarranted imposition of the Fee. Such an outcome should be avoided, and *can* be avoided by adjusting the proposed Fee to reflect that the charge will only be assessed against the net imports of electricity *consumed in California*. For example, one NCPA member has significant energy sales and purchases with the Pacific Northwest (PNW), as well as some imports from the Southwest. Under the proposal to net exports against imports pursuant to exchange agreements or between specific regions, the utility would only be able to net sales with the PNW (since it has both sales and purchases from that region) and not other regions where there are not corresponding sales and purchases.[5]

Footnotes:
[2] The Board was concerned in part with the precedential impact of the Fee regulation on the Scoping Plan measures in general and the proposed cap-and-trade program in particular. Board members noted that ambiguities and concerns regarding the treatment of imported electricity must be addressed prior to the approval of a Fee Regulation.

[3] The *Staff Report: Initial Statement of Reasons for Rulemaking* (ISOR) for the *Proposed AB 32 Cost of Implementation Fee Regulation* was issued by CARB on May 8, 2009.

[4] NCPA also notes that the current calculations for imported electricity from unspecified resources could penalize certain entities, and encourages CARB to remain active in discussions before the Western Climate Initiative where the use of regional emissions factors is being contemplated.

[5] In the example note above, the member has a total of 656,172 MWh of electricity imported from the PNW and 27,620 MWh imported from the SW pursuant to various power purchase agreements. During the same time period, the utility exported 4,862 MWh to the PNW. Under the netting scenario proposed, the 4,862 MWh exported to the PNW would be deducted from the total imports from the PNW and the utility would pay the Fee on the net imports from the PNW and on all imports from the SW. Nothing in this scenario impacts the utility's reporting or compliance obligation under AB 32 and the utility still pays the Fee on all electricity consumed in California.

Agency Response: This comment relates to several issues brought up in other comments concerning imports and exports of electricity under exchange agreements, and concerning wheeling and similar simultaneous exchanges. In addition, this comment recommends more broadly netting out of imports and exports to a region. In this response, we consider different types of import export arrangements, ranging from wheeling to complete "netting out" of imports and exports to the extent not already addressed in earlier responses.

First, as discussed in our responses to Comments 5.21 and 53.2 SCPPA, transactions that involve simultaneous exchange of imports and exports are either wheeling transactions or essentially the same as wheeling transactions. The fee is not applicable to the imported electricity of these transactions because it is not consumed in California.

We have responded in depth to concerns about the applicability of the fee to both legs of a non-simultaneous energy (or electricity) exchange agreement. See the responses to Comments 5.22, and 53.3 to 53.11 SCPPA.

This same reasoning applies to the commenter's recommendation that the fee should be applied only to net imports. We disagree with the recommendation. If the fee applied only to net imports, it would not apply to all statewide greenhouse gas emissions. This would create an inequity because other fee payers would need to pay more.

50.2 Comment: Netting imports and exports is based on sound public policy. As a practical matter, it is sound public policy to ensure that the electricity sector and California's electricity customers are not called upon to bear a disproportionate amount of the Fee burden. Staff has acknowledged that the Fee is intended to be applied to fuels and electricity consumed in California – netting imports and exports would only apply the Fee to electricity consumed by California consumers. Some opponents of this concept have opined that allowing such netting ignores the language in AB 32 that calls for reporting of electricity produced in-state and electricity imports.[6] However, this is simply not true.

Footnote:
[6] Health & Safety Code § 38530(b)(2).

Agency Response: There are several incorrect assertions in this comment. First, electricity customers do not bear a "disproportionate amount of the Fee burden." As explained in our response to Comment 46.1 EPUC, the fee is proportional to carbon emissions. Second, although as originally proposed, the regulation would have applied only to imported electricity that is consumed in California, staff have not said that the fee as modified and adopted is intended to be applied only to electricity consumed in California. In our response to Comments 53.6 and 5.22 SCPPA, we explain why the fee applies to both electricity generated in California (regardless of whether or not it is exported) and to imported electricity that is consumed in California. See also responses to Comments 5.9 to 5.12 SCPPA for why it is appropriate to apply the fee to both electricity produced in-state and exports, since both are sources of California statewide greenhouse gas emissions.

50.3 Comment: Furthermore, drafting the Fee Regulation in a manner that does not impose a double burden on the electricity sector does not change entities' reporting obligations under AB 32, or the compliance obligation for emissions reductions as outlined in the statute and the Scoping Plan. Indeed, the Fee is intended to be applied in a manner that is administratively feasible, and the ISOR expressly states that the result is a Fee on approximately 85% of the state's emissions – there is no actual link between a compliance obligation and assessment of the Fee. Additionally, ensuring that the Fee is assessed on the net of imported and exported electricity is also crucial in the development of a multi-jurisdictional cap-and-trade program; if not applied in this manner, electricity consumed in a partner jurisdiction will be assessed a different set of fees and subject to corollary requirements in that jurisdiction; simply put, the same electricity should not be subject to two sets of fees, especially when the power at issue is not consumed in California.

Agency Response: As discussed in our responses to Comments 5.21, 5.22, and 53.1 to 53.11 SCPPA, ARB does not agree with the commenter, and ARB has approved a fee that is applicable to both California electricity generation and to imported electricity that is consumed in California. The commenter is correct that there is no link between compliance obligation and assessment of the fee. These two obligations are separate and distinct – the first is to reduce emissions and the second is to raise funds to implement AB 32.

50.4 Comment: Netting imports and exports is also administratively feasible. The mechanism for calculating net energy imports is straightforward and would not entail additional administrative complexities. The reporting of imports and exports under the Mandatory Reporting Tool could be easily tracked with minor modifications to the Tool itself, making verification of the total imported electricity consumed in California easy to determine. NCPA members intend to work closely with CARB Staff to outline this process for purposes of future reporting periods.

Agency Response: Staff's concern with the NCPA proposal was not based on administrative feasibility but on the fact that the fee is intended to cover both the emissions associated with electricity generation in California (regardless of whether or not it is exported), and the emissions associated with imported electricity consumed in California. Our rationale for this approach is provided in our response to Comments 5.22 SCPPA, and amplified in other responses to SCPPA's comments concerning exchanges of imported and exported electricity. Although the commenter believes it would be feasible, the effect of netting imports and exports would be that some of the statewide greenhouse gas emissions associated with electricity would escape the fee, and the costs not paid would then fall to all others that pay the fee.

50.5 Comment: Finally, imposition of the Fee must not adversely impact the overall efficiency of the state and regional electricity grid operations. To that end, it would be helpful for the Board to give its Staff an opportunity to either provide empirical data that substantiate findings claimed in the original ISOR that "the imposition of the Fee is too small to affect wholesale market dispatch" (ISOR, p. 46) or remove the language entirely.

Agency Response: See our responses to Comments 5.22 SCPPA and 38.5 NCPA for an explanation of why ARB believes that the imposition of the fee is too small to affect wholesale market dispatch.

50.6 Comment: Modification to Billing Cycle Should Include Additional Time to Remit the Fee and Should Utilize the Most Current Reporting Data Available.

CARB Staff has proposed that the billing cycle for collection of the Fee be adjusted from February to October to "provide better alignment" with the state fiscal year. NCPA does not object to changing the actual billing date. NCPA recommends that Fee Determination Notices be due for collection ninety (90) days after receipt of the Notice, rather than sixty (60) days in order to ensure that affected entities have sufficient time to meet the revenue requirement.

Agency Response: The total revenue requirement will be known in advance of issuance of the Fee Determination Notice. ARB is developing a fee website that will provide information to help entities to estimate the total amount due in advance of receiving the Notice. The Nonvehicular Source, Consumer Products, and Architectural Coatings Fee (AB 10X) requires payments to be remitted within 60 days, which has provided sufficient time to affected parties. No change was made to section 95205 Payment and Collection.

50.7 Comment: The amount due, revised annually and based on an unspecified and uncapped amount, has the potential to vary greatly from year to year making estimating and planning for the total annual obligation problematic, and under the proposal to change the billing to the first half of the fiscal year, entities will be completely unaware of the total revenue requirement until a State budget is passed. This process significantly shortens the time during which an entity can estimate their Fee obligation. Accordingly, as part of the proposal to modify the billing cycle, CARB should also increase the amount of time an affected entity has to remit the Fee to the State.

Agency Response: See response to Comment 50.6 NCPA regarding the 60 day requirement to remit payment.

50.8 Comment: In concert with a modified billing cycle, CARB should also further investigate the efficacy of using more updated data for purposes of making the Fee Determination. The ISOR maintains that the costs will be passed along to end users, and CARB "expects that most businesses paying the Fee" will be able to pass the costs through to consumers (ISOR, p. 46). However, as several stakeholders have noted, there is no data to support such a position. Under the current proposal, the first Fee remittance will be in November 2010 (assuming an approved State budget between July and September) and will be based on annual usage information from 2008. Looking at the actual dates, it is clear that any notion that the costs can be passed-through to the entities that actually consumed the fuel or electricity would be impossible. Rather, those paying the Fee will be forced to adjust their current rates – if possible – to address past consumption; such a scenario is extremely problematic in instances where those currently undertaking extreme measures to conserve will be called upon to bear the burden for a Fee associated with past customer usage. As it pertains to repayment of the loans for past amounts due, there is little likelihood that the costs themselves can be attributed to the entities who consumed the electricity upon which the Fee Determination is based.[7]

Footnote:
[7] Additionally, in many cases, due to transmission ownership characteristics, some entities may import a large share of electricity; even if those same entities are only importing the electricity to immediately sell to another party, previously signed contracts may prohibit passing along the Fee, which would result in an even higher proportion of the Fee being paid by remaining customers.

Agency Response: See responses to Comment 47.3 KernOil, Comment 38.5 NCPA, and Comment BHSO2.1 WSPA.

50.9 Comment: While the problem does not disappear in the event that 2009 data is used rather than 2008 data, using more recent data does allow for a calculation that is closer in time to the actual consumption. Furthermore, the problems are exacerbated when viewed in light of the fact that the 2008 reporting period was essentially a test year, with no requirement for validation of the results. If possible, Staff should explore means by which to implement the Fee using more recent data, and data that is based on more experience with the Mandatory Reporting Regulations and use of the Reporting Tool.

Agency Response: 2008 data is not required to be verified, but must be certified by the submitter. For future years, a delay is necessary to ensure that the data is appropriately certified and verified. See also our response to Comment 50.8 NCPA.

50.10 Comment: Delay in Implementation Should Not Cause Excess Additional Costs

During the Workshop, Staff proposed delaying implementation of the Fee until the 2010-2011 fiscal year. Implementation of the Fee in 2010-2011 would be consistent with the proposed modification to the billing period, and would not unduly impact the original schedule proposed by the Agency. Staff has proposed the possible delay due to the fact that statutory timelines require mandatory review and comment periods on the revisions to the Proposed Regulation, and it would likely be physically impossible for the Fee to be implemented in time to issue Fee Determination Notices and collect the Fee before the end of the 2009-2010 fiscal year. Based on this reasoning, NCPA does not oppose the delay in implementation of the Proposed Regulation. It is absolutely imperative that the process for adoption of this precedent-setting Fee follow all of the legal requirements to ensure that Staff and stakeholders alike have ample opportunity to review the Proposed Regulation and all of the legal and practical issues associated with it.

With that said, however, NCPA is concerned that the delays in implementation – although necessary - will result in an even greater monetary burden on entities responsible for paying the Fee. As proposed, the first payment of the Fee will now include even greater past due amounts, as well as increased interest payments on the loans. Furthermore, the annual revenue requirement for 2010-2011 is unknown, and could be significantly higher than the 2009-2010 amount used to estimate the revenue requirement. This is of particular concern to NCPA due to the fact that the total revenue requirement is uncapped. Even in future years, it will not be possible for entities to plan ahead for subsequent Fee determinations, as there are no checks or limitations on the total revenues needed to implement (and enforce) the provisions of the Scoping Plan**.**

Agency Response: With the delay in adoption and implementation of the regulation, ARB needed to take an additional loan for fiscal year 2009-10 to implement AB 32 programs. This will increase the fee in the first four years to repay this additional loan. Upon repayment of the loans, the fees for affected entities would be expected to decrease. The commenter reiterates the concern that there is no cap on the total revenue requirement. This is addressed in the response to Comment 60.3 SCPPA.

50.11 Comment: During discussion between stakeholders and Staff regarding the proposed regulation, it was noted that the total fee at issue is de minimus (sic) in many instances, and that the total impact on end-users of electricity is expected to remain low. While Staff is confident that the total revenue requirement for implementation of AB 32 and the numerous measures set forth in the Scoping Plan are not likely to increase significantly from year to year, this optimism is not shared by many that will have to pay the Fee, nor is it borne out when looking at the increasing levels of activity that will be needed to implement the Scoping Plan measures.

Agency Response: See response to Comment 60.3 SCPPA.

50.12 Comment: Electricity Sector Point of Regulation Must be Legally Sound
During the Workshop, Staff proposed that the point of regulation for the Fee be adjusted so that all electricity is assessed a fee on the first deliverer, on a megawatt hour basis. Under this scenario, the Fee would apply to all electricity generated in California and imported into the State. Without the benefit of actual language upon which to comment, NCPA's comments are necessarily broad. However, it is important that the Proposed Regulation include a legal analysis showing the grounds upon which application of the Fee to electricity based on megawatt hours of electricity generated does not treat the electricity sector "sources" of greenhouse gas emissions differently than those other sources in the state that are assessed the Fee based on their upstream fuel source.

Agency Response: Our responses to Comments 5.1 and 5.5 SCPPA explain the first deliverer approach adopted in the regulation. Our explanation of how the regulation treats all sources of greenhouse gas emissions equitably is provided in our responses to Comments 53.13 and 53.14 SCPPA, and 46.1 and 46.2 EPUC.

50.13 Comment: Natural Gas Placed in Storage Should Not be Assessed the Fee
It is also important that the revised Proposed Regulation clarify that the purchase of natural gas placed in storage not be assessed the Fee. Sometimes natural gas is placed in storage and not immediately purchased by the electric generator; this intermediate transaction must not be considered an "end-use" for purposes of assessing the Fee. This clarification is necessary in order to minimize the potential for double-counting and ensure that there is no assessment of the Fee on natural gas that is subsequently used for the generation of electricity since the Fee is assessed directly on the megawatt hours of electricity produced.

Agency Response: The commenter requests that natural gas placed in storage should not be assessed the fee. As adopted, the fee does not apply to natural gas placed in storage.

<u>Comment 44: MID, September 2, 2009</u>

44.1 Comment: Modesto ID Supports Direct Calculation Of The Fee For The Electricity Sector

Staff's proposal to treat all electricity similarly for purposes of the Fee, and to invoice the Fee directly to the electricity sector entities, will eliminate the fuel-delivery pass-through of costs. Modesto ID believes that if the revised regulations contain clear language and a process to ensure that no fuel based fee charges would be passed through to electric generators, this is a far more transparent approach.

Agency Response: This comment was made before staff proposed modifications that were approved by the Board. Our response to Comments 53.13 and 53.14 SCPPA explain the modifications made to the regulation to ensure that no fuel based fee charges are passed through to electricity generating facilities.

44.2 Comment: A Mechanism Should Be Included In The Regulation To Ensure that Emissions Are Not Double-Counted for Fee Calculations

A proper balance needs to be established between ensuring that the Fee is broadly distributed amongst California GHG sources and protecting against application of the Fee associated with electricity generation unrelated to meeting California energy needs. Modesto ID concurs with the comments submitted by NCPA that imposing the Fee on all imported electricity as well as all electricity generated in California rather than simply on net imports (which focus on the actual electricity consumed in California), unduly burdens the electricity sector and California electric ratepayers by resulting in a payment of the Fee on electricity not consumed in California. This outcome is not mandated by the provisions of AB 32 and is clearly inconsistent with the stated purpose of the Fee in the Initial Statement of Reasons (ISOR). Modesto ID urges Staff to consider a resolution to this problem that would involve the netting of electricity imports and exports to ensure that no generation is double-counted in the Fee calculations and that the Fee is only applied to electricity consumed in California. This will in turn assure that California's ratepayers are not overly burdened and charged for emissions unrelated to their load.

Agency Response: Our responses to Comments 5.22 and 53.5 SCPPA and Comment 50.1 NCPA explain why there is no double counting and why all electricity generated in California is subject to the fee, as well as imported electricity that is consumed in California.

44.3 Comment: Provisions Should Be Included In The Regulation For A Dispute Resolution Procedure To Be Applied Before Late Fees Or Penalties Are Assessed. Modesto ID continues to urge Staff to consider including within the Fee Regulations some clear process by which parties obligated to pay the Fee can seek corrections to or resolve disputes regarding the calculation of the Fees invoiced or to be invoiced. Modesto ID believes that whether this process occurs before a final invoice is issued or after is less important than ensuring that a process is clearly set forth.

Section 95205 provides that CARB will issue a Fee determination notice and if the Fee is not paid within 60 days a late fee set by the Executive Officer shall be imposed. There is no provision for the Fee paying entity to challenge the calculated Fee or any of the input data underlying such Fee, or work through potential resolution with CARB. Further, Section 95206 provides for the imposition of enforcement penalties for each day the Fee is not paid. Since resolution of such disputes can often take a lengthy period of time due to information gathering, schedule coordination and other issues, provisions should likewise be included to defer such penalties during the periods disputes regarding the underlying "violation" are going through resolution. Dispute resolution procedures should be applied to all violations potentially acting as a basis for enforcement penalty. For example, in addition to Fee calculations, Section 95206 (c) imposes a penalty for each day a report contains incomplete or inaccurate information. Provision should be made for CARB to notify the submitting party that its report is deemed incomplete and allot time to correct the deficiency or confer with staff to resolve the dispute over whether there is a deficiency, before a penalty is imposed. In addition, penalties for such reporting deficiencies under the Fee Regulation must not duplicate or interfere with enforcement activities under the already existing Reporting Regulations.

Agency Response: The commenter is correct that there is no process specified in the fee regulation for the paying entity to challenge the calculated fee. ARB does not believe it is necessary to include such a process. The fee is based on information provided by the fee payer themselves, which is then entered into mathematical formulae that are clearly specified in the regulation. This process should minimize any potential for disputes to arise. In addition, ARB staff has had many years of experience administering ARB's fee regulations, and this experience indicates that in the rare cases when disputes do arise they can be effectively handled on a case-by-case basis without the need for a formal process.

ARB also believes that the enforcement provisions of the fee regulation are appropriate and do not need to be supplemented by a formal dispute resolution procedure. If ARB believes that a violation has occurred, the process that has been followed by ARB for many years is to notify the party involved and initiate discussions about whether a violation has occurred. In the vast majority of cases this existing process results in the parties reaching a mutually acceptable settlement, which may or may not include a payment of penalties to ARB. If a settlement is not reached, ARB does not have the authority to simply "impose" a penalty for a violation of the fee regulation. ARB must take the matter to court and it will be heard by a judge, who will decide whether a violation has in fact occurred and the appropriate amount of any penalties that should be assessed, after taking into account the factors specified in Health and Safety Code section 42403. The commenter also mentions the provisions of the fee regulation regarding the number of days of violation that occur in certain specified situations. These provisions are authorized by Health and Safety Code section 38580(b)(3) and are consistent with similar provisions in other ARB regulations.

See also the response to Comment 50.6 NCPA regarding the 60 day requirement to remit payment.

44.4 Comment: Some Certainty Must Be Provided As To The Level Of Costs To Be Incurred By California's Electric Ratepayers Under The Fee Regulation. As Modesto ID has noted in previous comments, the estimated costs to be covered by the Fee are just that – estimated. There are no assurances that the Fee will remain at the estimated level. Though the amount is relatively small now when viewed in isolation, it will still have a cumulative impact on ratepayers that are also facing increased costs to deal with the additional requirements of AB 32, as well as other State and Federal programs. California citizens are already facing higher costs of living, a reduction of government services, and higher unemployment. Many businesses in California struggle to operate and compete with very small margins. Even a small additional impact to the bottom line from the fee will be felt.

Agency Response: See responses to Comment 60.3 SCPPA regarding capping the fee, Comment 43.3 IEP regarding the state budget process, and Comment 17.1 WSPA regarding the cost to business.

Fees collected during the first four years (beginning with the 2010-11 fiscal year) are likely to be higher as they include principal and accrued interest payments for loans that paid for AB 32-related program expenses for ARB and Cal/EPA during fiscal years 2007-08, 2008-09 and 2009-10.

ARB recognizes that the financial burden caused by fees may impact California businesses and ultimately consumers, however the fee is very modest. Staff estimate that the cost to an average family will be less than 80 cents a year in their utility bill (both electricity and natural gas), and about 80 cents a year for the average car. The fee will likely decline after the loans have been repaid.

Comment 52 SCE, September 4, 2009

52.1 Comment: CARB staff is proposing that CARB switch to a "First Deliverer" approach for implementing the administrative fee regulation. Under this approach, all in-state generators will pay a portion of the fee based on their reported energy deliveries to the grid, and all importers will pay a portion of the fee based on their reported electricity imports. Accordingly, CARB will no longer assess the administrative fee on fuel providers for electricity generation, as had been proposed in earlier drafts of the fee regulation. With the understanding that this revision is not intended, either philosophically or mathematically, to change the total administrative fee paid by a generation facility, SCE supports this proposed move to a "First Deliverer" approach .

SCE recognizes the effort from CARB staff in developing workshops and soliciting stakeholder input on proposed changes to the AB 32 administrative fee regulation.

Agency Response: ARB thanks the commenter for its support.

52.2 Comment: In designing the final regulation, SCE encourages CARB staff to incorporate principles of fairness and equity within and across sectors. SCE appreciates the opportunity to have worked with CARB staff in ensuring that the final fee regulation is fairly and consistently applied to all parties based upon their reported and/or calculated emissions.

Agency Response: ARB thanks the commenter for its participation in the rulemaking process.

Comment 43: IEP, September 2, 2009

43.1 Comment: Each sector's fee should be proportionate to its share of emissions.

As IEP understands the Proposed AB32 Cost of Implementation Fee Regulation as presented at the August 25, 2009 workshop, CARB is attempting to implement a fee that is based in proportion to the emissions that are contributed by each sector. Under this framework, each sector would be responsible for its fair division of the fee through an emissions based calculation. IEP agrees with this approach, as it is paramount that each sector pays for its fair share of the program. Specifically, the electric sector should not bear a higher percentage of the fee than the proportional amount that it contributes (in emissions) as a sector. In following these principles, the AB32 Administrative Fee will be allocated in a straightforward and impartial manner.

Agency Response: ARB agrees. The mechanism for ensuring that each sector is responsible for its fair share in proportion to emissions is the use of the Common Carbon Cost as a direct fee rate when applied to MTCO2 emission, and in the calculation of fee rates applied to both fuels and electricity. Because the fee rate per MWh for each source of electricity is calculated based on emissions as specified in Section 95203, the electricity sector and each first deliverer within the sector pays fees proportional to emissions caused in the generation of the megawatt-hours of electricity delivered. See response to Comment 46.1 EPUC for more detail. All entities pay fees commensurate with their contribution to greenhouse gas emissions.

43.2 Comment: No Double Jeopardy

Whereas the AB32 Administrative fee was originally to be assessed on fuels as far "upstream" as possible (i.e. natural gas utilities, pipeline, etc.), the new proposal, with respect to the electric sector, recommends that electric generators be assessed a fee directly, based on the amount of electricity that they deliver to the California Grid. As a result of these changes, CARB indicates that electric generators will no longer face a fee on their fuel consumption and that the fee will only be assessed on the electricity component of the generation.

While the proposed changes suggest that CARB will assess a fee *only* on the electricity component of the generation, IEP wants to make certain that electric generators are not assessed a fee on both their electricity production and their fuel input.[1] To do so, would essentially result in electric generators paying twice, while others involved in the program would only pay once. Accordingly, a fundamental aspect of the proposed fee regulation is that once an electric generator pays a fee for electricity, it does not pay a fee for the fuel as well.

Footnote:

[1] This discussion excludes cogeneration facilities, in which CARB has suggested that cogeneration will be treated as an "industrial" facility.

Agency Response: We agree that no entity, including electricity generating facilities, should be subject to a double fee, either directly, or through a combination of a direct and indirect fee. Therefore, the Board approved modifications that ensure that there will be no "double jeopardy". See responses to Comments 53.13 and 53.14 SCPPA for a description of these modifications.

43.3 Comment: The Need for Transparency in Implementing the Fee Structure.

In order to promote confidence and support for the AB32 Administrative Fee Implementation, there must be transparency and openness in assessing and developing the fee. Currently, it is unclear as to which agencies, divisions, departments, etc. will receive funds from the AB 32 Administrative Fee. For purposes of providing those who are paying the fee with clarity as to where and on what their money is being spent, IEP recommends that CARB produce and make publicly available an annual report that identifies all of the resources, broken down by agency, that are included in the annual program costs. This report will be a helpful tool both for the state and the public to identify the actual costs and expenditures of the overall program.

Agency Response: A description of the agencies that were expected to receive funding from the fee was provided in the Initial Statement of Reasons (see pages 124-130). In addition, each year, the Administration will issue a preliminary cross cut budget based on the Governor's budget proposal. This public document provides details on the Governor's recommendations for state programs and agencies related to AB 32 implementation. This also will include what state agencies are expected to be working on AB 32 and that are expected to be funded through this fee. After the budget is approved, the Administration will issue an approved AB 32 cross cut budget summary. This document will be the basis of the TRR.

In addition, under AB 1338 (budget trailer bill, Statutes of 2008) each state agency working on AB 32 is required to produce a Five Year Plan. This must include: 1) the agency's funding proposals and base funding in the Governor's Budget, and 2) the agency's five year work plan. This includes climate change efforts that were specifically budgeted for as part of AB 32 implementation. Cal/EPA is charged with collecting and submitting this information to the Legislature by January 10 annually. In addition, information on the resources to be expended for agencies implementing AB 32 is all publicly available.

43.4 Comment: Reporting

As part of the fee calculation, CARB will evaluate the Common Carbon Cost (CCC), which is equal to the total required revenue for the current fiscal year divided by the total emissions from a specified calendar year.[2] This product will be inserted as an input in the specific fee calculations. As IEP understands it, CARB will be using annual emissions data, beginning in 2008. Accordingly, IEP would like to note that for the electric sector, 2008 data may not be accurate, as 2009 is the "test year", with 2010 representing the first precise and official data year.

Footnote:
[2] *AB 32 Cost of Implementation Fee Regulation Reference Materials,* page 2.

Agency Response: Under this fee regulation, the data for calendar year 2008 and subsequent years must be certified for completeness and accuracy by the person responsible for submitting the data for all sectors, including electricity. In addition, ARB may conduct audits on this data to ensure its integrity and compliance with this program.

43.5 Comment: Renewables Exemption.

Though CARB staff has implicitly taken the position that renewable generators will essentially be exempt from the AB32 Administrative Fee, specific language regarding this exemption must be explicitly defined. As IEP understands the implementation of the fee, all renewables including biomass and biogas will be exempt. While IEP supports these recommendations, it is evident that clarity is needed as to how CARB is defining "renewables" and to what extent renewables are actually excused from the fee. In essence, CARB must specify exactly how renewables will be treated under the program.

Agency Response: ARB has explained that the regulation's applicability section makes it clear that only electricity generation from fossil fuels is subject to the fee in our response to Comment 38.19 NCPA. Although electricity generated from renewable fuels is not subject to the fee, electricity generated from a facility that uses both renewable and fossil fuel will be subject to the fee proportionally to the amount of fossil fuel used, as explained in our response to Comment 48.2 CBEA. We note also that the regulation's definition of natural gas was modified to specifically exclude biogas. See also response to comment FF13.1 Sempra.

43.6 Comment: The Administrative Fee as a Transitional Mechanism. While the proposed administrative fee will provide CARB with a mechanism to collect money for the costs associated with AB32 implementation, the structure of the program should nonetheless be revisited upon the commencement of a cap-and-trade program during the 2012-2013 timeframe. Once the cap-and-trade program begins, there may be a more cost effective and timely means to recover the AB32 implementation costs (i.e. through allowances, offsets, etc) than what is currently being proposed. In addition, the current fee structure does not consider the inclusion of offsets, which will substantially change the emission profiles of those that are subject to the fee. As a result of the implications that a cap-and-trade program may play on the proposed administrative fee, IEP recommends that CARB reassess the adopted fee regulation in the 2012-2013 timeframe.

Agency Response: As the state's cap-and-trade program becomes more developed funding the administrative costs associated with AB32 will be considered if appropriate. ARB disagrees that the regulation itself should clarify that the Fee proposed therein will only be an interim funding measure as it is premature to assume that funding will come from a cap-and-trade program, or any another source.

Comment 46: EPUC, September 2, 2009

46.1 Comment: CARB must ensure that changes to draft administrative fee regulations will not financially disadvantage cogeneration facilities relative to other forms of electric generation.

Changes to Draft AB 32 Administrative Fee Regulations Should Ensure Efficient Cogeneration is Not Financially Penalized When Compared to Other Forms of Electric Generation.

CARB's new proposed changes will treat conventional generation in a different manner than cogeneration.

Agency Response: Our responses to Comments 53.12 to 53.16 SCPPA provide a full account of how the regulatory approach distinguishes between cogeneration facilities and electricity generation facilities, and provides our rationale for treating these two classes of entities differently. ARB does not believe that treating these two classes differently financially disadvantage (or penalizes) cogeneration.

The use of the Common Carbon Cost (CCC) ensures that all entities pay an equitable share of the carbon fee based on the carbon dioxide emissions associated with, or embedded in, the unit of measurement upon which the fee is directly assessed. A key part of the calculation of the fee is the use of the CCC, as described in the ISOR, and as calculated per the regulation, section 95203(b).

The amount of the fee is always based on, and is always proportional to, the amount of carbon dioxide emissions, regardless of whether the fee is applied to units of fuel, carbon dioxide, or electricity. Section 95203(c) describes how the CCC is used to calculate fuel fee rates, based on the fuel carbon dioxide emission factors in Section 95203(c). These fuel fee rates are used to calculate the fees for cogeneration facilities, except for those cogeneration facilities that pay fees directly per $MTCO_2$ of emissions.

The calculation methodologies for electricity emission factors and fee rates that are explained in the ISOR for imported electricity have been extended in the modified regulation to apply to in-state electricity as well. Emission factors are calculated for each specified source of electricity based on carbon intensity, per Sections 95203(f) and 95203(g). Section 95203(e) explains how the CCC and the source-specific emission factors are used to calculate electricity fee rates per megawatt-hour. Since different sources of electricity emit different amounts of carbon dioxide per MWh generated, a different fee per MWh of electricity is calculated for each source.

Because the fee applied to fuels and electricity is always based on the carbon dioxide emissions embedded in the fuel or electricity, it is equitable to all entities based on their contribution to the problem of greenhouse gas pollution. This means that, although electricity generation facilities will pay the fee based on the carbon content per megawatt-hour and cogeneration facilities will pay the fee based either on fuel or emissions, they both pay for CO2 emissions. There is no disadvantage or penalty to cogeneration.

The precautions taken in the regulation to assure that there is no double counting, explained in our response to 53.14, provide further assurance that cogeneration is not financially disadvantaged under the regulation.

46.2 **Comment:** While conventional generation will pay the administrative fee on the basis of MWh delivered to the grid, regardless of the associated emissions or the fuel they use, cogeneration facilities will pay the fee based on actual fuel use or emissions. Given this difference, CARB must ensure that cogeneration facilities are not penalized financially relative to other forms of electricity generation. To ensure comparable treatment, CARB should cap the effective charge per MWh for a cogeneration facility at the charge imposed on other electricity generators.

Agency Response: This comment was made before the staff released the modified regulation that was approved by the Board. As explained in our response to Comment 46.1 EPUC, the regulation ensures that cogeneration facilities and conventional generation (electricity generating facilities) are treated equitably.

It is not true that “conventional generation will pay the administrative fee on the basis of MWh delivered to the grid, regardless of the associated emissions or the fuel they use.”

The regulatory sections referred to in our response to Comment 46.1 EPUC explain how the fee per megawatt-hour fee is calculated based on the emissions or fuels used at the specific electricity source (electricity generating facility) that produces the electricity. As discussed in that response, use of the CCC ensures that there is comparable, equitable treatment of cogeneration facilities and electricity generation facilities. Because the calculation methodologies ensure equitable treatment, there is no need to cap the effective charge per MWh for a cogeneration facility.

46.3 Comment: Draft AB 32 administrative fee regulations require additional clarification to ensure that cogeneration facilities will not be subject to duplicative regulation. (Page 1)

Additional clarification is required to ensure that proposed changes to draft AB 32 administrative fee regulations will not subject cogeneration facilities to duplicative regulations. As illustrated through the following examples, current changes coupled with existing draft language risk imposing the administrative fee twice for the same emissions:

1. Under CARB's proposed changes, cogeneration facilities would be responsible for "*fuel use or total emissions*." Rules must make clear that if a facility pays the administrative fee directly to CARB based on emissions, it should be exempt from any administrative fee surcharge imposed by the pipeline delivering its natural gas supply.
2. Cogeneration facilities associated with refineries could be subject to duplicative regulation if they are required to pay the administrative fee on refinery-produced fuels used in generation; refinery gas and coke use are already accounted for in the portion of the regulations that address the imposition of the administrative fee on a refinery. (page 2)

CARB proposes that cogeneration facilities be treated as industrial facilities, providing two alternative methods for assessing the fee: based on fuels or based on emissions. It remains unclear, however, how the fee will ultimately be determined.

The June draft of the AB 32 administrative fee regulations suggests that cogeneration facilities could pay the administrative fee:

- indirectly through a natural gas surcharge passed through from a local distribution company;
- directly as an end-user receiving natural gas supplies from an interstate pipeline; or
- indirectly through charges imposed by a non-utility, intrastate pipeline.

Alternatively, the current proposed changes indicate that a cogeneration facility could pay its administrative fee based on fuels ***or*** emissions. The proposed changes do not specify whether CARB or the cogeneration facility will determine whether fuel or emissions will serve as the basis for the administrative fee.

Clarification is required to make sure that, if the cogenerator pays the fee directly to CARB based on emissions, it is not also surcharged by a natural gas distributor based on fuel use.

To prevent double regulation, CARB should provide additional information regarding the calculation of a cogeneration facility's fee responsibility by:

- Clarifying the circumstances under which a cogeneration facility pays its fee based on fuel use and/or emissions;
- Ensuring that a cogeneration facility's total AB 32 administrative fees do not exceed the value of the fees computed solely on the basis of actual fuel use;
- Providing additional information on how the emissions fee will be calculated to ensure that it does not disadvantage CHP paying the fee based on emissions relative to other generation;
- Ensuring that the emissions associated with a cogeneration facility are not defined in a manner that overlaps or conflicts with emissions that are the responsibility of a refinery; and
- Clarifying that cogeneration facilities paying the administrative fee, in whole or in part, as a surcharge on natural gas transportation are not also responsible for a separate fee based on the associated emissions from combustion of this fuel. (page 3-4)

CARB AB 32 Administrative Fee Regulations Must Ensure that Cogeneration Facilities are not Subject to Duplicative Regulations As a Result of Existing Refinery Regulations CARB's proposed changes create overlap and conflict with the existing draft regulations for emissions associated with refinery fuel and coke use. Under the draft regulations (presented in June), refineries would bear the responsibility to pay the administrative fee for emissions from the consumption of catalyst coke, petroleum coke or refinery gas:

> *(3) Refineries*
>
> *Fees shall be paid on the amount of emissions by the owner or operator of any refinery that emits process emissions resulting from the steam methane reforming process, or the production or consumption of:*
>
> *(A) Catalyst coke;*
> *(B) Petroleum coke; or*
> (C) *Refinery gas*.[3]

In comparison, under the proposed changes, cogeneration would be charged the administrative fee for emissions from combusting the following fuels: "*coal, natural gas, coke, and refinery gas*." CARB should keep in mind that the owner of the cogeneration facility and the owner of the refinery may not be the same entity. Accordingly, the draft regulations must clarify that where the refinery takes responsibility for the emissions from refinery gas and coke combustion, the associated cogeneration facility does not bear the administrative fee obligation for these emissions.

CARB should also clarify how the administrative fee for refinery gas and coke would be calculated. The proposed MWh administrative fee proposed for noncogeneration forms of electric generation is fuel-neutral and does not take carbon intensity of fuel into consideration. Consequently, it would disadvantage cogeneration if the method used to determine the fee associated with emissions from refinery-produced fuels resulted in an effective MWh fee that exceeded the fee imposed on other generation. (page 4-5)

Footnote:
[3] *See* CARB Draft AB 32 Administrative Fee Regulations issued in June 2009, at § 95201

Agency Response: This comment was made before the staff put forth the modified regulation that was approved by the Board. The responses to Comment 53.14 SCPPA and 46.1 EPUC explain in detail how the fee applies to industrial facilities, including cogeneration facilities, and to deliverers and users of natural gas, and how fees on natural gas are passed through. The previous discussion of modifications to the applicability section in the response to Comment 53.14 SCPPA clarifies that there will be no duplicative fees for natural gas using cogeneration or for refinery cogeneration. As discussed, the removal of the section of the originally proposed regulation specific to refineries ensures no duplication of fees for refineries. The modifications to Sections 95201(a)(1) and (5) ensure that cogeneration facilities and other users of natural gas, associated gas, coal, catalyst coke, petroleum coke, and/or refinery gas will only pay the fee on either emissions or fuels, and never on both.

Sections 95203(c), (d) , (i) and (k) further clarify how fees are calculated for coal, catalyst coke, petroleum coke and refinery gas. The fees for coal and petroleum coke are charged as a per short-ton fee, at a fee rate that is calculated using an emission factor per short ton for those fuels. The emission factors used to calculate the fee rate are listed in the table of emission factors in section 95203(d). Although the fee rate is applied to short tons of coal or catalyst coke, the basis of the fee is the calculated emissions.

Catalyst coke and refinery gas are treated differently. For these fuels, the fee is charged per $MTCO_2$ of emissions that are reported pursuant to the mandatory reporting regulation, and the fee for an entity that uses these fuels is calculated pursuant to section 95203(k).

The commenter also wanted the regulation to ensure that “a cogeneration facility’s total AB 32 administrative fees do not exceed the value of the fees computed solely on the basis of actual fuel use.” In fact, the fees are applied directly to emissions only for catalyst coke and refinery gas, because those two fuels have variable carbon content. Thus, for cogeneration facilities using those two fuels, there is no practical way to calculate fees based on fuel quantities, so instead the fee must be based directly on reported emissions.

The concept paper presented at the August 25, 2009 was a summary of the proposed modifications to the regulation. The regulation specifies that cogeneration facilities are not considered electrical generating facilities. The regulation clarifies the point of regulation for fuels used at all sources other than electrical generating facilities in section 95201.

46.4 Comment: Cogeneration facilities that have two separate meters, one for exported electricity and one for imported electricity, may be forced to bear duplicative fees unless CARB credits these facilities with the administrative fee that would be associated with exported power. (page 2)

CARB Must Ensure that Industrial Sites with Cogeneration Facilities Are Not Required to Pay the Fee for Electricity Generation in Excess of the Facility's Use. While a generation facility is typically interconnected to the grid through a single meter, some cogeneration facilities may be interconnected to the grid through multiple meters to provide increased reliability in the event of grid disturbances. For these facilities, power may be simultaneously exported through one meter and imported across another. Without "netting" the meters, a facility could bear a larger share of the administrative fee than it should. (page 5)

For example, consider an industrial site with 100 MW of cogeneration and two meters at its utility interface, Meter A and Meter B, and consumes 104 MW in total. Assume further that Meter A reflects 10 MW of imports and Meter B reflects 6 MW of exports. Under this scenario, the site could be required to pay an administrative fee for the fuels associated with the 100 MW generation and, through the electric utility, a fee embedded in the rate for the 10 MW of imported power, or a total of 110 MW. More appropriately, the site should pay directly the fee for its 100 MW of generation, while paying a fee indirectly to the utility for the "net" imports (4 MW,) so that its total obligation does not exceed its total electricity consumption.

To avoid double imposition of the fee, CARB should provide industrial sites with multiple meters a credit for the amount of any duplicative fees. The credit would reflect the administrative fee associated with 6 MW of exported power.

Agency Response: This comment was submitted before modifications proposed by staff and approved by the Board had been decided. The commenter appears to hypothesize that the fee regulation might be applied to MW (megawatts). However, under the regulation, no entity pays a fee based on megawatts. Megawatts are of units power, not units of electrical energy. In the electricity industry, megawatts are also considered units of the capacity of a power plant to provide instantaneous power. But, unlike megawatt-hours (MWh), megawatts cannot be understood to have carbon content. MWhs are the units for electrical energy to which the fee is applied. They have calculable carbon content, and the regulation indicates how the carbon content per megawatt-hour is calculated.

However, had the commenter had similar concerns about megawatt-hours, as explained in responses to Comments 53.13 and 53.14 SCAPPA, and 46.3 EPUC, cogeneration facilities do not pay any fee applied to megawatt-hours, but instead pay a fee applied either to units of fuel, or directly to MTCO2 of emissions. It is true that cogenerators will likely face the costs of fees passed through in electricity costs from first deliverers to utilities to electric utility customers. If a cogenerator does not have metering that allows actual "imports and exports" (to and from a facility) to be measured, such a cogenerator should also be able to pass through the fuel fee on the electricity they sell to the grid. No commenter has provided more than a hypothetical example of a possible unwarranted fee due to complex metering. The hypothetical entity could likely resolve this through more accurate metering.

46.5 Comment: **EPUC-3**: Treatment of cogeneration facilities outside the electricity sector for purposes of AB 32 administrative fee must not prejudge development of AB 32 greenhouse gas (GHG) regulations. (page 2, paragraph 1)

The regulatory scheme used for the AB 32 administrative fee should not prejudge the regulation scheme to be used for AB 32's GHG and the cap-and-trade programs. Unlike the AB 32 GHG regulations, the administrative fee is meant to promote administrative ease rather than determine responsibility in a cap-and-trade market. Given the difference in objectives, it would not be appropriate for the administrative fee scheme to be used to shape future GHG regulations.

Agency Response: The first sentence of this comment is not clear. This fee is one of several AB 32 greenhouse gas regulations. However, we agree that treatment of cogeneration facilities in this regulation should not predetermine how cogeneration facilities are treated in the development of any other AB 32 regulations.

Comment 47: KernOil, September 2, 2009

47.1 Comment: The two remaining small refiners producing transportation fuels are "family owned" and are not owned or operated by publically traded integrated oil companies and do not have upstream oil and gas production or downstream marketing and retail stations. Small refiners are clearly being disproportionally economically impacted by the AB 32 regulations.

CARB estimates $63.1 million dollars is needed for the FY 2009/10 collection to administer the AB 32 Program and for debt repayment. Based on CARB's fee allocation proposal, the refiner sector is expected to pay $33.8 million or 53.4% of the total $63.1 FY2009/10 program fees. However, based on CARB's GHG Scoping Plan emissions inventory refineries only represent 6% of the total GHG emissions, yet refineries are being assessed 53.4% of the total annual fees to fund the program. This is clearly an unfair, inequitable and disproportional economic impact to refiners. Kern recommends the fees for refineries be assessed in a way that more fairly reflects the proportionality of refinery emissions as compared to the total GHG inventory.

Agency Response: The “upstream” approach ARB developed allows for much simpler and less costly administration of the program compared to assessing the fee on all end users.

In terms of small refiners being at a disadvantage, the fee will be the same for every gallon of gasoline and diesel, and will amount to approximately one-tenth of one cent per gallon. It does not appear that one refiner can gain a competitive edge over another by not passing through the cost of the fuel. Also, since it appears that market position fluctuates little between the major refineries (less than one percent of the total market)[2], there should be no variation in the cost per gallon applied by each refinery to pass through the fee.

See also response to Comment 53.1 SCPPA, Comment 11.1 BP, Comment BHJ-O9.1 WSPA and Comment BHJ-O9.2 WSPA.

47.2 Comment: Kern has recommended the fee “tax” be placed at the retail sales pump and full disclosure be made at the pump so the public clearly understands why each gallon of fuel purchased has increased in cost. Unfortunately, CARB has indicated they do not have the manpower to collect the fees from such a large population of retail stations throughout the State.

Agency Response: This fee is not intended to change fuel use behavior. It is expected that the cost of this fee per gallon (approximately one-tenth of one cent) would be unnoticed by the consumer so that no change in fuel purchase habits will result from its imposition even if posted at the pump.

Additionally, the commenter suggests that the place to collect the fee is at the pump. Other commenters have stated that ARB should use the same method of collecting this fee as is used by the Board of Equalization (BOE) to collect fuel taxes. Reasons why this is not applicable to this regulation are discussed throughout the response to Comments 45 WPSA and BHJ-O9 WSPA. The method employed by BOE is as far “downstream” in the fuel supply chain as is reasonable, however, even their method does not actually collect the fee at the pump, but rather at an upstream location. ARB believes that collection at the pump would require additional resources, increasing the administrative burden and the fee.

47.3 Comment: CARB wrongly assumes that refiners can “pass-through” the fee. This is a misconception since the ability to pass-through costs are controlled by market forces beyond the control of any one individual refiner. However, refiners

[2] California State Board of Equalization. (2009) Monthly Motor Vehicle Fuel Distributions Reports 2002-July 2009. Retrieved August 2009 from [http://www.boe.ca.gov/sptaxprog/spftrpts.htm].

do have the ability to pass-through costs of fees or taxes if the fees or taxes are known in advance and are assessed by the governmental agency, and equitably applied to all refiners. Currently, it appears the AB 32 fee (cost/gallon) will not be known until the fiscal year ends and CARB then determines how much was spent during that year, at which time the fee will then be calculated and communicated to refiners. This process will not provide refiners with the ability to pass on the fee for that prior year.

Agency Response: As stated on page 46 of the ISOR, ARB expects that refiners paying the fee have the ability to pass the costs through to consumers. The demand for gasoline and diesel is inelastic and the carbon content portion of the fee is also assessed on imported fuel, so the refiners should have the ability to pass on fee costs. It is common knowledge that the price paid by consumers for gasoline and diesel fuel often increases or decreases by significant amounts, and that in the past refineries and importers have been able to increase the price of their products when their costs go up due to market forces. Because the cost of the fee will affect providers of gasoline and diesel fuel in substantially the same way, ARB believes that the fee will likely be passed on to customers just as other cost increases have been passed on in the past. Additionally, even if entities cannot pass the cost through to the ultimate consumer, it is anticipated the fee will be absorbed as a cost of doing business.

47.4 Comment: Kern offers the following suggestion that would help the ability of refiners to pass-through the fees.

- CARB must create a budget in advance, divide that by the estimated gallons to be assessed (historical data and information is available) and publish a rate (cost/gallon) to be in effect for that fiscal period. This published rate needs to be provided to refiners in advance of the annual fiscal cycle.
- Refiners would then include the fee as a line item on the invoice generated at the fuel transfer rack. This would be consistent with the method of pass-through for State Board of Equalization (BOE) fees and taxes (e.g., Supplier of Motor Vehicle Fuel Fee, Supplier of Diesel Fuel Fee, and Prepayment of Sales Tax), all of which are computed as a cost per gallon to facilitate their inclusion on an invoice.
- Industry payments could be made to CARB monthly, quarterly, or annually based on sales volumes for the related period. This would be consistent with the payment of BOE fees and taxes.
- If AB 32 Program costs are more or less than budget estimate, the differences can then be rolled into the subsequent year’s rate calculation.

Agency Response: ARB cannot project the fee for each fiscal year. The fee is based on the adopted budget. ARB also cannot base a fee on prospective gasoline and diesel fuel sales because of the uncertainty of those estimates. See also responses to comment BHS-O11.3 CIOMA.

<u>Comment 48: CBEA, September 2, 2009</u>

48.1 Comment: We understand that you are proposing to shift from fuels to MWh delivered to the grid as the basis for the GHG fee on electrical generating power plants and imported energy that serves the grid. CBEA believes that if this approach is used, the fuel source of the MWh should be taken into consideration, which we believe is your intent, particularly with respect to biofuels used to generate electricity. These fuels are generally considered biogenic, producing CO_2 emissions that are part of the natural carbon cycle (i.e. are carbon neutral), and are a vital component in meeting the renewable energy mandates of the State of California. As such, the use of these fuels should be encouraged without any additional financial barriers. However, the concept paper on this issue is not clear, nor were statements made in the workshop that the GHG fee would be applied to all electricity delivered to the grid.

Agency Response: We agree. This comment was made while staff were deliberating and formulating the regulatory language that was approved by the Board. Section 95201(a)(4) clarifies that fees will be paid for each megawatt of electricity (net power) generated by combustion of natural gas, coal or other fossil fuels except California diesel at an electricity generating facility in California. The fee is not applicable to megawatt-hours of electricity generated by the combustion of biomass, or by the combustion of any other biofuels. (Electricity generated from combustion of California diesel is not subject to the fee because the fee is applied to California diesel at a different point of regulation.)

48.2 Comment: New biomass facilities, or expansions of existing facilities, will be needed to meet GHG reduction targets.

CBEA therefore requests that the modifications to the proposed regulations: 1) clearly indicate that electricity provided to the grid from biomass sources, and the incidental use of fossil fuel to support these operations, not be subject to the proposed GHG fee for electrical generation, and; 2) clearly indicate that these regulations will not impose GHG fees on any sources of biomass fuels, and any incidental fossil fuels required in their use, regardless of whether they are used for stationary power generation or for vehicle fuels.

Agency Response: As discussed in the response to Comment 48.1 CBEA, the fee is not applicable to megawatt-hours of electricity generated by the combustion of biomass. However, section 95201(a)(4) clearly states that the fee applies to electricity generated from fossil fuels. ARB does not agree that the incidental use of fossil fuels to support biomass operations should be exempt from the fees. It would not be equitable to exclude fossil fuels from the fee because they are used alongside biomass fuels not subject to the fee. Staff have worked to apply the fee as broadly as feasible to quantifiable carbon dioxide emissions from fossil fuels. The combustion of fossil fuels is by far the largest contribution to statewide greenhouse gas emission. It would not be fair to other fossil fuel users to exempt incidental use of fossil fuels, as other fossil fuel users would be then required to pay slightly higher fees.

The commenter states that new biomass facilities will be needed to meet greenhouse gas reduction targets. Although this statement may be true, this fee, when applied to incidental fossil fuel used alongside biomass, would typically amount to less than one cent per megawatt-hour, while prices per megawatt-hour often range from thirty to over a hundred dollars (see response to 5.22 SCPPA for low wholesale prices typical during a period in which natural gas prices were low). Such a small cost of the fee is unlikely to discourage new biomass facilities.

Comment 51: NRDC-1, September 2, 2009

51.1 Comment: We understand that CARB feels it might be difficult to collect the fee by spring 2010 as originally planned. Before making that decision, we urge you to give stakeholders additional information regarding the impacts of the proposed delay:

How much additional money will CARB need to collect to cover finance charges as a result of a delay from spring 2010 (FY 2009-10) to fall 2010 (FY 2010-11)?

Agency Response: Because this Fee Regulation was not approved during the planned June 25, 2009, but rather at the September 25, 2009 Board meeting, it was not possible to begin collection of the fee during spring 2010.

As a result of delaying the fee collection until fiscal year 2010/11, ARB needed to utilize a $35 million loan from the Beverage Container Recycling Fund for the current fiscal year (2009/10). The additional cost resulting from the delay will be determined by how much of the $35 million loan is needed and the accrued interest, based on the current interest rate of the Pooled Money Investment Account. Interest rates and other information on this account can be found at: [http://www.treasurer.ca.gov/pmia-laif/]

51.2 Comment: Give a few potential timelines for getting the fee implemented, similar to slide 22 presented at the August 25 workshop, but with more detail about reasons for the time gaps. For example, you could give three scenarios:

1. as expeditious as legally possible, regardless of practicalities;
2. as expeditious as practicably possible, if all goes well; and
3. a conservative timeline, allowing for unforeseen difficulties.

Agency Response: ARB's timeline is as expeditious as legally and practicably possible. ARB anticipates that by June 2010 the fee regulation will be in effect and that fees will be collected in the fall. Nevertheless, ARB can not send out invoices until the state budget is passed, which has historically been between July and September. ARB anticipates sending out invoices within 30 days after the budget is finalized.

51.3 Comment: What streamlining measures could be put in place to reduce administrative burdens without compromising public input in order to speed up implementation of the fee and ensure a spring 2010 implementation date?

Agency Response: ARB will not be able to begin fee collection in Spring 2010 because the Fiscal Year 2010/11 budget will not be adopted until on or around July 2010.

Comment 54: SWICS, September 2, 2009

54.1 Comment: Electricity -- Applicability and Point of Regulation -- Biomass Energy

We understand that you are proposing to shift from fuels to MWh delivered to the grid as a basis for the GHG fee on electrical generating power plants and imported energy that serves the grid. SWICS believes that if this approach is used, the fuel source of the MWh should be taken into consideration - which we believe is your intent particularly with respect to biofuels (e.g., landfill gas and biomass) used to generate electricity. These fuels are generally considered biogenic, producing CO_2 emissions that are part of the natural carbon cycle, and are a vital component in meeting the renewable energy mandates of the State of California. As such, the use of these fuels should be encouraged without any additional financial barriers. However, the concept paper on this issue is not clear, nor were statements made in the workshop that the GHG fee would be applied to all electricity delivered to the grid. A number of SWICS members operate electrical generating facilities in California that use landfill gas or biomass as a source of fuel -rather than fossil fuels, although small amounts of fossil fuel, typically natural gas, may be used for purposes such as flame stabilization. We therefore request that the modifications to the proposed regulations clearly indicate that electricity provided to the grid from biomass or biogas sources, nor the incidental use of fossil fuel to support these operations, not be subject to the proposed GHG fee for electrical generation. <u>*SWICS requests that the regulations contain specific provisions to ensure that these biomass sources of electrical power are exempt from the GHG fee provisions - both for electricity generated in California and for that imported from other states.*</u>

Agency Response: Section 95201 of the fee regulation clearly states the fossil fuels that are subject to the fee, and that the fee will apply to electricity generated from combustion of fossil fuels, including natural gas. As discussed in our response to Comment 48.1 CBEA, the fee does not apply to electricity generated from biofuels. However, as discussed in our response to Comment 48.2 CBEA, there is no exemption for natural gas or other fuels.

Pipeline gas delivered by utilities to electricity generating facilities is not subject to the fee because the electricity generated is subject to the fee based on the emissions associated with generation. Biogas transported in pipelines is not subject to the fee, but natural gas is, regardless of its intended use. As discussed in the response to Comment 48.2 CBEA, it would be unfair to other fee payers to exempt some natural gas from the fee.

54.2 Comment: It is not clear from the existing proposed regulations and the concept papers how you will differentiate between natural gas used to generate grid electricity and natural gas used for other combustion purposes. As stated in the previously proposed regulations: 95201 (a)(1) - All public utility gas corporations operating in California. Fees shall be paid for each therm of *natural gas delivered to* ***any*** *end user.* (Emphasis added)

However, now it appears that power plants that use natural gas to generate electricity will separately pay the fee based on MWh delivered to the grid. The GHG fee on electricity to the grid would appear to be based on the type of fuel used to produce the power to the grid and the MWh actually delivered - and would be paid by the electrical generating entity. For other entities that combust natural gas, it appears that the GHG fee will be charged to the utility that delivers the pipeline gas to the combusting entity – including entities that generated on site power or heat (but not to the grid), or who are cogeneration facilities - as per the language of the previously proposed regulation.

For natural gas fueled electrical generation to the grid, this natural gas is usually provided by a public utility via a pipeline. Thus, it would not be appropriate for the fee to also be charged on the pipeline natural gas delivered to the electrical generating facility by public utility. We assume that the new revised regulations will contain provisions that allow the gas pipeline utility to *subtract* the natural gas they deliver to the electrical generating facility so as to not result in a double payment of fees (i.e., both by the pipeline utility and by the natural gas fueled electrical generating facility). Further clarification of this point would be much appreciated. *This is particularly important with respect to a similar parallel issue, discussed next, involving pipeline gas used as a transportation fuel.*

Agency Response: Our response to Comments 53.13 and 53.14SCPPA explain how the regulation ensures that natural gas delivered to electricity generating facilities will not be subject to the fee. Natural gas deliverers will pay the fee on gas delivered to all end users except electricity generating facilities. ARB will provide the natural gas utilities with a list of electricity generating facilities that are being charged the fee, so the utilities can exclude deliveries to those facilities from the delivered natural gas they report to ARB that is subject to the fee. The natural gas utilities will use ARB's list to exclude electricity generating facilities from the pass-through of the natural gas fee.

54.3 Comment: SWICS requests that the regulations be clarified to provide that pipeline gas that is metered separately and used to produce a low carbon transportation fuel *not be subject to the GHG fee.* Just as pipeline natural gas used to produce electricity to the grid needs to be subtracted from the total quantity of gas that the pipeline utility must pay a GHG fee (as discussed above), the regulations should provide that pipeline gas that is separately metered to provide transportation fuel should be deducted from the total quantity of natural gas for which the pipeline utility must pay a fee. *SWICS requests that the* *regulations be modified to ensure that GHG fees are not charged on any form of natural gas that is used for vehicle fuel.*

Agency Response: There is no exemption for fossil fuels, including natural gas, depending upon the use. The intention of the regulation is to apply the fee to all natural gas as defined in the regulation, combusted or consumed in the state, and to those fossil fuels not specifically excluded in section 95201. The fee is not applied to pipeline gas used to generate electricity because the fee is applied directly to electricity.

54.4 **Comment:** SWICS has received some indication that it is not CARB 's intent to impose GHG fees on any biomass-derived fuels at this time. However, the recent concept papers did not appear to address this issue clearly. *SWICS requests that CARB provide clear indication that these regulations will not impose GHG fees on any sources of biomass fuels, and any incidental fossil fuels required in their use, regardless of whether they are used for stationary power generation or for vehicle fuels.*

Agency Response: The fee regulation is clear that the fee will apply to fossil fuel used for electricity generation and natural gas defined as being produced underground in geologic formation – thus excluding biogas. As discussed in our response to 48.2 CBEA, there is no exemption for fossil fuels based on incidental use.

Comment 57: CAPCOA, September 23, 2009

57 **Comment:** We respectfully request modification of one aspect of each of the above referenced proposals – to enable the future approval of alternative reporting tools developed by local air pollution control or air quality management districts. We strongly believe this will result in streamlined reporting, significant savings of costs and time for businesses and our organizations, and represents good government and customer service. The specific language we suggest is shown in the Attachment to this letter.

This modification is consistent with language in AB 32. Section 38530 (a)(4) of AB32 states, *"Ensure rigorous and consistent accounting of emissions, and **provide reporting tools and formats** to ensure collection of necessary data"* (emphasis added). This language suggests that more than one tool is appropriate. Section 38530 (c)(2) further states *"Review existing and proposed international, federal, and state greenhouse gas emission reporting programs and make reasonable efforts to promote consistency among the programs established pursuant to this part and other programs, **and to streamline reporting requirements on greenhouse gas emission sources"*** (emphasis added).

Districts that develop optional tools that consolidate criteria and greenhouse gas reporting should be allowed the opportunity to work with CARB staff to make sure these reporting tools meet all the requirements of the mandatory reporting regulation. Only then should those alternative tools be approved.

Most of the facilities that report greenhouse gases to CARB are also required to report criteria and toxic pollutants to their local air quality agency. Much of the information is the same. Combined reporting will save the facility time and eliminate errors or inconsistencies in reporting. Reconciliation of reports, such as the amount of fuel used, will be inevitable if facilities report to both agencies. We anticipate that this will take significant time from both local air quality staff and CARB staff.

(Attached)
§95204. Reporting and Recordkeeping Requirements.
(a) *Reporting Format*

All reports required by this article must be submitted to ARB by using the California Air Resources Board's Greenhouse Gas Reporting Tool, as specified in Title 17, California Code of Regulations section 95104(e), and is available on ARB's internet website at <u>www.arb.ca.gov or an equivalent tool developed by local air pollution control or air quality management districts and approved by the Executive Officer.</u>

Proposed Amendment to the Regulation for the Mandatory Reporting of Greenhouse Gas Emissions
§95104. Greenhouse Gas Emissions Data Report.

(e) The operator shall submit emissions data reports, and any revisions to the reports, through the California Air Resources Board's Greenhouse Gas Reporting Tool <u>or an equivalent tool developed by local air pollution control or air quality management districts and approved by the Executive Officer.</u>

Agency Response: Section 95104(e) of the Regulation for the Mandatory Reporting of Greenhouse Gas Emissions addresses the comment by requiring the use of the California Air Resources Board's Greenhouse Gas Reporting Tool or any other reporting tool approved by the ARB's Executive Officer that guarantees transmittal and receipt of data required by the Mandatory Reporting Regulation and the AB 32 Cost of Implementation Regulation.

<u>Comment 58: SMAQMD, September 23, 2009</u>

58 **Comment:** I respectfully request modification of one aspect of each of the above referenced proposals – to enable the future approval of alternative reporting tools developed by local air pollution control or air quality management districts. I strongly believe this will result in streamlined reporting, significant savings of costs and time for businesses and air regulators, and represents good government and customer service. The specific language is shown in the attachment to this letter as the CAPCOA Suggested Language.

This modification is consistent with language in AB 32. Section 38530 (a) (4) of AB 32 states, *"Ensure rigorous and consistent accounting of emissions, and **provide reporting tools and formats** to ensure collection of necessary data"* (emphasis added). This language suggests that more than one tool is appropriate. Section 38530 (c)(2) further states, *"Review existing and proposed international, federal, and state greenhouse gas emission reporting programs and make reasonable efforts to promote consistency among the programs established pursuant to this part and other programs, **and to streamline reporting requirements on greenhouse gas emission sources"*** (emphasis added).

Districts that develop optional tools that consolidate criteria and greenhouse gas reporting should be allowed the opportunity to work with CARB staff to make sure these reporting tools meet all the requirements of the mandatory reporting regulation. Only then should those alternative tools be approved. I anticipate that SMAQMD will participate in such a process and will opt into tools developed to consolidate criteria and greenhouse gas reporting.

Most of the facilities that report greenhouse gases to CARB are also required to report criteria and toxic pollutants to their local air quality agency. Much of the information is the same. Combined reporting will save the facility time and eliminate errors or inconsistencies in reporting. Reconciliation of key parameters of reports, such as the amount of fuel used, will be inevitable if facilities report to both agencies. We anticipate that this will take significant time from both local air quality staff and CARB staff.

Agency Response: See response to Comment 57 CAPCOA

Comment 61: Pills, September 23, 2009

The attached Index of Legal Documents is submitted as part of the comments to be included in the administrative record in Agenda Item No. 09-6-5.

These documents consist of pleadings and related documents filed in a California Public Records Act proceeding in Sacramento County Superior Court, No. 34-2009-80000232. That action culminated in an Order filed September 18, 2009 (Attachment 31 of the Index of Legal Documents).

In addition, this submission includes the documents, and indices submitted by CARB in response to the subject requests for public records, in electronic format on the enclosed DVD.

With regard to the Index of Legal Documents, I would like to call the Board's attention, in particular, to the declaration of Daniel J. Whitney filed August 26, 2009 (Attachment 24), at page 7:17-8:4, and line 7:23-26 ["ARB did not keep hourly records of AB 32 implementation and administration work for fiscal years 2007-2008 or 2008-2009. Accordingly, the time spent on such work by ARB employees was estimated by ARB division chiefs for the Initial Statement of Reasons prepared for the Regulation"].

I would also like to call the Board's attention to the Order (Attachment 31), page 7, second full paragraph, lines 4-6 ["Viewing this matter in its proper context in relation to the pending rule-making proceeding, in which respondent Board is already under the legal obligation to reveal the factual support for its proposed action…"].

Agency Response: The pleadings submitted by the commenter relate to litigation brought by the client of the commenter regarding ARB's handling of a Public Records Act request. The comment does not require a response from ARB because it is not directed specifically at the fee regulation. In addition, ARB's responses to the allegations made in the submitted pleadings are included in the pleadings. ARB has never kept hourly records for any project. That has been an agency-wide decision for the entire existence of ARB. Additionally, hourly record keeping at this late date would increase costs and lower efficiency. A system of record keeping would need to be implemented and time would be taken from the actual implementation of AB 32. Finally, as is noted in comment 62.1.3, ARB was successful in defending the litigation and the judge in this case ruled in ARB's favor and denied the Petition for Writ of Mandate.

<u>Comment 62: Pills, September 23, 2009</u>

Note: This comment includes three documents, which are numbered 62.1, 62.2 (including 62.2A series) and 62.3 below for reference.

62.1.1 Comment: The Associations submitted requests for public records under the California Public Records Act, Govt. Code § 6250 et seq. (PRA Requests), dated February 13, 2009 and May 28, 2009, and this led to litigation in the Sacramento County superior Court entitled *California Business Properties Association, et al. v. California Air Resources Board*, Case No. 34-2009-80000232. Our office has submitted to you, under separate cover, an Index of Legal Documents, including the Court's Order filed September 18, 2009, from that proceeding.

Agency Response: ARB received the Index of Legal Documents, which is included in the rulemaking file as Comment 61 Pills. Staff notes that the litigation was decided in ARB's favor.

62.1.2 Comment: This Board faces a very significant policy issue, as well as a number of substantial issues under the California Administrative Procedure Act (APA) and AB 32 and incorporated statutes, as outlined below, due to the lack of transparency and lack of production of facts, financial information, and proposed and actual budgets relating to the amount of the proposed fee and nexus with the regulatory programs encompassed within AB 32.

Agency Response: Please see response to Comment 43.3 IEP regarding transparency and responses contained in this section for other related subjects.

62.1.3 Comment: Since May 7, 2009, CARB staff has been asserting that it can withhold facts, financial information, numbers, and estimates (defined as "rough or approximate calculations") because its "facts were so *closely intertwined* with material reflecting staff's deliberative process that each was not severable from the other" (emphasis added). CARB has asserted the deliberative exemption as to even routine summaries of staff hours (PYs), outside contracts, and budget information. CARB is withholding 100% of the supporting documentation on the staff hours (PYs) and large numbers of documents on contracts, budget items, actual expenditures, etc., totaling over 80% of the claimed direct fee, and approximately 48,728 pages or 84% of its total file. This is detailed in (1) a comment letter from Tony Francois of KP Public Affairs providing additional comments on behalf of the Association ("Francois Letter"), and (2) a Report from Stonebridge Associates analyzing the supporting documentation on the Proposed AB 32 fee.

Agency Response: ARB asserted the deliberative process privilege to all documents created in relation to the rulemaking before the regulations were made public through the publications of the Notice of Proposed Action. ARB subsequently has added many documents to the rulemaking record, including the contracts at issue in this comment. It should be noted, however, that the judge, in the aforementioned litigation, determined that ARB was entitled to withhold information that ARB determined was draft or reflected ARB's deliberative process. Specifically, Judge Marlette ruled as follows in the Public Records Act litigation:

> From the materials it has reviewed so far, and without having conducted an in camera review of the withheld records, the Court is able to reach the following factual conclusions regarding the withheld records:
>
> 1. All of the records respondent Board has withheld from disclosure related to the pre-decisional phase of a pending rule-making proceeding, in that the proposed regulation has not yet been adopted in its final form, and is subject to change, and thus further deliberation, until such final adoption occurs.
>
> 2. All of the records respondent Board has withheld from disclosure are deliberative in the sense that they relate to respondent Board's process of determining the form of the proposed regulation. This conclusion applies to all records related to the pending rule-making proceeding, whether respondent board has designated them in its privilege logs as subject to

the deliberative process privilege, the attorney-client privilege, or as draft documents.

3. An unknown number of the records respondent Board has withheld from disclosure probably contain factual information of the type petitioners seek through their PRA requests. It may or may not be practical to segregate such factual information from purely deliberative material in individual records.

4. Some portion of such factual information contained in the records most likely is in a sense deliberative because it involves efforts to estimate matters that are inherently imprecise and not capable of immediate objective determination and thus subject to the exercise of judgment and discretion, such as the allocation of staff time and other cost factors to certain tasks out of many that a governmental agency may perform.

Based on these factual conclusions, the Court finds that the records respondent Board has withheld from disclosure, including factual information contained therein, fall within the scope of the deliberative process privilege as embodied in Government Code section 6255(a).

Having made that finding, the Court must address the issue of whether respondent Board has demonstrated that, on the facts of this particular case, the public interest served by not disclosing the records clearly outweighs the public interest served by disclosure of the records.

Here, respondent Board has demonstrated that there is a significant public interest that would be served by not disclosing the records in question, namely, the interest in protecting the deliberative process from the "chilling" effect of public disclosure. This interest is entitled to additional weight in this case on the ground that the deliberative process is not yet complete, in that the rule-making proceeding to which the withheld records relate is still pending and the final form of the regulation has not yet been determined. This interest applies both to purely deliberative matter and to factual matter that is deliberative in the sense that it involves the application of judgment and discretion to matters that are imprecise and not capable of immediate objective determination.

…

Having weighed these competing interests in light of the principle that exemptions from disclosure under the PRA must be narrowly construed, the Court finds that, under the particular circumstances of this case, the public interest that would be served by non-disclosure significantly outweighs the public interest that would be served by disclosure, i.e., there is a clear overbalance in favor of non-disclosure.

In reaching this conclusion, the Court has considered it to be particularly significant that the PRA requests at issue here relate to a pending rule-making proceeding in which respondent Board is already required by law to prepare statement of reasons and an administrative record in support of the proposed (and final) regulation that contains the factual information on which the regulation is based. (See, e.g., Government Code sections 11346.2, 11346.5(b), 11347.3) Respondent Board is thus already under a legal obligation to make public, through the rule-making proceeding itself, all of the facts that support its action. (footnote omitted.)

(Notice of Entry of Order Discharging Alternative Writ; Judgment Denying Petition for Writ of Mandate, October 16, 2009, p. 9:3 - 11:12.)

62.1.4 Comment: In particular, CARB has withheld all supporting documentation on the claimed staff hours and person years (PYs) for the following amounts (totaling $27.8 Million of the $54.6 Million claimed by CARB for FY 2007-2008 and 2008-2009):

AB 32-Related Costs FY 2007-2008

Table 3a Cost Category	Staff Report Numbers	Unsupported Amount
Staff PYs	125.46	
Direct Staff Costs	$10,611,546	$10,611,546
Staff Overhead	$3,724,635	$3,724,635

AB 32-Related Costs FY 2008-2009

Table 3a Cost Category	Staff Report Numbers	Unsupported Amount
Staff PYs	181.23	
Direct Staff Costs	$16,086,806	$10,193,676
Staff Overhead	$35,636,817	$3,301,864

We estimate that approximately $27.8 Million is claimed by CARB for staff hours and staff overhead (PYS) for fiscal years 2007-2008 and 2008-2009, of the $54.6 Million being retroactively claimed for those years. It is to be emphasized that the Legislature made the policy determination on greenhouse gases in 2006 and a decision to assess a fee was made by CARB in 2008. At this point CARB is primarily calculating total staff time, overhead, and other costs for its fee calculation. CARB is subject to the burden of showing that these are direct costs attributable to the AB 32 program and that the totals submitted are correct.

Agency Response: The regulation provides that the direct cost of the AB 32 program is set by the Legislature in the budgeting process. See Response to Comment 43.3 IEP. ARB has included additional CALSTARS reports from 2007-08 and 2008-09 to the rulemaking record and has also included the breakdown of PYs. Additionally, the budget bills of fiscal years 2007-08 and 2008-09 require ARB to repay the loans taken for those years. Section 95203 of the fee regulation provides the fee will be calculated based on the revenue required by the Legislature plus the amount of the loan payments. ARB has no discretion in this matter: it must repay the loans from the startup years, now including the 2009-2010 fiscal year. The commenter's concern about a lack of substantiation of costs, while relevant to the actual implementation of the fee regulation, is not relevant to the adoption of the regulation. The regulation provides a mechanism to collect the funds. The amount of the collection is calculated annually. The amount of the loans already received were subject to internal review at ARB, the Legislature and the Department of Finance when the loans were issued. ARB is statutorily required to recover its loan funds.

62.1.5 Comment: CARB has admitted (Declaration of Daniel Whitney in the Public Records Act litigation, p. 7:23-28) that CARB staff did *not* keep records ["ARB did *not* keep hourly records of AB 32 implementation in administration work for fiscal years 2007-2008 or 2008-2009. Accordingly the time spent on such work by CARB employees was *estimated* by CARB division chiefs for the Initial Statement of Reasons prepared for the [AB 32] Regulation" (emphasis added)]. E-mails from Edie Chang dated April 30 and May 1, 2009, to approximately 28 CARB employees, requested estimates of staff hours and provided forms of "spreadsheets-one for fiscal year 2007/2008 and one for fiscal year 2008/2009" to be filled in with percentages of staff time allocable to claimant programs and the programs on which they work. The spreadsheets included "drop-down menus" and included instructions on certain specific programs. At least 100 pages of spreadsheets and reports were issued in response to this request, but CARB *refuses to disclose* any of these supporting documents to the Associations or the public. Nor has CARB disclosed the methodology for the estimates, or provided any means by which the estimates can be verified, reviewed for accuracy, or even identified or traced to the persons who prepared the material.

Agency Response: As ARB stated in its pleadings during the pendency of the litigation related to the Public Records Act requests, the resulting spreadsheets were drafts of calculations that contained deliberative process information. Any earlier spreadsheets represented draft numbers and deliberative process information. Judge Marlette ruled in the PRA case that ARB was entitled to withhold the information sought based on these privileges. The purpose of the regulation is to enact a method to implement the fee required by Health and Safety Code section 38597. The rulemaking process is for the purpose of implementing the regulation itself.

However, ARB has added information to the rulemaking file to support the funds spent implementing AB 32 through the 15-day notice. See response to Comment 62.1.4 Pills.

62.1.6 Comment: It seems to be CARB's position that the public is not entitled to see how staff calculated past-year costs, but only the final total. This position is contrary to the Legislative intent of the AB 32 [*sic*], the statutory requirement to which the proposed AB 32 fee regulation is subject, and the Public Records Act.

Agency Response: The commenter is incorrect. ARB has stated on multiple occasions that staff calculated past-year costs by estimating the PYs spent and adding contract costs and equipment costs to arrive at a final expenditure amount. It should be noted that both fiscal years at issue, ARB actually spent *more* than the loan amount sought to be recovered through the fee.

62.1.7 Comment: The timing of the request on staff hours also bears scrutiny. On April 30, 2009 and May 1, 2009, when Edie Chang *requested* division chiefs to produce estimates of staff hours since no hourly records existed according to Mr. Whitney, CARB staff had been issuing figures for several months. Edie Chang's request was *issued* approximately one week before the final ISOR was issued to the public. It is not clear how there could have been adequate time for accurate estimates to have been prepared and incorporated into the ISOR in such a short period of time.

Agency Response: This comment does not address the regulation and does not require a response.

62.1.8 Comment: CARB admits that the withheld material contains facts, financial information, numbers, and estimates, yet continues to assert that the factual data and information is privileged. The withholding of this information has resulted in significant 'data gaps' [*sic*] of over 80% of the fee proposed by CARB, and is prejudicing the Associations' ability to "check the math". CARB's refusal to disclose documents related to direct costs severely frustrates Petitioners' right to know how costs are being allocated and the actual costs for regulatory activities performed by CARB, and has prejudiced their ability to provide meaningful public comment on the proposed fee regulation.

Agency Response: Staff has added more information about the financial records to the rulemaking record pursuant to the 15-day notice. See response to Comment 62.1.4, 62.1.6 and 62.1.7 Pills.

62.1.9 Comment: The requested documents at issue in this case relate to CARB's proposed AB 32 fee regulation of $54.6 Million in the first year and $36.2 Million in the second year, with continuing amounts in subsequent years.

Under Govt. Code § 11346(a), there are "basic minimum procedural requirements" applicable to this proposed regulation. Under Govt. Code § 11346.5(b), CARB "shall make available to the public upon request the… reports, documentation, and other materials related to the proposed action"

Under Govt. Code § 11347.3(a) and (b), CARB:

shall maintain a file… available to the public… [which] shall include:

(7) All data and other factual information, technical, theoretical, and empirical studies or reports, if any, on which the agency is relying…
…
(11) Any other information, statement, report, or data that the agency is required by law to consider…
…
(12) An index or table of contents that identifies each item contained in the rulemaking file…
…
(d) The rulemaking file shall be made available by the agency to the public, and to the courts… (emphasis added)

The Associations have not received all data, financial information, reports, documentation, etc., nor or [*sic*] an index. CARB is withholding, e.g., the reports and documentation estimated staff time, as well as documents relating to the proposed fee, all as specified in the Francois Letter. Under the APA, CARB is required to disclose the facts, financial information, numbers, estimates, and nexus information sought under the Associations' PRA Requests, and has not yet done so.

Agency Response: All financial information, public reports and documents relied upon by ARB in drafting the fee regulation have been made available to the public throughout the rulemaking process. ARB has fully complied with all provisions of the APA. The underlying documents on which ARB formulated the final documents and spreadsheets contain deliberative process information that is not subject to disclosure.

62.1.10 Comment: At the time AB 32 was enacted, the Speaker of the Assembly placed the following statement in the administrative Record: "It is my intent that and funds provided by Health and Safety Code Section 38597 are to be used *solely for the direct costs in administering* this division" (emphasis added). Govt. Code § 38597 sets forth a procedure for CARB to adopt "a schedule of fees to be paid by the sources of greenhouse admissions [*sic*]… *consistent* with [H&S] Section 57001…" (emphasis added). Sections 57001(b) and (c), as incorporated through § 38597, require a "fee accountability program" of CARB "designed to encourage more efficient and cost-effective operation of the programs for which the fees are assessed" and provide that "the amount of each fee is not more than is reasonably necessary to fund the efficient operation of the activities or programs for which the fee is assessed". H&S Code § 57001(a) (emphasis added); 38597. The requirements include "the manner in which the fee is assessed", the "management and workload standards of the program", and inclusion of elements of H&S Code § 25206.1. Section 25206.1 defines "direct costs" as the cost of processing and services "that can be specifically attributed to a particular cost objective". CARB is required ["shall comply"] with H&S Code § 25206.2(a) and (b) and provide an estimate that includes a detailed description of the work, estimated billing rates for all classes of employees working on the project, all expected charges to be billed, billing rate and indirect cost rate schedules by employee job classification, standardized work task descriptions, and inclusion of sufficient detail so that the requestor can relate the items to the benefits received. CARB is to provide "access to time records and other materials" and there is to be a review "for accuracy and appropriateness by a member of the department staff who has direct knowledge of the work or service performed". The inclusion of the fee accountability provision into AB 32 demonstrates the Legislature's intent that the collection of fees under AB 32 be subject to a heightened standard of public accountability and transparency.

CARB's withholding of the estimates, spreadsheets, and documentation on the staff time (PY) and data gaps is in conflict with these statutory obligations.

Agency Response: ARB has met the requirements of Health and Safety Code section 57001 throughout the rulemaking process. Section 57001 states:

> (a) Except as provided in subdivision (f), each office, board, and department within the agency shall… implement a fee accountability program for the fees specified in subdivision (d). That fee accountability program shall be designed to encourage more efficient and cost-effective operation of the programs for which the fees are assessed, and shall be designed to ensure that the amount of each fee is not more than is reasonably necessary to fund the efficient operation of the activities or programs for which the fee is assessed.
> (b) Before implementing the fee accountability program required by this section, each board, department, and office within the agency shall conduct a review of the fees identified …The purpose of this review shall be to determine what changes, if any, should be made to all of the following, in order to implement a fee system which accomplishes the purposes set forth in subdivision (a):
> (1) The amount of the fee.
> (2) The manner in which the fee is assessed.
> (3) The management and workload standards of the program or activity for which the fee is assessed.
> (c) The fee accountability program of each board, department, or office within the agency shall include those elements of the requirements of Section 25206 which the secretary determines are appropriate in order to accomplish the purposes set forth in subdivision (a).

Specifically, ARB will implement a fee accountability program once the fee is in place. (Section 57001 (a).) Prior to this regulation, however, there was no fee in place and the provisions of section 57001 did not apply. ARB has reviewed the amount of the fee, the manner of assessment and workload standards both in formulating these regulations and in the submission of the budget change proposals (BCPs) which the previous years' loans funded. (Section 51007 (b).) Section 25206, referenced in section 57001 (c) was repealed in 1996. Section 25206.1 (which the commenter quotes) is part of the Hazardous Waste Control Act, which governs the procedures and processes for treating hazardous waste appropriately. The secretary has not seen fit to apply the cited standards to a fee to recover costs associated with combating global warming and reducing greenhouse gas emissions. The specific requirements of section 25206.1 do not apply to this fee.

62.1.11 Comment: While a tax requires approval of a two-thirds vote of the Legislature, California Constitution XIII A, Section 4, requires that fees be for a "specific purpose rather than for general governmental purposes". *Sinclair Paint Company v. State Board of Equalization* (1997) 15 Cal.4th 866, 873. California Constitution Article XIIIA, Section 4 provides authorization for a "fee which does not exceed the reasonable cost for providing the service or regulatory activity for which the fee is charged. In order to support a regulatory fee, the government bears the burden of demonstrating "(1) the estimated cost of the service or regulatory activity; and (3) the basis for determining the manner in which costs are apportioned." 15 Cal.4th at 869. Among other requirements, the amount of the fee is not to exceed "the reasonable cost of providing" the services for which the fees are charged. *Sinclair*, 15 Cal.4th at 881. The fact that CARB is required to demonstrate this direct cost-basis under *Sinclair* only increases the public interest in disclosure of these records.

CARB's refusal to provide the information required by the APA, by AB 32, and by *Sinclair* with respect to the calculation of the fee is preventing the Associations from reviewing whether the charges are limited to direct costs and are reasonable.

Agency Response: See responses to Comments 38.2 NCPA and 43.3 IEP. Additionally, ARB has provided all documentation available to the public on which ARB relied in drafting the regulation.

62.1.12 Comment: CARB's correspondence represented the following:

Letter of CARB Dated March 9, 2009:

… ARB staff will continue to *make all responsive materials*, not exempt from disclosure under the PRA, *available* to you *as we complete our collection* and review of materials.

Letter of CARB Dated March 27, 2009:

… we endeavor to be as complete as possible and are gathering *every document that might arguably fall* within the scope of your request. Since staff is currently writing the ISOR and *is in the process of generating the very type of information covered by your request*… Once the ISOR [disclosed on May 8, 2009] is completed, the rationale and ***supporting documentation will be released*** to the public. (emphasis added)

CARB staff has yet to comply with its statement that "supporting documentation will be released" after May 8, 2009.

Agency Response: See response to Comment 62.1.11 Pills.

62.1.13 Comment: A hearing was held in the Public Records Act litigation pending in Sacramento County Superior Court on September 18, 2009. CARB's counsel made the following statements on the record:

> <u>Mr. Goldman (counsel for CARB)</u>:
>
> Any question that Mr. Francois has in his declaration, he can ask the staff of ARB during this pending rule making proceeding just beginning, and as a matter of law under the Government Code, as this Court's tentative cites, the staff have to respond. And if they don't, they do so at their peril, as this Court recognizes because then the regulation, if adopted, without the proper substantive responses to public comments is going to be right back in this court.
>
> And so as a matter of law, there's a clear remedy for any confusion that the petitioners may be under. …as a matter of law, the ARB staff has to respond substantively and help [Mr. Francois, representing the Associations] understand what's going on…
>
> And not only that, in the context of this proceeding, this Court recognizes that there's a pending separate independent APA rule making process, which as a matter of law under other provisions of the Government Code, require staff to respond to any and all public comments.
>
> So as a matter of law in the context of this case and in light of the freestanding PRA and the free standing APA that any and all confusion under which Mr. Francois is laboring must as a matter of law be rectified by ARB staff, and if they don't do so at their peril.
>
> (Transcript of hearing, P 24:12-26:5)

The Courts [*sic*] Minute Order filed September 18, 2009 includes the following rulings:

> … Respondent Board is thus already under a legal obligation to make public, through the rule-making proceeding itself, **all of the facts** that support its action.
>
> …Viewing this matter in its proper context in relation to a pending rule-making proceeding, in which **respondent Board is already under the**

> **legal obligation to reveal the factual support for its proposed action** ... the Court finds that an in camera review of the withheld records, or any portion thereof, is not necessary to the resolution of the issues before the Court. (Order, pp. 5 and 7, emphasis added.)

CARB is collaterally estopped from withholding all factual support for the proposed fee calculation.

Agency Response: ARB has made all factual support and all documents relied upon in the formulation and drafting of the regulation available to the public pursuant to Government Code section 11346.2(b)(2) and 11347.1. See response to Comment 62.1.11 Pills. Additionally, the court ruling in the PRA case does not constrain what ARB states in this document.

62.1.14 Comment: The Associations urge the Board to uphold its responsibility to make publicly available all factual materials and documentation that support and substantiate the proposed AB 32 Fee Regulation. The Associations request the Board to adopt a resolution directing staff to produce all documents that contain spreadsheets, information on staff hours (PYs), and facts, financial information, numbers, and estimates related to the proposed fee regulation, and the nexus between the proposed action and regulated activity. The public and the Board members should be provided this information before the comment period on the proposed AB 32 Fee Regulation is closed and this matter is considered and voted on by the Board.

Agency Response: See response to Comments 62.1.11 Pills and 62.1.13 Pills.

Note: Comment 62.2 Pills includes a number of attachments, most of which are copies of ARB documents. In addition the attachments include a letter from Assembly Speaker Fabian Nunez to the Chief Clerk of the Assembly and a letter from Pillsbury to Daniel Whitney regarding the PRA. Staff have responded to Comment 62.2 Pills and Attachment E (referenced as Comment 62.2A Pills) below. No responses to the other attachments are needed.

62.2.1 Comment: The Legislature has made clear that any fees collected pursuant to Health & Safety Code § 38597-the source of CARB's authority here-must be assessed "on sources of greenhouse gas emissions" and "solely for the direct costs incurred" for administration of AB 32. *See* Health & Safety Code § 38597; *see also* letter from Fabian Nunez to the Assembly Daily Journal, August 31, 2006 (appended hereto as Attachment *A).*

Agency Response: See response to Comment 53.1 SCPPA regarding sources. The direct costs for implementing AB 32 are described in the ISOR (see pages 103-130) and are supported by documentation in the administrative record. Also see response to Comment 62.1.10 Pills.

62.2.2 Comment: As discussed below, CARB staff has failed-in the public records that it has thus far provided to the Associations, in the records that it has made public on the CARB website, and in the materials it has presented in its public workshops-to establish that the fee compelled by the proposed AB 32 Fee Regulation will actually be collected "solely for the direct costs incurred" for AB 32 administration. CARB staff has also failed, in the public records provided thus far, to establish that the CARB will impose the proposed fees only on "sources of greenhouse gas emissions"-with respect to various sources of greenhouse emissions regulated by CARB under AB 32 but which are not charged fees under the proposed AB 32 Fee Regulation. Finally, CARB is required to develop a fee regulation based upon a proper nexus between the fees collected, the fee payers, and the regulatory activity funded by the fee, and to fairly allocate the fee among fee payers. CARB has failed, in the public records provided thus far, to establish a proper nexus and a fair allocation of the proposed fees. The refusal by CARB staff to make public supporting documentation related to the proposed AB 32 Fee Regulation has seriously impaired the Associations' ability to provide informed comments on the proposed AB 32 Fee Regulation.

Agency Response: See response to Comment 53.1 SCPPA regarding sources. See response to Comment 62.2.1 Pills regarding direct costs. ARB disagrees that the fee regulation does not contain a "proper nexus between the fees collected … and the regulatory activity funded by the fee…" Specifically, the six sources identified are responsible for the condition created, namely the emission of greenhouse gases. In adopting the regulation in its current format, ARB reviewed cases related to fee regulations. The most important state fee case to date is *Sinclair Paint Co. v. State Bd. of Equalization* (1997) 15 Cal.4th 866. In that case, the paint companies sought a refund of fees imposed by the Childhood Lead Poisoning Prevention Act of 1991 (the Act), enacted by a simple majority vote of the Legislature. Under the Act, the Department of Health Services assesses a fee on companies responsible for lead contamination in the environment to support a program to address the public health problem of lead poisoning in children. The fee paid by each company is determined by the amount of lead each company is estimated to have dispersed into the environment. The court upheld the fee, finding a fee may be assessed on those who are responsible for the condition to be remedied. The two major categories of fee payers, paint companies and oil companies, are reasonably deemed responsible for the large amount of lead remaining in the environment. Similarly, this regulation applies to entities that are responsible for the emission of greenhouse gases into the environment. AB 32 is analogous legislation to the Childhood Lead Poisoning Prevention Act of 1991 in *Sinclair*. ARB is tasked with eliminating those emissions through the methods delineated in the Scoping Plan. As such, ARB believes a sufficient nexus exists between the fees collected and the programs implemented pursuant to the Scoping Plan.

62.2.3 Comment: One of the principal things the Associations have learned, as a result of analysis of public records as well as recent litigation over records that CARB has insisted on keeping secret, is that there does not appear to be any simple, straightforward way to query CARB's financial records to determine CARB's actual expenses related to AB 32 implementation over the two most recently completed fiscal years. Instead, the only way that the CARB staff has been able to provide any information on this subject is to engage in what amounts to a wide ranging internal debate, the outcome of which seems to depend on judgment calls (not accounting practices) and the contents of which are meant to be kept secret from the public. This is not an auspicious beginning to what should be a fairly straightforward process of calculating CARB's AB 32 administrative costs and allocating those costs fairly across the various regulated sources of greenhouse gas emissions.

Agency Response: ARB has discussed expenditures extensively in the Staff Report and has added to the administrative record extensive supplemental materials regarding how funds were expended. See also response to Comment 62.1.13 Pills.

62.2.4 Comment: APA REQUIREMENTS AND CARB'S CONSIDERATION OF THE PROPOSED AB 32 FEE REGULATION. Under the California Administrative Procedure Act ("APA")(Government Code, section 11340 et seq.) there are "basic minimum procedural requirements" applicable to adoption of regulations. *See* Govt. Code § 11346(a). Among the requirements are the maintenance of an administrative file of the rulemaking that is available to the public, which includes: "all data and other factual information, technical, theoretical, and empirical studies or reports, if any, on which the agency is relying," "any other information, statement, report, or data that the agency is required by law to consider," and "an index or table of contents that identifies each item contained in the rulemaking file." Govt, Code § 11347.3(a)-(b). The APA also requires agencies to "make available to the public upon request... reports, documentation, and other materials, related to the proposed action." § 11346.5(b).

To date, CARB staff has failed to comply with the requirements of the APA. The Associations have not received all data, financial information, reports, or documentation relating to the proposed AB 32 Fee regulation, despite repeated requests for such information, and attempts to gain access to these records through California Public Records Act ("CPRA") requests and litigation. CARB staff is withholding, by its own admission, documents containing factual data related to staff hours, equipment costs, and contract costs relied upon by CARB staff in drafting the regulation. The withholding of these types of records from the public is in direct conflict with the APA requirements cited above.

Actions by CARB staff also raise the possibility that the Office of Administrative Law ("OAL") will disapprove the proposed AB 32 Fee Regulation, due to the lack of support in the administrative record. The OAL reviews agency regulations to verify whether an agency's rulemaking is legally valid, supported by an adequate record, and easy to understand. This means that OAL will disapprove the proposed AB 32 Fee Regulation if it finds that CARB has violated aspects of the

APA (by maintaining an incomplete rulemaking file), or has otherwise failed to satisfy the "Necessity," "Clarity," "Consistency," "Reference." and "Nonduplication" standards required under Govt, Code § 11349.1.

Agency Response: See response to Comments 62.1.3, 62.1.4, and 62.1.8 Pills.

62.2.5 Comment: THE ASSOCIATIONS' PUBLIC RECORDS ACT REQUESTS. On February 13, 2009, the Associations submitted a CPRA request to CARB, seeking 16 categories of documents that would substantiate the basis for, and the amount of, the fees to be collected under the proposed AB 32 Fee Regulation, as well as substantiate the nexus between the fees to be paid, the fee payers, and the regulatory activity to be funded with the fees. Initially, CARB staff failed to comply with the February 13 CPRA request, and raised objections based on asserted deliberative process, attorney-client, and attorney work product privileges. Eventually, in response to the February 13, 2009 CPRA request, between March 9, 2009 and April 30, 2009-after prodding from the Associations and in four separate productions-CARB Staff provided 3,227 pages, *but withheld* 11,981 *pages of CARB 's records.* Upon review, the Associations concluded that the released records fell well short of substantiating the basis for the amount of fees CARB plans to collect through the proposed AB 32 Fee Regulation. Almost nothing in these records provided information on CARB's actual costs to implement AB 32 in the past or future. On May 28, 2009, the Associations submitted to CARB a second and third CPRA request, covering the period through the release of the May 8, 2009 Staff Report for the proposed AB 32 Fee Regulation ("May 8 Staff Report") and beyond, and covering the same categories of documents as the February 13 request.

On June 19, 2009, less than a week before the originally scheduled date to adopt the proposed AB 32 Fee Regulation, CARB staff produced approximately 5,500 pages of records in its initial response to the Associations' second and third CPRA requests, covering the period from February 13, 2009, through May 28, 2009. On August 11, 2009, CARB staff released an additional 569 pages of records in response to the third CPRA request, and revealed that CARB staff had withheld 36,272 pages of records from the second and third CPRA requests. CARB has to date only released 9,463 pages of records in response to the Associations' CPRA requests, *and has withheld a total of* 48,728 *pages of records.* The vast majority of records released to the Associations by CARB were inconsequential materials not directly related to the calculation of past year costs of AB 32 implementation or to the nexus between the proposed AB 32 Fee Regulation and AB 32 program activities.

Because CARB staff has withheld the majority of the administrative file relating to the proposed AB 32 Fee Regulation, the Associations are at a distinct disadvantage in making meaningful comments on aspects of the proposed Regulation. Accordingly, the Associations are basing their comments solely on the review of those limited and incomplete public records that have been provided to them, and that provide very little insight into actual past year expenditures related to AB 32 program activities. Therefore, the Associations emphasize that their comments are not exhaustive of the deficiencies in the record relating to the proposed AB 32 Fee Regulation, but merely indicative of the types of deficiencies the Associations have identified. In reviewing the limited and incomplete records that CARB has provided them, the Associations have identified significant "data gaps" between the information that CARB has provided to them and the figures presented in the May 8 Staff Report. The "data gaps" (discussed in Section V, below) are representative of the types of discrepancies and lack of support for AB 32 expenses that the Associations have observed in the records available to them.

Agency Response: See response to Comment 62.1.3 Pills. The commenter appears to believe that the "administrative record" and the documents withheld in connection with the Public Records Act requests are the same thing. This is not the case. The "administrative record" is the rulemaking record that must be maintained by ARB pursuant to the APA and must contain certain documents, pursuant to Government Code section 11347.3(b). The file is not required to contain every document ever considered in the course of the rulemaking or before the publication of the Notice of Proposed Action, with limited exception. ARB continues to maintain the rulemaking file and it is publicly available upon request in the visitor center at ARB's office. ARB continues to maintain that records withheld pursuant to the deliberative process exemption to the Public Records Act remain exempt as they contain the thoughts and ideas of staff formulating the fee.

62.2.6 Comment: THE CPRA LITIGATION IN SACRAMENTOSUPERIOR COURT As a result of CARB staff refusing to release a large portion of responsive records to the Associations' CPRA requests, the Associations' were forced to resort to legal action to gain the release of those records. An action was filed on May 7, 2009 to obtain access to the documents withheld by CARB relating to the basis for the amount of the proposed fee and the nexus with the regulatory activity to be funded by the proposed fee under Health & Safety Code § 38597. The CPRA authorizes injunctive and declarative relief, and a writ of mandate, to enforce the public's right to inspect or receive a copy of public records, with an expedited procedure for the court to issue a decision "at the earliest possible time."

The Associations sought an alternate writ of mandate requiring CARB to show cause why the 48,728 pages of materials withheld from the disclosures pursuant to the February 13 and May 28 CPRA requests were not subject to disclosure. The Superior Court issued the alternative writ on July 17, 2009, and set a hearing for in camera review of the records on September 18, 2009. Through the meet-and-confer process, the Associations agreed to eliminate certain categories of requests and to eliminate duplicative materials from their requests, and yet CARB still withheld over 48,000 pages of documents that are responsive to the Associations' requests. Throughout the meet-and-confer process, the position of CARB staff never shifted from its insistence on withholding records that it admits contain "internal ARB cost estimates and related analysis of numbers." CARB's Brief in Support of Opposition to Disclosure of Privileged Documents at 11, *California Business Property Association, et al.,* v. *California Air Resources Board,* No. 34-2009-80000232, Sacramento Superior Court, Aug. 26, 2009.

Agency Response: See response to Comments 62.1.3, 62.1.5, 62.1.9 Pills.

62.2.7 Comment: At the September 18 hearing, the court ruled that CARB was not required to release the records it was withholding, despite the existence of "data gaps" related to the proposed AB 32 Fee regulation. The court stated that it was significant that the materials at issue related to a rulemaking process, where CARB was "already required by law to prepare [a] Statement of Reasons and an administrative record in support of the proposed (and final) regulation that contains the factual information on which the regulation is based." Minute Order, *California Business Property Association, et al.,* v. *California Air Resources Board,* No. 34-200980000232, Sacramento Superior Court, Sept. 18,2009. The court went on to state that "respondent Board is already under the legal obligation to reveal the factual support for its proposed action," and that "any failure by the Board to provide facts in the rule-making record to support its action presumably would make the regulation vulnerable to legal challenge." *Id.* At the September 18 hearing, Matthew Goldman, attorney for CARB, represented to the Associations, and assured the court, that any questions that the Associations have relating to substantiation of the actual costs of AB 32 implementation, or any other issues, would be answered by CARB staff in the rulemaking process.

Based on the ruling of the September 18, 2009 hearing, and the commitments of CARB's attorney Matthew Goldman at that hearing, it is the Board's legal duty to assure that the rulemaking record contains all the supporting factual documentation, data, and information relating to the proposed AB 32 Fee Regulation, and that CARB staff make public the financial and factual information used by CARB staff to determine the purported "actual costs" of AB 32 implementation they present in the May 8 Staff Report. Following the public release of such information, the Board should continue the 45-day comment period, as requested in Section VI below, in order to allow informed comments from the public

Agency Response: See response to Comments 62.1.3, 62.1.5, 62.1.9 Pills.

62.2.8 Comment: THE ASSOCIATIONS' COMMENTS As discussed above, CARB has a legal duty to make available to the public, through the rulemaking file, all "data and other factual information, technical, theoretical, and empirical studies or reports, if any, on which the agency is relying" in adopting a regulation. Govt. Code § 11346(a). Additionally, a regulation must be legally valid, and the rulemaking record must be supported by adequate evidence. *See* Govt. Code § 11349.1. The Associations' have closely scrutinized all records released by

CARB staff in response to the CPRA requests. In addition, the Associations have reviewed all records made public by CARB staff at public workshops for the proposed AB 32 Fee regulation, and all records posted to CARB's website relating to the proposed AB 32 Fee Regulation. The Associations can not identify the supporting documentation for the past year, current year, or future year expenditures for AB 32 implementation on which CARB staff is basing the proposed AB 32 Fee Regulation. This indicates that there is not an adequate record documenting the actual "direct costs" of AB 32 implementation to support the proposed AB 32 Fee Regulation, and that adoption of the proposed regulation would violate both the express legislative intent of AB 32 and the provisions of the APA.

Agency Response: See response to Comment 62.1.9 Pills.

62.2.9 Comment: The Associations strongly urge the Board not to adopt the proposed AB 32 Fee Regulation at this time, or until the past year and current year accounting for the actual costs of AB 32 implementation is made public, and CARB staff provides documentation for all expenditures from fiscal years 2007-08 and 2008-09, and for all anticipated 2009-10 expenditures, related to AB 32 implementation in reasonable detail. Based on the records released by CARB in response to the Associations' CPRA requests, CARB has failed to substantiate the cost-basis for claimed expenditures from fiscal years 2007-2008 and 2009-2008. It would be an abuse of the Board's discretion to proceed with adoption of the proposed fee regulation when the actual costs of implementation of AB 32 are not publicly accounted for, and when they seem based only on secret internal agency debates.

Agency Response: See responses to Comments 62.1.2, 62.1.3, 62.1.4, 62.1.5, 62.2.8, 62.1.9 and 62.1.11 Pills.

62.2.10 Comment: The Associations submitted their CPRA requests on CARB in an attempt to obtain the documentation for the costs of AB 32 implementation that CARB staff claims for fiscal years 2007-08 and 2008-09. These costs from past years will be collected from regulated parties retroactively over a period of four years, according to the May 8 Staff Report. *See* May 2009 Staff Report, at p. 106-107. CARB staff has presented summaries of the estimated expenses for these past years on pages 109-11 of the May 8 Staff Report in Table 3a, titled "AB 32 Position Information and Program Costs for Program Summary, FY 2007-08" (updated 6/11/09 on the CARB website), and Table 4a, titled "AB 32 Position Information and Program Costs for Program Summary, FY 2008-09" (updated 5/27/09 on the CARB website). These tables purport to show the estimated expenses for implementation of AB 32 in fiscal year 2007-08 and fiscal year 2008-09. However, CARB staff has failed to release records to the Associations that will substantiate these estimated expenses. CARB staffs disclosures have not explained the many discrepancies between the information presented in the May 8 Staff Report and the records provided in response to the Associations'

CPRA requests. The withholding of supporting documentation for the AB 32 implementation has resulted in considerable "data gaps" between the total amounts that CARB staff is claiming serve as the cost-basis for the fee, and what can be ascertained from records CARB staff has made public. The refusal of CARB staff to release records that substantiate past year expenditures and directly address the "data gaps" has severely prejudiced the Associations' ability to make meaningful comments and participate in the public comment period.

Agency Response: See responses to Comments 62.1 and 62.3 Pills. Additionally, ARB notes that the commenter's ability to comment on the regulation has not been impeded or prejudiced. The entire regulation has been public and in compliance with the Administrative Procedure Act. The issues for the rulemaking are whether the regulations proposed meet the standards set forth in the Administrative Procedure Act.

62.2.11 Comment: Further, the records CARB staff has released related to direct staff expenses raise serious questions about CARB staff's accounting practices. The questionable accounting for past year expenses related to AB 32, in addition to the lack of substantiation of actual expenditures for fiscal years 2007-08 and 2008-09, calls into question the basis for any estimated future year budgets for AB 32 administration. This means that the very basis for fee collection under the proposed AB 32 Fee Regulation, the Total Required Revenue ("TRR"), is deeply flawed. Such a critical flaw in the calculation of the AB 32 fee formula calls into question whether the methodology for collection of fees in the proposed AB 32 Fee Regulation is supported by substantial evidence.

Agency Response: The TRR is calculated based upon loan repayment amounts used to fund the first three years of the program (principal and interest) and actual budgeted personnel positions and resources for implementing AB 32 as appropriated by the Legislature and the Governor. The TRR projection described in the Staff Report and at the September 25, 2009 board meeting staff presentation were estimates, based on the best information ARB had at the time. The actual TRR for each fiscal year will be calculated after the state budget approved. The amount of the loans for the first three years will not change based on any subsequent accounting. ARB is legally obligated to repay the loans.

62.2.12 Comment: In addition, CARB staff posted spreadsheets to the CARB website on June 1, 2009 that report an allocation of direct staff expenditures among various AB 32 program elements and specific AB 32 regulations. Copies of these staffing resources spreadsheets are posted at http://www.arb.ca.gov/cc/adminfee/spreadsheets.htm. These spreadsheets indicate that a significant percentage of CARB's direct staff expenses for implementation of AB 32 are not related to regulation of the four fuels and two process emission categories on which the proposed AB 32 fee would be imposed. The inclusion of these activities raises questions as to whether CARB staff has established a sufficient nexus between the regulated activities and the proposed AB 32 fee, if these types of activities are included as costs to be recovered under the proposed AB 32 Fee Regulation.

Agency Response: See response to Comment 62.2.2 Pills.

62.2.13 Comment: According to the May 8 Staff Report, all expenses the fee will recapture for past and future years will be based on Budget Change Proposals ("BCPs") submitted to the Department of Finance by CARB and other agencies that are eligible for reimbursement through the proposed AB 32 fee. In responding to the Associations' CPRA requests, CARB staff has provided many copies of BCPs for CARB and the other agencies that the proposed fee will reimburse or fund (including Cal/EPA, California Energy Commission, Integrated Waste Management Board, Department of Food and Agriculture, and General Services). State agencies use BCPs to request additional funding for staffing and other funding changes each year. They do not reflect actual expenditures by state agencies, and do not in fact reflect the actual level of funding received by agencies from the state each year. Therefore, basing the level of funding each agency may be entitled to on BCPs is an inaccurate and improper method of cost recovery.

Agency Response: The TRR will be based on the adopted budget. ARB agrees that BCPs do not necessarily reflect the level of funding received by agencies each year.

62.2.14 Comment: The response from CARB staff to the Associations' CPRA requests and the method for internal collection of cost-related information for the proposed AB 32 Fee Regulation calls into question CARB staff's approach to calculating the actual costs of AB 32 implementation related to the proposed AB 32 Fee Regulation. Mr. John Rozsa of Stonebridge Associates, Inc., an expert on accounting practices of public agencies, has prepared a report that he has submitted to the Board analyzing records made public by CARB staff relating to costs of AB 32 implementation. See John Rozsa, Analysis of Public Records Submitted in Support of Proposed AB 32 Greenhouse Gas Regulation Fee, Sept. 22, 2009 (hereinafter, the "Rozsa Report"). According to the Rozsa Report, the only reliable means of validating all costs incurred for the implementation and administration of AB 32 is the California State Accounting and Reporting System ("CALSTARS system"). "CALSTARS provides state agencies with an automated organization and program cost accounting system for systematically accounting for all revenue, expenditures, receipts, disbursements, and property of the state." Rozsa Report at p. 6. According to Mr. Rozsa, the CALSTARS system is capable of validating all CARB expenditures related to AB 32 activity over the past two fiscal years, and is the only reliable method of doing so. Why CARB staff would rely on estimates of expenses such as staff salaries, contracts, and equipment, therefore, is highly questionable.

Agency Response: CALSTARS has limitations. The ability to isolate one program area is predetermined by the cost allocation structure in use. ARB has four major programs, as displayed in the annual Governor's Budget: Mobile Source, Stationary Source, Program Direction and Support, and Subvention. The present cost allocation structures focus on those four areas, then distinguishes the various fund sources supporting each program area. Since AB 32 activities are in three of those four areas, and are supported by the Air Pollution Control Fund, it is not possible for CALSTARS cost allocation tables to segregate AB 32 expenditures. There are other minor programs that also receive funding support from the Air Pollution Control Fund (APCF), in both the mobile and stationary areas. This is why ARB prepared numerous spreadsheet documents to tie together the various cost components of AB 32 activities. The spreadsheets are supported by CALSTARS data, but also rely on the standard average cost methodologies where appropriate (such as personal services and some operating costs).

62.2.15 Comment: As previously noted, up through April 30, 2009, CARB did not release any records that would substantiate any actual costs to implement AB 32 in prior, present, or future fiscal years. On that date, after the Associations had been requesting cost data for three months, and CARB had been advising the Associations and others that its implementation costs for the prior two fiscal years had been $57 million and the future implementation costs would range from $36 to $55 million, CARB's Office of Climate Change finally requested that each of CARB's division chiefs provide information to substantiate CARB' s staffing resources for the preparation of a staff report that would be released five working days later ("April 30, 2009 e-mail"). A copy of the April 30, 2009 e-mail is attached as Attachment B. CARB staff claims it relied on responses from its division chiefs (and perhaps others) to the April 30, 2009 e-mail to create Tables 3a and 4a, and the staffing resources spreadsheets. However, the records released to the Associations by CARB in response to the Associations' CPRA requests do not support many of the estimated numbers appearing in Tables 3a and 4a, or the numbers in the staffing resources spreadsheets. In papers filed by CARB in the above referenced litigation, CARB staff has admitted that it is withholding responses to the April 30, 2009 email containing estimates of staff time under the deliberative process privilege. *See* Whitney Declaration in Support of CARB's Opposition to Disclosure of Privileged Documents at' 13, *California Business Property Association, et al.,* v. *California Air Resources Board,* No. 34-2009-80000232 (Sacramento Superior Court, Aug. 26, 2009).

Agency Response: Documents released in response to the Public Records Act requests were intermediate work products. See responses to Comments 62.3.1, 62.3.2, 62.1.3, 62.1.4 and 62.1.8 Pills.

62.2.16 Comment: CARB staffs insistence on withholding all records that "reflect the development of estimated ARB costs (e.g., staff resources, vendor contracts)" has resulted in a situation where the public has no access to information that would document or support the actual costs of AB 32 implementation. Further, the last minute scramble on April 30, 2009, just prior to release of the May 8 Staff Report, to gather estimates for staff time and other costs related to AB 32 implementation suggests that CARB staff may have failed to approach the calculation of past year costs with the level of efficiency and accountability required under California law.

Agency Response: See responses to Comments 62.1.3, 62.1.4, 62.1.5, 62.1.6, 62.1.7 and 62.1.8 Pills.

62.2.17 Comment: Data Gaps in CARB's Estimated Expenditures Related to AB 32 for Fiscal Years 2007-08 and 2008-09 As a direct consequence of CARB staffs withholding of supporting documentation for past year costs, there remain significant "data gaps" between the costs claimed by CARB staff in Tables 3a and Table 4a of the May 8 Staff Report and the actual expenditures by CARB that can be calculated from records either previously made public or released to the Associations through their CPRA requests. For example, Table 3a of the May 8 Staff Report includes an estimated subtotal of 125.44 PYs (person years), purportedly covering CARB staff working on AB 32 programs for FY 2007-08, and Table 4a includes an estimated subtotal of 181.23 PYs, purportedly covering CARB staff working on AB 32 programs for FY 2008-09. As stated above, on April 30, 2009, CARB staff requested each of its divisions to provide spreadsheet information for each employee and percentage of time working on specific AB 32 programs. However, charts and spreadsheets provided to the Associations with reported PYs and percentages of time spent on AB 32 programs from individual divisions account for only 57.44 PYs in fiscal year 2007-08, and only 65.32 PYs in fiscal year 2008-09. Copies of the CARB records containing these PY estimates are attached as Attachment C. Even the estimated numbers of PYs from these records are not validation that these PYs were actually involved in AB 32-related activities, as some of these records do not identify a division, and some do not identify the author of the document. This "data gap"-related to the estimated number of staff working on AB 32 programs, and the specific work done in implementing AB 32-and all other "data gaps" related to the actual cost of AB 32 implementation, seriously impacts the implementation of CARB's Fee Accountability Program, and the ongoing calculation of the TRR, as described in the Fee Calculation Methodology section of the May 8 Staff Report. *See* May 8 Staff Report at p. 21.

Agency Response: The charts and spreadsheets in Attachment C of Comment 62.2 Pills were released in response to a Public Records Act request and represent intermediate work products. See response to Comments 62.3.1 and 62.3.2 Pills.

62.2.18 Comment: CARB has also failed to release records that would substantiate salary expenses for CARB staff working on AB 32 implementation activities from fiscal years 2007-08 and 2008-09. Table 3a and Table 4a of the May 8 Staff Report include expense categories for "Actual Annual Salaries," which list

CARB staff salaries by job classification. Table 3a includes a subtotal of $10,611,546 for "Actual Annual Salaries" for fiscal year 2007-08, while Table 4a includes a subtotal of $16,086,806 for "Actual Annual Salaries" for fiscal year 2008-09. CARB has not released records in response to the Associations' CPRA requests that support the calculation of these subtotals for "Actual Annual Salaries" for fiscal years 2007-08 or 2008-09, because CARB has not released records that show how staff time was estimated by separate divisions, how salaries were assigned to AB 32-related categories, or other evidence of "Actual Annual Salaries" totals for fiscal years 2007-08 or 2008-09. CARB staff has released a CALSTARS report that contains evidence of expenditures for certain divisions for the first seven months of fiscal year 2008-09, including expenditures for personnel salaries. A copy of the CALSTARS Report is attached as Attachment D. However, the CALSTARS report fails to indicate whether any salary costs are related to AB 32 implementation. As the Rozsa report confirms, CARB staff has not released or made public any records that validate CARB's total claimed costs of $26,698,352 in "Actual Annual Salary" related to AB 32 implementation for fiscal years 2007-08 and 2008-09. *See* Rozsa Report at p. 12-13.

Agency Response: ARB has provided substantiation of salary expenditures in Tables 3a and 4a. See responses to Comments 62.3.2, 62.3.4, 62.3.5 and 62.3.15 Pills.

62.2.19 Comment: CARB staff "Benefits" is an expense category on Table 3a and Table 4a that is related to the cost category of "Actual Annual Salaries." According to the May 8 Staff Report, CARB staff calculated total "Benefits" by multiplying the total "Annual Actual Salary" by 35.04%. The "Benefits" category in Table.3a of the May 8 Staff Report includes a subtotal of $3,724,653 for fiscal year 2007-08, while the "Benefits" category in Table 4a of the May 8 Staff Report includes a subtotal of $5,366,817 for fiscal year 2008-09. Because CARB staff has failed to substantiate the total expenses for "Annual Actual Salary" related to AB 32 implementation for fiscal years 2007-08 and 2008-09, the total expenses for CARB staff "Benefits" are also not substantiated. Accordingly, CARB has not made public any records or information that can validate the total claimed expenditures of $9,091,470 for "Benefits" related to AB 32 implementation for fiscal years 2007-08 and 2008-09. The Rozsa Report confirms the Associations' findings that there is no support for "Benefits" costs included in the proposed AB 32 Fee Regulation. *See* Rozsa Report at p. 12-13.

Agency Response:
See response to Comment 62.2.18 regarding substantiation of salary costs.

The methodologies used to determine the benefit costs are sound, substantiated, and conform to the various policies of the Department of Finance, Department of Personnel Administration, and the California Public Employee Retirement System.

Per existing collective bargaining agreements (ratified by the Legislature), the State has an obligation to fund, as a percentage of salaries, a portion of both retirement and health benefit costs of individual state employees. The retirement rates are published in the annual Budget Act, please see “Control Section 3.60 Contribution to Public Employees Retirement Benefits;” for health benefits, it is much more complex, as the cost varies due to the specific health plan chosen and the number of beneficiaries. Therefore, ARB uses a standard average percentage for health benefits, as prescribed in the State Administrative Manual.

62.2.20 Comment: Another area of significant "data gaps" is CARB staffs accounting for past fiscal year expenses related to the categories of "Operating Costs" included in Tables 3a and 4a of the May 8 Staff Report. According to Tables 3a and 4a, CARB expended $4,161,096 in "Operating Expenses" related to AB 32 implementation for fiscal year 2007-08, and $7,474,650 in "Operating Expenses" related to AB 32 implementation for fiscal year 2008-09. CARB staff has divided "Operating Costs" into several sub-categories, including "General Expense," "Printing," "Communications," "Postage," "Training," "Travel-In-State," and "Facilities." Records released by CARB in response to the Associations' CPRA requests contain no substantiation of costs in any sub-category of "Operating Costs" for fiscal years 2007-08 and 2008-09. The CALSTARS report, discussed above, does not substantiate any of these expense categories, as there is no indication in the CALSTARS report that these expenses relate to AB 32 implementation. The Rozsa Report notes that these costs are dependent on the numbers of PYs used to calculate the expense, as CARB staff has determined a "Standard Average per Position Cost" for all Operating Costs. *See* Rozsa Report at p. 10. The Rozsa Report also questions the "especially troublesome General Expense rate of $20,454 per person" claimed for fiscal year 2008-09, given that the category does not even include expenses for facilities or administrative overhead. *Id.* at 10. The Rozsa Report concludes that these costs are not validated by any records made public by CARB, and that the total claimed expenditures of $11,635,746 for "Operating Costs" related to AB 32 implementation for fiscal years 2007-08 and 2008-09 are not substantiated by any evidence. *Id.* atp.9.

Agency Response: See response to Comment 62.3.11 Pills.

62.2.21 Comment: The final category of expenses listed in Table 3a and Table 4a of the May 8 Staff Report is "Other Costs," which includes the sub-categories "Contracts," "Equipment," and "Administrative Overhead." Table 3a includes a subtotal of $4,652,429 for "Contracts" related to AB 32 implementation for fiscal year 2007-08, and Table 4a includes a subtotal of $5,900,000 for "Contracts" related to AB 32 implementation for fiscal 2008-09. CARB has not released any records that substantiate the actual expenses related to Contracts for fiscal years 2007-08 and 2008-09. While the CALSTARS report released by CARB to the Associations does contain some evidence of Contract expenditures, for the reasons discussed above, the CALSTARS report does not substantiate that any of these expenses relate to AB 32 implementation. Other records released by CARB which relate to AB 32 contracts consist mainly of spreadsheets that list various contracts, the subject of the contract, and the amount of the contract. These records do not make clear which contract amounts are included in the amounts reported in Tables 3a and 4a of the May 8 Staff Report, and provide no information as to amounts actually disbursed by fiscal year. As the Rozsa Report found, "no two of these lists arrive at the same contracts total, nor does a single one of them show the total listed on [Table] 3a." *See* Rozsa Report at p. 9. In addition, CARB staff provided no records to the Associations that substantiate that these contracts were actually filled, as no receipts or other documentation confirming contract expenses were included in CARB releases of records. The contracts themselves were not produced. CARB has not produced any records that validate the total claimed expenditures of $10,552,429 for "Contracts" related to AB 32 implementation for fiscal years 2007-08 and 2008-09.

Agency Response: See responses to Comments 62.3.6, 62.3.7, 62.3.9 and 62.3.10 Pills.

62.2.22 Comment: Another sub-category of "Other Costs" listed in Tables 3a and 4a of the May 8 Staff Report is "Equipment" expenses related to AB 32 implementation. Table 3a includes a subtotal of $45,180 in "Equipment" expenses for fiscal year 2007-08, and Table 4a includes a subtotal of $1,830,564 in "Equipment" expenses for fiscal year 2008-09. However, CARB has not released any record to the Associations containing support for equipment expenses in fiscal years 2007-08 and 2008-09. While the CALSTARS report released by CARB to the Associations does contain some evidence of equipment expenditures, for the reasons discussed above, the CALSTARS report does not substantiate that any of these expenses relate to AB 32 implementation. The Rozsa Report confirms the Association's findings, by stating that there is no validation for CARB's total claimed expenditures of $I,875,744 for "Equipment" related to AB 32 implementation for fiscal years 2007-08 and 2008-09. *See* Rozsa Report at p. 10-11.

Agency Response: See responses to Comments 62.3.12 Pills.

62.2.23 Comment: Another area of costs where CARB staff has not released any information to the Associations that substantiates the agency's claimed expenses is "Administrative Overhead." According to the May 8 Staff Report, these expenses include executive oversight, as well as administrative and computer support for AB 32 programs. *See* May 8 Staff Report at p. 107. CARB calculated this amount by attributing 13% of all agency "Administrative Overhead" costs to AB 32-related activities. *See* May 8 Staff Report at 107. Table 3a includes a subtotal of $1,998,872 in "Administrative Costs" for fiscal year 2007-08, and Table 4a includes a subtotal of $1,961,069 in "Administrative Costs" for fiscal year 2008-09. CARB staff has not provided the Associations with any records supporting a determination that 13-percent of all CARB activities are climate change-related, nor has CARB staff released any records that support attributing 13 percent of administrative services to climate change based on such a conclusion. This proposed approach of attributing costs to AB 32 implementation is objectionable based on the lack of any substantial evidence that any of these administrative activities relate to AB 32 activities. In addition, the Rozsa Report raises that possibility that "the Administrative Overhead has been inflated through double counting." *See* Rozsa Report at p. 10. In total, CARB staff has failed to substantiate the total claimed expenditures $3,959,941 in "Administrative Costs" related to AB 32 implementation for fiscal years 2007-08 and 2008-09.

Agency Response: See responses to Comments 62.3.14 Pills.

62.2.24 Comment: As detailed above, the information that CARB has released to the Associations does not explain how they calculated the total cost-basis for AB 32-related work in fiscal years 2007-08 and 2008-09, which has resulted in significant "data gaps" in the records released to date. For past fiscal years 2007-08 and 2008-09, CARB has estimated that its costs totaled $64,083,681. However, CARB has failed to substantiate any of its past year expenditures related to AB 32 implementation in the records released in response to the Associations' CPRA requests, in records released by CARB at public workshops, and in records and information made public on CARB's website. Based on the Associations' review of all these records and information, there is a complete lack of support for past year expenditures, and also a lack of substantial evidence supporting the accounting of expenses relating to AB 32 implementation in fiscal year 2007-08 and 2008-09.

Agency Response: See responses to Comments 62.3 Pills (in its entirety).

62.2.25 Comment: Deficiencies in the Calculation of the Total Required Revenue for the Proposed AB 32 Fee Regulation
The May 8 Staff Report states that the under the proposed Fee Calculation Methodology, "each year ARB will determine the annual revenue requirement," and that the Total Required Revenue will be the sum of legislatively approved AB 32 program expenditures, in addition to the amounts required to pay back loans for AB 32 implementation from past years. CARB, May 8 Staff Report at 21. The May 8 Staff Report contains a description and definition of the term Total Required Revenue, as it relates to the proposed AB 32 Fee Regulation. *See* May 8 Staff Report at p. 21. According to the May 8 Staff Report, the Total Required Revenue calculation is "the total amount of money that ARB will collect on an annual basis ... the regulated public will be able to accurately compute the cost of the efforts of state agencies implementing AB 32." As described in detail in the above paragraphs, the records made public by CARB staff to date do not allow an accurate computation of the costs of the efforts of state agencies implementing AB 32. Analysis of these records reveals

significant "data gaps" between the records and Tables 3a and 4a in the May 8 Staff Report, relating to expenditures for fiscal years 2007-2008 and 2008-2009.

Agency Response: See responses to Comments 62.1 Pills and 62.3 Pills in their entirety. The computation of costs to date are simply the budget amount each year and the loan repayment. The loan amounts are stated in previous budgets.

62.2.26 Comment: The May 8 Staff Report also includes tables which report expected expenditures for CARB and other agencies related to implementation of AB 32 for fiscal year 2009-2010. *See* May 8 Staff Report at p. 126-30. Table 8 summarizes these figures, and Tables 9-14 reports the anticipated staff, contracts, and equipment costs for CARB, the California Integrated Waste Management Board, the Energy Commission, the California EPA, the Department of General Services, and the Department of Food and Agriculture respectively. Table 8 reports a total of $36.2 million in anticipated costs for the six entities for fiscal year 2009-2010. The May 8 Staff Report also describes criteria to be used by CARB in determining which of its own expenses and which expenses of other agencies would be recovered through the proposed AB 32 fee for the current and future fiscal years. *See* May 8 Staff Report at p. 125.

However, the Associations review of records released by CARB in response to the CPRA requests, and of records made public by CARB, reveals no records that allow the regulated public to accurately compute the anticipated actual cost of the efforts of state agencies implementing AB 32 in fiscal year 2009-2010, which costs the proposed AB 32 fee will be recover. The only records related to this subject at all are the various Budget Change Proposals related to the six agencies indicated. The total amount of each of these proposals appears to differ from the amounts shown for each agency in Tables 9-14 of the May 8 Staff Report. There are no records, among those released by CARB in response to the Associations' CPRA requests, that provide substantial information on how CARB computed the figures appearing in Tables 14 of the May 8 Staff Report, or how those figures relate to those in the budget change proposals.

Agency Response: The ISOR staff report contained the best available information at the time the Notice of Proposed Action was published. The adoption of the fee was delayed until September 2009 and the fee collection will not begin until fiscal year 2010-11. The fee will be based on the approved fiscal year 2010-11 budget. For the fiscal year 2009-10, the loan (which will be folded into the fee for the first four years of the fee regulation) will only cover ARB and Cal/EPA.

62.2.27 Comment: Other than the various budget change proposals discussed above, there are no records released by CARB in response to the Associations' CPRA requests that allow the regulated. public to accurately compute the budgeted cost of the efforts of state agencies implementing AB 32 in fiscal year 2009-2010, the same costs the proposed AB 32 fee would recover. In addition, CARB has not released or made public any records that relate to the PYs, staff salaries, equipment costs, contract costs, or other costs of other state agencies that are to be reimbursed through the proposed AB 32 Fee Regulation for fiscal year 2009-10 and onward. CARB staff has also failed to release any records or information that explain how CARB determines or proposes to determine, for fiscal years 2009-2010 and onward, what the actual number will be for Total Required Revenue or that identify 'the amount approved in the California Budget Act' as the 'cost of implementing AB 32.' This amounts to a huge "data gap" that impacts directly upon the very basis for fee collection under the proposed AB 32 Fee Regulation. Because CARB staff has not released the information described above, the proposed method of determining the Total Required Revenue does not appear to be based on the "actual costs" of implementation of AB 32. Such a critical flaw in the calculation of the AB 32 fee formula calls into question whether substantial evidence supports the methodology for collection of fees in the proposed AB 32 Fee Regulation.

Agency Response: The fee will not cover agency expenditures other than ARB and Cal/EPA for fiscal year 2009-10. In fiscal year 2010-11, and future years the total revenue required (TRR) will be based on the budgeted amount determined by the normal budget process and approved by the Legislature and the Governor.

62.2.28 Comment: Lack of Support for Nexus between the Regulated Activities and the Proposed AB 32 Fee

The Associations have previously commented to CARB relating to the lack of support for the nexus between the regulated activities under AB 32, and the proposed collection of fees from six sources of green house gas emissions. Our position on this issue has not changed, and CARB staff has not released any records or information that would address the issues identified in our previous letter. Attached for the Board's convenience as Attachment E is a copy of the Associations' June 24, 2009 comment letter on the proposed AB 32 Fee Regulation. Additionally, on May 26, 2009, the Associations submitted a series of comments in the form of questions to CARB's legal staff relating mainly to nexus issues and the proposed AB 32 Fee Regulation. Because CARB staff has not treated this submission as a formal comment letter, we are re-submitting the original May 26, 2009 comment letter for the CARB's formal consideration and response. A copy of the May 26, 2009 comment letter is attached as Attachment F.

As stated above, a major hurdle preventing the Associations from making meaningful comments on the proposed AB 32 Fee Regulation has been the ongoing foot dragging by CARB staff and its refusal to timely provide them with public records that would support and substantiate major components of the proposed AB 32 Fee Regulation. CARB has a legal duty under the Health and Safety Code and the APA to assure the public that fees collected under the proposed AB 32 Fee Regulation will be assessed "solely for the direct costs incurred" by AB 32, and that the public shall have access to "data and other factual information, technical, theoretical, and empirical studies or reports" on which CARB relied in drafting the proposed regulation. As a result of the Court's ruling in *California Business Properties Association* v. *California Air Resources Board,* discussed above, CARB has a "legal obligation to reveal the factual support for its proposed action," and CARB's attorney committed the agency to answering all questions, and responding to all comments, from the Associations relating to substantiation of the actual costs for AB 32 implementation and other data gaps the Associations have identified.

In the interest of open government and full transparency, as well as CARB's legal duties in regards to adoption of the proposed Regulation, CARB staff must publicly disclose all supporting documentation for the proposed AB 32 Fee Regulation prior to any action the Board may take, and thereby allow the public to have a full and fair opportunity to comment on the proposed AB 32 Fee Regulation.

Agency Response: See responses to Comments 62.2A (in its entirety), 62.1.11, 62.1.13 and 62.2.2 Pills.

62.2.29 Comment: REQUEST FOR CONTINUATION OF THE 45-DAY COMMENT PERIOD The Associations respectfully request the Board to defer final action on adoption of the proposed AB 32 Fee Regulation until CARB staff, as required by law, have released all supporting documentation related to (a) the actual costs of AB 32 implementation for past and current fiscal years, and (b) supporting data and information relating to the nexus between the activities to be funded and the six sources of greenhouse gas emissions on which fees will be imposed. As noted above, there are substantial questions concerning the accuracy and verification of calculations affecting all costs involved in the proposed AB 32 Fee Regulation. The Associations and the general public are unfairly prejudiced by lack of access to the withheld information, and the Board should exercise its discretion to allow additional time for the public to gain access to this information and prepare their comments accordingly.

Agency Response: See responses to Comments 62.1.11 and 62.1.13 Pills.

62.2A.1 Comment: The Legislature has made clear that any fees collected pursuant to Health & Safety Code § 38597-the source of CARB's authority here-must be assessed "on sources of greenhouse gas emissions" and "solely for the direct costs incurred" for administration of AB *32. See* Health & Safety Code § 38597; *see also* letter from Fabian Nunez to the Assembly Daily Journal, August 31, 2006 (appended hereto as Attachment A).

As discussed below, CARB staff has failed, in the public records that it has thus far provided to the Associations, to establish that the fee compelled by the proposed AB 32 Fee Regulation will actually be collected "solely for the direct costs incurred" for AB 32 administration. CARB staff has also failed, in the public records provided thus far, to establish that the proposed fees will be imposed only on "sources of greenhouse gas emissions." Finally, CARB is required to develop a fee regulation based upon a proper nexus between the fees collected, the fee payers, and the regulatory activity funded by the fee, and to fairly allocate the fee among fee payers. CARB has failed, in the public records provided thus far, to establish a proper nexus and a fair allocation of proposed fees.

Agency Response: See responses to Comments 53.1 SCPPA regarding sources of GHG emissions, 62.2.1 Pills regarding direct costs and Comment 62.2.2 Pills regarding nexus.

62.2A.2 Comment: THE ASSOCIATIONS' PUBLIC RECORDS ACT REQUESTS
On February 13, 2009, the Associations submitted a California Public Records Act CCPRA") request to CARB, seeking 16 categories of documents that would substantiate the basis for, and the amount of, the fees to be collected under the proposed AB 32 Fee Regulation, as well as substantiate the nexus between the fees to be paid, the fee payers, and the regulatory activity to be funded with the fees. Initially, CARB staff failed to comply with the February 13 CPRA request, and raised objections based on asserted deliberative process, attorney-client, and attorney work product privileges. Eventually, in response to the February 13, 2009 CPRA request, between March 9, 2009 and April 30, 2009-after prodding from the Associations and in four separate productions-CARB staff provided 3,227 pages, *but withheld* 11,981 *pages of CARB's records.* Upon review, the Associations concluded that these records fell well short of substantiating the basis for the amount of fees to be collected through the proposed AB 32 Fee Regulation. On May 28, 2009, the Associations submitted to CARB a second and third CPRA request, covering the period through the release of the May 8, 2009 Staff Report for the proposed AB 32 Fee Regulation,("May 8 Staff Report") and beyond, and covering the same categories of documents as the February 13 request.

On June 19, 2009, CARB staff produced approximately 5,500 pages of records in its initial response to the Associations' second and third CPRA requests, covering the period from February 13, 2009, through May 28, 2009. After reviewing these records over the past few days, the Associations are still not able to identify the actual basis for many of the estimated cost figures that CARB staff present in the May 8, 2009 Staff Report.

As is clear from the foregoing, the Associations have been forced to review the records provided them in a very compressed time frame caused by CARB staff s resistance to releasing appropriate supporting documentation for the proposed AB 32 Fee Regulation in a complete and timely fashion. Despite repeated attempts by Association representatives to work with CARB staff to expedite the release of records, it took CARB until April 30, 2009 to produce any substantial volume of records in response to the initial CPRA request. Records responsive to the second and third CPRA requests were only made available on June 19, 2009, four business days prior to the hearing date.

CARB staffs repeated failure to respond to the Association's CPRA requests has severely impaired the Associations' ability to comment fully and effectively on the proposed AB 32 Fee Regulation.

CARB staff has, by its own admission, withheld 11,981 pages of records from the Associations in response to the first CPRA request, and has withheld an as yet undisclosed number of pages from the most recent disclosure on June 19,2009. CARB staff rationalizes its withholding of records on unsupported and dubious claims of deliberative process and attorney client privilege (discussed in section IV, below). Accordingly, the Associations are basing their comments solely on the review of those limited and incomplete public records that have been provided to them, and that they have been forced to review in an unreasonably short period of time. Therefore, the Associations emphasize that their comments are not exhaustive of the deficiencies in the record relating to the proposed AB 32 Fee Regulation, but merely indicative of the types of deficiencies the Associations have identified. In reviewing the limited and incomplete records that CARB has provided them, the Associations have identified significant data gaps between the information that CARB has provided to them and the figures presented in the May 8 Staff Report. The gaps (discussed in section IV, below) are representative of the types of discrepancies and lack of support for AB 32 expenses that the Associations have observed in the records available to them.

Agency Response: See response to Comment 62.2.5 Pills.

62.2A.3 Comment: THE PENDING PUBLIC RECORDS ACT LITIGATION IN SACRAMENTO SUPERIOR COURT. As a result of the dilatory production of documents under the Associations' CPRA requests, an action was filed on May 7, 2009 to obtain access to the documents withheld by CARB relating to the basis for the amount of the proposed fee and the nexus with the regulatory activity to be funded by the proposed fee under Health & Safety Code § 38597. The CPRA authorizes injunctive and declarative relief, and a writ of mandate, to enforce the public's right to inspect or receive a copy of public records, with an expedited procedure for the court to issue a decision "at the earliest possible time," The Associations sought an alternate writ of mandate requiring CARB to show cause how the 11,981 pages of materials withheld from the disclosures pursuant to the February 13 CPRA request were not subject to disclosure. The CPRA requires that "factual information" *must* be disclosed. The courts have held that the Legislature intended that "access to information concerning the conduct of the People's business is a fundamental and necessary right of every person in this state," and that any claims of privilege and exemption are to be narrowly construed. *Citizens for a Better Environment* v. *Dept. of Food and*

Agriculture (1985) 171 Cal.App.3d 704, 711. Under Health & Safety Code §§ 38597 and 5700l(a), CARB is subject to a fee accountability program, and AB 32 requires that funds collected are to be "solely for the direct costs incurred."

The Superior Court is in the process of issuing the alternative writ and scheduling an *in camera* review of the 11,981 pages of withheld material (79% of CARB's files through February 13, 2009). As noted elsewhere in this correspondence, CARB has improperly claimed that financial and factual information is privileged and exempt from disclosure. The Board should continue the 45-day comment period, as requested in section VI below, pending this review by the Court and disclosure of the appropriate sections of the 11,981 pages of material.

Agency Response: See responses to Comments 62.2.6 Pills. The Superior Court denied the Petition for Writ of Mandate on October 16, 2009, explaining that the Associations' remedy was to comment on the regulation during the rulemaking proceedings. As was stated previously, however, these comments do not directly relate to the substance of the regulation, rather they relate to its implementation.

62.2A.4 Comment: Summaries of CARB's costs for the past two fiscal years ("FY") are presented on pages 109-11 of the May 8 Staff Report in Table 3a, titled "AB 32 Position Information and Program Costs for Program Summary, FY 2007-08" (updated 6/11/09 on the CARB website), and Table 4a, titled "AB 32 Position Information and Program Costs for Program Summary, FY 2008-09" (updated 5/27/09 on the CARB website). These tables purport to show the estimated expenses for implementation of AB 32 in FY 2007-08 and FY 2008-09. However, CARB staff has not provided the Associations with records that would explain the actual basis for these estimated numbers. In addition, CARB posted spreadsheets to its website on June 1, 2009 that report an allocation of direct staff expenditures among various AB 32 program elements and specific AB 32 regulations. These spreadsheets indicate that a significant percentage of CARB's direct staff expenses for implementation of AB 32 are not related to regulation of the four fuels and two process emission categories on which the proposed AB 32 fee would be imposed. Further, the records staff has provided related to direct staff expenses raise serious questions about CARB staffs accounting practices. In addition, the questionable basis for the accounting for past year expenses related to AB 32 calls into question the basis for any estimated future year budgets for AB 32 administration.

Agency Response: See response to Comment 62.2.2 Pills regarding nexus. See also responses to Comments 62.3 (in its entirety) and 43.3 IEP.

62.2A.5 Comment: CARB staff claims that all expenses to be recaptured through this fee for past and future years will be based on Budget Change Proposals ("BCPs") submitted to the Department of Finance by CARB and other agencies that are eligible for reimbursement through the proposed AB 32 fee. In responding to the Associations' CPRA requests, CARB staff has provided many copies of BCPs for CARB and the other agencies that will be reimbursed or funded by the fee (including Cal/EPA, California Energy Commission, Integrated Waste Management Board, Department of Food and Agriculture, and General Services). While these reports provide some information on the types of work that the agencies plan on doing related to AB 32, they do not substantiate what expenditures were actually made in implementing AB 32. These BCPs also indicate a lack of nexus between the proposed fee payers, the four fuels and two process emission categories, and the activities being carried out by state agencies other than CARB to implement AB 32. Other records produced by CARB staff in response to the CPRA requests also indicate that there may be an overall lack of substantive support for actual expenditures in implementing AB 32.

Agency Response: See response to Comment 62.2.2 Pills regarding nexus. The fee will be based on the approved budget, not BCPs. See also response to Comment 17.17 WSPA.

62.2A.6 Comment: For example, Table 3a of the May 8 Staff Report includes a subtotal of 125.44 PYs (person years), purportedly covering CARB staff working on AB 32 programs for FY 2007-08, and Table 4a includes a subtotal of 181.23 PYs, purportedly covering CARB staff working on AB 32 programs for FY 2008-09. The records provided the Associations by CARB staff indicate that CARB requested each of its divisions to provide spreadsheet information for each employee and percentage of time working on specific AB 32 programs. However, charts and spreadsheets provided to the Associations with reported PYs and percentages of time spent on AB 32 programs from individual divisions can account for only 57.44 PYs in FY 2007-08, and only 65.32 PYs in FY 2008-09. The estimated number of staff working on AB 32 programs, and the specific work done in implementing AB 32, is critical to proper implementation of CARB's fee accountability program. With supporting data on more than half of the claimed PYs missing, the Associations' ability to make meaningful comments on the proposed AB 32 Fee Regulation has been prejudiced.

Agency Response: See response to Comment 62.2 (in its entirety).

62.2A.7 Comment: Another area of significant data gaps is CARB staffs accounting for past and current year expenses related to the categories of "Operating Costs" included in Tables 3a and 4a of the May 8 Staff Report. CARB staff has divided Operating Costs into several sub-categories, including General Expenses, Printing, Communications, Postage, Training, Travel-in-State, and Facilities (rent). The only records that CARB staff has provided in response to the Associations' CPRA requests that contain supporting data for these types of costs is a California State Accounting and Reporting System ("CALSTARS") report of CARB "Expenditures by Program and Object as of 01/31/09." This report appears to cover the first seven months of FY 20082009, and contains cost information reported to the Department of Finance by CARB on a monthly basis. However, the expenses listed in the CALSTARS report do not support CARB's estimates for FY 2008-09. For example, the May 8 Staff Report lists estimated printing costs to be $173,618 for FY 2008-09, yet the CALSTARS report only lists $4,089 in printing-related expenses. The May 8 Staff Report also lists postage costs at $181,230, yet the CALSTARS report contains no line item for postage expenses. Similar discrepancies exist for each of the sub-categories for Operating Costs in FY 2008-09. In addition, no CALSTARS Reports for FY 2007-08 were provided to the Associations in response to any of their CPRA requests. In total, these Operating Costs account for $11,635,746 over the two-year period of FY 2007-08 and FY 2008-09 in Tables 3a and 4a, and are not substantiated by records thus far provided the Associations by CARB staff.

Agency Response: See response to Comment 62.3.11 Pills.

62.2A.8 Comment: Similarly, expenses listed in the May 8 Staff Report Tables 3a and 4a for "Other Costs" are not supported by the records provided by CARB staff in response to any of the Associations' CPRA requests. These costs include equipment costs, which the May 8 Staff Report estimates to be $1,830,564 for FY 2008-09. However, the CALSTARS report only includes $63,955 in expenses that are attributed to equipment. While emails provided to the Associations in response to their CPRA requests indicate that CARB staff claims it has the "back-up" for the $1,830,564 amount, CARB staff has not produced any such documentation. In total, equipment costs account for $1,875,744 in expenses over the two-year period of FY 2007-08 and FY 2008-09 as set forth in Tables 3a and 4a, and are not substantiated by records thus far provided the Associations by CARB staff.

Agency Response: See response to Comment 62.3.12 Pills.

62.2A.9 Comment: Any discussion of "Contract Costs" must come with the caveat that the Associations have had limited time to review specific material provided on June 19, 2009 related to Contract Costs. Little information on Contract Costs was released prior to that date. What can be observed, though, is that while CARB staff has released some charts and spreadsheets with certain data relating to contracts, and the contractors involved, it is difficult to correlate the estimated costs for each of FY 2007-08 and FY 2008-09 with the numbers in the records provided, because the furnished records often contain different totals for Contract Costs in FY 2007-08 and FY 200809 than does the May 8 Staff Report. In addition, no records were provided the Associations that substantiate that these contracts were actually filled, as no receipts or other documentation confirming contract expenses were provided. The only substantiation of actual expenditures, the CALSTARS report for FY 2008-09, only indicates that $1,803,512 was spent on contracts in the first seven months of that FY, while the May 8 Staff Report lists $5,900,000 as the total for FY

2008-09 contracts. In total, Contract Costs account for $10,552,429 in expenses over the two year period of FY 2007-08 and FY 2008-09 as set forth in Tables 3a and 4a, and are not substantiated by records thus far provided the Associations by CARB staff.

Agency Response: See responses to Comments 62.3.6, 62.3.7, 62.3.8, 62.3.9 and 62.3.10 Pills.

62.2A.10 Comment: Another category of costs for which CARB staff has offered no supporting documentation includes expenses for "Administrative Overhead." According to the May 8 Staff Report, CARB staff estimates that these costs were $1,998,872 in FY 2007-08, and $ 1,961,069 in FY 2008-09. CARB staff states that "[t]o calculate this cost, ARE determined that approximately 13 percent of our program-related positions are budgeted as climate change positions. Staff then attributed 13 percent of the total cost of the Chairman's Office, the Executive Office, administrative services and computer services to the climate change program." May 8 Staff Report, p.107. CARB staff has not provided the Associations with any records supporting a determination that 13-percent of all CARB activities are climate change-related, nor has staff provided any records that support attributing 13-percent of administrative services to climate change based on such a conclusion. This approach is objectionable based on the lack of any substantial evidence that any of these administrative activities are related to AB 32 activities. In total, administrative overhead accounts for $ 3,959,941 in expenses over the two-year period of FY 2007-08 and FY 2008-09 as set forth in Tables 3a and 4a, and is not substantiated by records thus far provided the Associations by CARB staff.

Agency Response: See responses to Comments 62.3.13 and 62.3.14 Pills.

62.2A.11 Comment: Overall, the amount of Operating Costs, Other Costs, and Administrative Overhead that is unsubstantiated totals $28,023,860 over the two-year period of FY 2007-08 and FY 2008-09. This is more than 43% of the combined total estimated AB 32 expenditures in the May 8 Staff Report over that same two-year period. It is unconceivable that CARB could responsibly adopt the proposed AB 32 Fee Regulation when such a large percentage of the proposed fee amount would be collected for wholly unsubstantiated costs.

Agency Response: ARB has substantiated these costs both in the Staff Report and by providing additional documentation in the administrative record.

62.2A.12 Comment: As stated above, a major hurdle preventing the Associations from making meaningful comments on the proposed AB 32 Fee Regulation has been the ongoing foot dragging by CARB staff and its refusal to timely provide them with the public records to which they are lawfully entitled. Add to this the extraordinary number of pages of records that CARB staff is withholding under claim of various privileges. This is especially troubling given the inappropriate manner in which it is clear that CARB staff has been applying these privileges. As just one example, on May 27, 2009, CARB staff provided documents to the Associations in response to the February 13 CPRA request that included headers reading "Attorney-Client Confidential Work Product." *(See* Attachment B, appended hereto). These records were spreadsheets with estimates of staff hours and percentages of time spent on AB 32-related work (later posted on CARB's website as noted above), and would not qualify as attorney-client privilege given the factual content of these spreadsheets. In fact, CARB staff has since admitted that these headers were a mistake, and that there was no privilege attached to these documents. Likewise, in the most recent release of records on June 19, 2009, CARB provided a document with the same header, "Attorney-Client Confidential Work Product." This document contained estimates of "Climate Change Staffing Resources for FY 2007-08 and FY 2008-09," and due to the factual nature of the information, could not be considered privileged. *(See* Attachment C, appended hereto). These examples indicate that it is highly likely that CARB is misapplying applicable privileges, and is possibly unlawfully withholding thousands of pages of public records related to the proposed AB 32 Fee Regulation. In the interest of open government and full transparency, CARB staff should disclose all responsive documents to the Associations prior to any action the Board may take, and thereby allow the public to have a full and fair opportunity to comment on the proposed AB 32 Fee Regulation.

Agency Response: See response to Comment 62.1 Pills (in its entirety).

62.2A.13 Comment: In addition to the above comments related to data gaps in CARB's expenditures to date, the limited information that has been provided demonstrates that there are significant expenses being claimed that are not in fact AB 32 expenses, as well as significant expenditures that lack any nexus with the proposed fees and fee payers.

Agency Response: See response to Comment 62.2.2 Pills regarding nexus.

62.2A.14 Comment: In the first category, the Associations have preliminarily identified direct staff expenses, using the aforementioned direct staff expense spreadsheet for FY 2008-2009 posted to CARB's website *(See* Attachment B), which are related to the Western Climate Initiative ("WCI") in the amount of $556,620.79, amounting to 3.46% of direct staff costs for the current fiscal year. WCI is not an AB 32 activity, and the Associations reserve the right to further challenge the ability of CARB to recover past or future expenses related to WCI through the AB 32 administrative fee. It appears that some of the claimed contract expenses also relate to WCI, and the Associations reserve the right to further comment as they are able to further analyze the information provided on June 19. Further analysis may result in the identification of further staff costs that are related to WCI or to other general climate change work, such as the

Climate Action Team and other activities, which are not "direct costs incurred" for administration of AB 32.

Agency Response: This comment does not relate to the regulation. However, AB 32 specifically requires ARB to work with other jurisdictions to consider information pertaining to other GHG emission reduction programs (HSC 38561(c)). Further, the comment periods for this regulatory development was extended by three months.

62.2A.15 Comment: In the second category of AB 32 implementation costs that lack a nexus with the proposed fees-the Associations would call CARB's attention to the following percentages, again based upon the posted spreadsheet of direct staff costs for FY 2008-2009, of overall staff time spent on AB 32 activities that directly regulate or otherwise address emissions that are not related to the four fuels and two process emissions categories:

Forestry	.99%
Glass	.69%
Protocol Development	1.43%
Small business assistance	.70%
High GWP gases	10.62%
Landfills	1.85%
Land use Planning	2.36%
Subtotal	18.64%

An additional set of expenditures whose nexus with the proposed fee payers is questionable include a group of goods movement and transportation related measures:

Goods Movement:	1.56%
Cool Cars:	1.14%
Smartway:	4.34%
Shorepower:	.42%
Tire Pressure:	1.62%
Subtotal:	9.08%

Agency Response: See response to Comment 62.2.2 Pills regarding nexus.

62.2A.16 Comment: There is an additional category of expenses that the Associations have been given to understand, based upon statements of CARB staff, would not be funded using the AB 32 administrative fee. These include:

Pavley:	1.56%
Electricity Programs:	2.14%
Subtotal:	3.70%

Agency Response: This comment does not apply to the regulation, however, the criteria for funding by the fee is described in the Staff Report (pages 33 and 125). See also response to Comment 17.17 WSPA.

62.2A.17 Comment: The grand total of the percentage of these expenditures is 34.88%. Applied to the direct staff expenses and benefits figures provided in Table 4a for FY 2008-2009, the total related expense is $7,577,199.70.

Finally, based upon review of the limited information provided by CARB staff on the activities of other agencies in implementing AB 32, it does not appear that any of the activities proposed to be funded have a proper nexus with the four fuels and two process emissions on which the proposed fee would be imposed. These expenses are estimated to make up $3.1 million for FY 2009-2020, or 8.6% of the total annual revenue going forward.

Agency Response: See response to comment 62.2.2 Pills regarding nexus.

62.2A.18 Comment: THE FIFTEEN-DAY COMMENT PERIOD UNDER GOVT. CODE SECTION 11346.8 IS NOT AN ADEQUATE SUBSTITUTE FOR THE PROPER CONSIDERATION OF COMMENTS DURING THE 45-DAY COMMENT PERIOD REQUIRED PRIOR TO BOARD ACTION

It is possible that CARB staff may argue that the 45-day comment period should close on June 24, 2009 and that the 15-day comment period under Govt. Code § 11346.8 would be a substitute for the proper submission and consideration of comments by the full Board. However, the subsequent 15-day comment period is strictly limited. Under § I 1346.8(c), CARB may not amend the proposed regulation unless the change is "non-substantial or solely grammatical in nature" or "sufficiently related to the original text" that the public is on notice from the outset of any change to originally proposed regulatory action. This is not the case concerning the substantial data gaps and nexus issues as set forth above. Accordingly, the Board should extend the 45-day comment period for at least one additional public hearing to allow for the very substantial issues concerning the data gaps and withheld documents to be resolved, and to afford a proper amount of time for preparation and submission of comments.

Agency Response: This comment is from a letter received on June 24, 2009, prior to the Board deferring a decision until the September board hearing. The comment period was extended until September 25, 2009. However, in addition to extending the comment period, many of the documents that were officially added to the record during the first 15-day notice were available on ARB's website beginning in June 2009. This is well in advance of any action the Board took on the regulation. Although statutorily limited to 15 days once the records were officially added to the rulemaking record, the entire availability of the added documents far exceeded 15 days and provided ample time for parties to comment.

62.2A.19 Comment: REQUEST FOR CONTINUATION OF THE 45-DAY COMMENT PERIOD The Associations respectfully request the Board to defer final action on adoption of the proposed AB 32 Fee Regulation to the July 23 Agenda, with the comment period to remain open through July 22, 2009. As noted above, there are substantial questions concerning the accuracy and verification of calculations affecting a very sizable fraction of the proposed fee. The Court is considering the 11,981 pages of withheld materials in an *in camera* review, which may raise additional issues concerning the accuracy of the information presently before the Board. The Associations have been unfairly prejudiced by the withheld material, untimeliness of material that has been produced, and inadequate time to prepare proper comments for consideration by the Board on this very important issue. The Board should exercise its discretion to allow additional time for comments.

Agency Response: See response to Comment BHJ-O12 CMTA.

62.3.1 Comment: Deficiencies in Acquired Documents

The acquired documents[4] displayed a number of serious deficiencies that created insuperable difficulties in related the data on the documents to the ARB Published Data. For example, documents comprising the Acquired Expenditure Data:

- Lack headers to indicate what organizational element or topic was represented
- Lack salary information
- Only include data from a single division
- Are blank or incomplete
- Fail to designate what FY was being represented
- Document requests for data but do not include responses to those requests
- Lack date information and either contradict or duplicate other documents covering the same spending category
- Contain internally conflicting information
- Lack complete fiscal year data for 2008-09

Footnote:

[4]All records reviewed, and all Bates numbers referenced, are from ARB's production of records in response to the Associations' May 28, 2009 Public Records Act requests. The only records relating to costs or financial data in the responses to the February 13, 2009 request were Budget Change Proposals, duplicates of which were re-released in the May 28 responses.

Agency Response: In response to multiple Public Records Act (PRA) requests in early and mid 2009, ARB provided the most current and accurate information that was then available. Both the draft data included in ARB's PRA responses and expenditures included in the Staff Report were estimates. The PRA only requires that documents in existence be provided, not that the agency create additional documents for the use of the requester. ARB has addressed many of the concerns expressed by the commenter and has submitted both new and revised data into the administrative record.

62.3.2 Comment: Evidence from Analysis of an Intermediate Product of the Estimation Exercise that Published ARB Data May Be Incorrect

An attachment to an email dated May 4, 2009 that appeared to be an Intermediate Product in the estimation exercise was found in the Acquired Expenditure Data.[5]

The Intermediate Product consisted of scanned Excel spreadsheets and included initial and revised PY for FY 2007-08 and FY 2008-09, by position, with divisional affiliation and salary information. The scanned files were entered into Excel worksheets and analyzed. The intermediate Product is presented in Appendix E.

An analysis was conducted of the Intermediate Product and compared with the ARB Published Climate Change Staffing Resources spreadsheets claimed by ARB to support tables 3a and 4a.

Despite the fact that the Intermediate Product is untitled and undated, the close similarities of total personnel expenditures in the Intermediate Product to those in the ARB published data makes these documents valuable for insight into how ARB developed some of the cost figures for Tables 3a and 4a.

The analyses are presented in Appendices B & C, Tables B-1, B-2, C-1 and C-2.

Tables in Appendix B compare estimated and published PY by division, with annual estimated expenses, and it is in this comparison that the most significant accounting anomalies can be observed.

Among those anomalies FY 2007-08, the following should be highlighted:

FY 2007-08

- The Intermediate Product included PY and salary expenditures for individuals in divisions listed in the ISOR as components of Administrative Overhead, e.g., ASD, Legislative Office, OIS[6], and PIO.
- Estimated total PY are reduced significantly between the Intermediate Product and the ARB published version in Table 3a but salary expenditures do not change a proportionate amount.
- In other words, the total expense listed in the Intermediate Product for persons working in Administrative Overhead appears to be absorbed into program costs despite the removal of their PY from total PY.
- The above raises the possibility that Administrative Overhead costs have been double counted, first by folding their costs into program costs and second by removing administrative services PY from the list of program PY and including the costs again in Administrative Overheard.

- Total administrative services apparently folded into program costs for FY 2007-08 totaled $565,639[7] Total claimed Administrative Overhead was $1,998,872.

Footnotes:
[5]Found at Bates Numbers 000419 to 000446
[6]PY but not expenditures included.
[7]$418,872 plus benefits.

Agency Response: The Intermediate Product that is discussed above, which is an email with attached spreadsheets that was released in response to the PRA request, was an early step of the process of developing the expenditure data used for the Staff Report released May 8, 2009. This spreadsheet was not intended to be a complete representation of the expenditure data. It is inappropriate to contend that this early effort to compile data somehow suggests that the tables and spreadsheets ultimately released with the Staff Report (or their revised versions) are inaccurate.

To ensure the accuracy of the data, staff performed quality control reviews of Tables 3a and 4a after the May 8, 2009 release of the Staff Report. During this review minor errors were found and corrected and both revised tables were posted on ARB's website (May 27, 2009 and June 11, 2009). Staff also reviewed the data again as a result of this comment, and verified that there was no "double counting" as expressed in the comments above.

These reviews consisted of staff gathering and compiling PY information that was based on the best estimates of those providing the information. Staff then double checked to ensure PYs were not double counted. Staff also took a conservative approach to counting PYs by rounding down in all instances.

62.3.3 Comment: FY 2008-09

This fiscal year appears to have the same problems as FY 2007-08 in that administrative services positions are removed from PY totals without having their removal proportionally reflected in expenditure totals, suggesting that these expenditures are double counted.

The administrative services costs in this case are larger[8] and total $1,526,010[9] compared to total Administrative Overhead claimed for FY 2008-09 of $1,961,069.

Footnotes:
[8]They include OIS positions.
[9]$1,130,042 plus benefits.

Agency Response: See response to Comment 62.3.2 Pills above.

62.3.4 Comment: Some divisions show significant changes in PY allocated to AB 32 activities between initial and revised totals, whereas the total PY do not reflect such large changes. For example, OIS decreases from 8.97 PY to 0.4, SSD increases from 47.41 PY to 57.16 PY, PTSD increases from 23.05 PY to 28.1 PY and EO (OCC) decreases from 35 PY to 19.5 PY between initial and revised. However, the change in total PY across all departments between initial and revised is less than 5 PY.

Agency Response: The commenter believes that changes were made to PYs within individual divisions (shown in the intermediate product) and do not match what is shown in the Staff Report (final product). As discussed in the responses to the previous comments, the draft versions obtained through Public Records Act request (PRAs) are unfinished and often unrefined work products. It is inappropriate to use them as tools to speculate that the ISOR expenditure data is faulty or flawed because they do not show the entire process for developing the final data.

62.3.5 Comment: The published PY count is very close to the revised PY among individual divisions.

Despite these changes, individual positions that have had their percentage of time revised do not show any changes in total annual expenditures.

The analysis appears to compromise the validity of the ARB Published Data by showing that, during its estimation exercise, ARB changed personal PY amounts and divisional allocations without making parallel changes in personnel expenditures.

Agency Response: The published count for FY 2008/09 PYs (person years) is 182.77 (ISOR, page 111). It is not clear what draft version of the data the commenter is comparing this to. It is important to note that the costs and PYs developed for the Staff Report were preliminary estimates. If one compares these preliminary estimates to the actual budgeted positions of 152 PYs for FY 2008/09, this shows that ARB spent more on the AB 32 program than was budgeted (in this case 30.77 PYs in excess of budgeted PY). This overage is not being charged to fee payers. Only the loan repayment is being applied to the fee, which for FY 2008/09 is $32 million from the Beverage Container Recycling Fund. In other words, the amount spent by ARB for AB 32 implementation is in excess of the amount that will be billed to fee payers and recovered through the fee.

62.3.6 Comment: Contracts

Documentation of FY 2007-08 and FY 2008-09 contracts awarded largely exists on undated spreadsheets. The spreadsheets fail to corroborate each other and fail to total to the amounts claimed in Tables 3a and 4a.

Moreover, there are no accounting documents, such as CALSTARS records or invoices, which confirm contract amounts or even whether they were approved in a particular fiscal year.

Agency Response: These spreadsheets were not intended to "corroborate each other." The PRA only required documents in existence be provided, not that the agency create additional documents for the use of the requester. ARB has addressed many of these concerns and has included both new and revised data into the administrative record, including CalSTARS reports, summaries of contracts, copies of contracts, purchase orders and invoices, and Department of Finance Final Budget Summary reports that document contract and other expenditures.

62.3.7 Comment: An analysis and comparison of contract information is presented in Appendix D, in Tables D-1 and D-2 for FY 2007-08 and FY 2008-09, respectively. The findings of that analysis are summarized below for each fiscal year.

FY 2007-08
Table 3a lists a total Contracts expense of $4,652,429. The documents furnished by ARB included several spreadsheets showing planned contracts. Many of these spreadsheets were undated, and some of them appear to have been preliminary, showing only a handful of the contracts listed elsewhere.

No two of these lists arrive at the same contracts total, nor does a single one of them show the total listed on 3a. Some of the more complete-looking lists show contracts totaling as much as $5,804,379, while others show money allocated over various fiscal years and include a FY 2007-08 total of $4,233,097.

Agency Response: Because the documents provided for the PRA were early drafts or estimates used in developing the Staff Report, in many cases the spreadsheets are not complete. Tables 3a and 4a from the Staff Report (pages 109-111) provided preliminary expenditures on ARB's AB 32 program, including expenditures for contracts. Since the release of the ISOR in May 2009, staff has reviewed all of the related contracts. To ensure that all the contracts were directly related to AB 32 activities, staff re-examined each contract to determine the correct amount to be charged against AB 32. Staff took a conservative approach when reviewing contracts that included other program areas and climate change in order to ensure the appropriate percentage was allocated to AB 32 work. The result was a change in the amount of contract funds that were applied to AB 32. For FY 2008-09 contracts related to ARB's AB 32 program totaled approximately $4.7 million.

62.3.8 Comment: FY 2008-09
Table 4a lists a total of $5,900,000 in FY 2008-09 contracts. This amount is not supported by documents in Acquired Expenditure Data.

At best, contracts that appear on more than one document[10] total $4,247,956, several of which are noted on one of these documents as being "in process." Total contract amounts that can be tallied from lists in the Acquired Expenditure Data range from $4,911,786 to $639,145. It is not at all clear that the listed contracts were actually approved and had their funds encumbered in FY 2008-09.

Footnote:
[10]Bates Numbers 000450-000452 and 002031-002042.

Agency Response: See response to Comment 62.3.7 Pills.

62.3.9 Comment: The latest contract listing is associated with a cover email dated May 5th, 2009. Employee notations within the spreadsheet itself indicate that it is in the process of being verified. More importantly, the document is dated prior to the end of the fiscal year and while it may have been ARB's intent to approve these contracts before the end of the fiscal year, there is no evidence that it did.

Agency Response: As noted in the response above, staff has reviewed all of the contracts related to AB 32, made subsequent changes based on updated contract and invoice information and has provided them as part of the administrative record.

62.3.10 Comment: The absence of any internal documentation consistent with the contract amounts claimed in (Tables) 3a and 4a would seem to make it doubly important that contract expenses be confirmed by some sort of fundamental accounting information that could substantiate that the claimed contract amounts were indeed paid out. However, this data has not been provided by ARB. Additionally, ARB has no provided copies of any contract proposals or invoices that would substantiate these contracts having been bid for, awarded or paid.

Completely Unsubstantiated Costs
The following cost categories are completely unsubstantiated in that not one piece of information has been provided to confirm that the expenditures even occurred.

Categories	FY 2007-08	FY 2008-09
General Expense	$1,803,576	$3,706,878
Printing	$96,087	$173,618
Communications	$317,740	$354,848
Postage	$75,264	$181,230
Training	$313,600	$362,460
Travel In-state	$300,429	$520,855
Facilities	$1,254,400	$2,174,760
Total	**$4,161,096**	**$7,474,650**

These $11.6 million in expenditures have been presented as the result of simple PY multiples of a state Standard Average per Position Cost. However no evidence has been presented that would confirm the accuracy of the average cost used.

In addition, these expenditures are sensitive to the number of PY used. If ARB's PY count is as arbitrary as appears to be the case in the analysis of the Intermediate Product, total expenditures could be considerably different than claimed.

Agency Response: See response to Comments 17.16 WSPA and 62.3.6 Pills, which address the issues raised by the commenter.

62.3.11 Comment: Especially troublesome is the General Expense rate of $20,454 per person for FY 2008-09—a remarkably larger rate for an expense category that is not only undocumented but that also, by ARB's own admission, does not even include expenses for facilities or Administrative Overhead.

Agency Response: General Expense is not an undocumented category, it includes costs from several categories, and as used in the Staff Report table included, but was not limited to the following items of expense:

- General Expense (office supplies, computers, software licenses, minor office equipment, cubicles, etc)
- ARB Lab Supplies
- Insurance (Dept. of General Services charges liability insurance on every state agency)
- Out-of-State Travel
- ProRata (an assessment made by the Department of Finance on all special funded agencies - please see their Web site for specific details on historical ProRata assessments charged to ARB and other agencies)

For FY 2008-09, the amounts and rates were made at a point in time prior to the completion of the fiscal year; however, we now have final accounting reports. ARB has expended $24,904,789 in FY 2008-09 for the above categories of expense; dividing by the final 1,241.7 actual personnel year equivalent (position count verified by the State Controller's Office, and published in the Governor's Budget - Summary By Object), the ARB average per position is $20,057.01 for General Expense.

62.3.12 Comment: Other unsubstantiated costs include:

Categories	**FY 2007-08**	**FY2008-09**
Equipment	$45,180	$1,830,564
Administrative Overhead	$1,998,872	$1,961,069
Total	**$2,044,052**	**$3,791,633**

Agency Response: Equipment and other expenditures included in the ISOR released (May 8, 2009), were preliminary numbers. Shortly after the ISOR was released, Governor Schwarzenegger issued Executive Order S-09-09 to curtail state spending because of the State's ongoing financial challenges. This Executive Order effectively froze all spending by the state, including funds that were planned for AB 32 program equipment. ARB did not procure as much equipment for the AB 32 program during the 2008-09 fiscal year as planned and therefore is reducing equipment expenses to approximately $477,000. ARB is subtracting all equipment expenses (as included in the ISOR) from FY 2007-08 expenses as well.

ARB has provided purchase orders and invoices of equipment into the administrative record.

62.3.13 Comment: The earlier analysis of the Intermediate Product has suggested that there is a possibility that Administrative Overhead has been inflated through double counting. Regardless of whether that is the case, the amount claimed for Administrative Overhead is completely undocumented.

Agency Response: The Staff Report describes how the Administrative Overhead (referred to as "program oversight" in the ISOR) is calculated (p. 107). These costs are consistent with what is used publicly for budgeting purposes and staff has verified that there is no "double counting."

62.3.14 Comment: In the ISOR[11] ARB states it made the decision to not break down PYs for several divisions, including the Executive Office, Chairman's Office, Administrative Services Division and Office of Information Services, but instead estimated that 13% of the total costs of those divisions should be counted as "Administrative Overhead."

ARB states that that the 13 percent figure was arrived at because it determined that approximately 13 percent of program-related positions were budgeted as climate change positions.

However, no documents were provided that showed ARB's total numbers of "program-related positions," so it is impossible to see how the 13 percent figure was produced.

Footnote:
[11] Pg. 107

Agency Response: ARB used the ratio of AB 32 positions to the total positions at ARB, agency wide. ARB had approximately 1,115 personnel years (PYs) in fiscal year 2008-09. Of this total, 150 PYs were dedicated to AB 32 activities at ARB. 150 divided by 1,115 is approximately 13 percent. Department of Finance reports have also been included in the administrative record which show ARB staffing levels for the years discussed here.

62.3.15 Comment: Additionally, there is no documentation of the total costs of the listed divisions, which, for example, in FY 2007-08 would be approximately $15.4 million, if 13 percent of that total would come to the claimed figure of nearly $2 million.

Agency Response: On or around May 27, 2009, ARB provided detailed documentation of all staff working on the AB 32 program. This information also included employees by division throughout the agency. This can be found at: [http://www.arb.ca.gov/cc/adminfee/spreadsheets.htm] and was added to the rulemaking record in the first 15-day Notice of Modifications.

ARB has also provided agency-wide costs for ARB and Cal/EPA that are contained in the CalSTARs reports (references, also found at the hyperlink above).

62.3.16 Comment: As regards equipment purchases, it is remarkable that no documentation of expenses in this category has been provided, in that it totals $1,875,744 over the two fiscal years in question.

Agency Response: See response to Comment 62.3.12 Pills regarding equipment purchases.

62.3.17 Comment: Data Tests Applied

Despite the deficiencies in the Acquired Expenditure Data, each document was closely examined and two tests were applied to the "data" it included: 1) a consistency test, and 2) a validity test. The results of the test on each document are presented in Appendix A in Tables A-1 and A-2.

Data on a document was considered to be "consistent" if it appeared to match ARB published data. For example, if data for a particular division on a document in Acquired Expenditure Data matched either PY or salary data within ARB Published Data for that division, the data on the document was deemed "consistent."

Data was considered to be "valid" if it matched data from the few CALSTARS documents that were included among the Acquired Expenditure Data. No CALSTARS data was able to be matched for reasons discussed earlier.

An exception to the rule on matching was made in the case of the Intermediate Product. As detailed above, the Intermediate Product was an early version of the final spreadsheets, entitled Climate Change Staffing Resources, that ARB claims support its personnel expenditures for AB 32. Therefore, the Intermediate Product can not be said to independently confirm those spreadsheets.

Summary results for these tests for FY 2007-08 and FY 2008-09 are presented in the following Tables 1 and 2.

For FY 2007-08 and FY 2008-09, the only expenditures that could be considered consistent were some contract costs. None of the remainder of the data was deemed consistent. No data was deemed valid due to the absence of CALSTARS data.

[TABLE 1]

Table 1: Consistency and Validity of ARB Published AB 32 Position Information and Program Costs for FY 2007-08				
Personal Services and Operating Expenses			**Consistency**	**Validity**
	Number of PYs	**Actual Annual Salaries ($)**		
Sub-Total	125.44	10,611,546	0	0
Benefits				
FICA	6.20%	657,916	0	0
Medicare	1.45%	153,867	0	0
Retirement	16.63%	1,764,700	0	0
Health	10.82%	1,148,169	0	0
Sub-Total	35.10%	3,724,653	0	0
Total Personal Services		14,336,199	0	0
Operating Costs	**Standard Average Per Position Cost**	**Annual Cost**		
General Expense	14,378	1,803,576	0	0
Printing	766	96,087	0	0
Communications	2,533	317,740	0	0
Postage	600	75,264	0	0
Training	2,500	313,600	0	0
Travel-In-State	2,395	300,429	0	0
Facilities	10,000	1,254,400	0	0
Sub-Total	33,172	4,161,096	0	0
Total Staff Related Costs:		18,497,295	0	0
Other Costs				
Contracts		4,652,429	4,233,097[12]	0
Equipment		45,180	0	0
Administrative Overhead		1,998,872	0	0
Sub-Total		6,696,481	0	0
	Total Costs:	25,193,775	4,233,097	0
Percent Expenditures Accounted For			17%	0%

<u>Footnote:</u>
[12] Per Bates Number 000150

[TABLE 2]

Table 2: Consistency and Validity of ARB Published AB 32 Position Information and Program Costs for FY 2008-09				
Personal Services and Operating Expenses:			Consistency	Validity
	Number of PYs	Actual Annual Salaries ($)		
Sub-Total	181.23	16,086,806	0	0
Benefits				
FICA	6.20%	997,382	0	0
Medicare	1.45%	233,259	0	0
Retirement	16.57%	2,665,584	0	0
Health	10.82%	1,740,592	0	0
Sub-Total	35.04%	5,636,817	0	0
Total Personal Services		21,723,623	0	0
Operating Costs	Standard Average Per Position Cost			
General Expense	20,454	3,706,878	0	0
Printing	958	173,618	0	0
Communications	1,958	354,848	0	0
Postage	1,000	181,230	0	0
Training	2,000	362,460	0	0
Travel-In-State	2,874	520,855	0	0
Facilities	12,000	2,174,760	0	0
Sub-Total	41,244	7,474,650	0	0
Total Staff Related Costs:		29,198,273	0	0
Other Costs				
Contracts		5,900,000	4,248,856	0
Equipment		1,830,564	0	0
Administrative Overhead		1,961,069	0	0
Sub-Total		9,691,633	4,247,956	0
	Total Costs:	38,889,906	4,247,956	0
Percent Expenditures Accounted For			11%	0%

The documents ARB has produced thus far do not support the notion that ARB Published Data is an accurate representation of expenditures incurred for AB 32. In fact, it would probably be more accurate to say that ARB has labored mightily to prevent the public from gaining access to data that would confirm its published numbers.

Agency Response: ARB disputes the assertion that by applying “consistency and validity tests” one can conclude that the expenditure data contained in the Staff Report is inherently inconsistent and invalid, and therefore flawed. Applying these tests to information that was in draft form and provided specifically for the PRA is inappropriate.

Data published in the Staff Report and subsequent revisions to tables 3a and 4a, along with the web posting of the spreadsheet that includes substantial detail for all ARB staff working on AB 32 during FYs 2007-08 and 2008-09, represents ARB’s best effort to provide accurate, consistent data. ARB provided two lengthy spreadsheets on personnel details that underscore ARB’s effort to go above and beyond what was required.

In terms of the CALSTARS report that was provided as a result of the PRA request, the PRA only requires documents in existence be provided, not that the agency create additional documents for the use of the requester. ARB has addressed many of these concerns and has included both new and revised data in the administrative record.

Comment 5: SCPPA, June 18, 2009

5.1 **Comment:** First, in order to avoid potential legal complications, SCPPA recommends that the scope of the fees be modified to exclude any application to imported electricity. In the alternative, if the Board desires to approve staffs proposal to apply the fee to imported electricity, SCPPA recommends that the Board seek an opinion from the California Attorney General about the legality of applying the fee to imported electricity and, additionally, that the Board provide a reasonably exhaustive analysis of the legality in the Final Statement of Reasons ("FSOR") that will be sent to the Office of Administrative Law ("OAL") with the administrative fee regulation.

Agency Response: The fee regulation was modified so that the fee would be applied equally to all electricity, whether it is imported or generated in California. In this response, we first explain why imported electricity is included, and then discuss the modifications.

Imported electricity should not be excluded from the fee regulation for several reasons. As stated in the ISOR, “one major goal of the proposed regulation is to equitably impose fees on the widest possible spectrum of greenhouse gas sources in an administratively feasible manner.” Because imported electricity consumed in California is responsible for 10 to 13 percent of California’s greenhouse gas emissions[3], and because it is administratively feasible to apply the fee to both in-state and imported electricity, the regulation is more equitable including imported electricity than it would be if imported electricity were excluded.

At the preliminary workshops, many stakeholders expressed the view that the fee should be applied as broadly as possible to all greenhouse gas emissions, including greenhouse gas emissions due to electricity imported into California. In particular, representatives of the transportation fuel industry opined that imported electricity should not be left out. If it were, transportation fuels would be subject to higher fees since the pool of covered entities would be smaller. Staff agreed with this opinion, and included imported electricity to make the fee regulation as equitable as possible, and to not unfairly burden other sectors of California’s economy.

Another reason that imported electricity is included in the fee regulation is that the scope of AB 32 very clearly includes emissions from imported electricity. Subsections 38505 (i) and (m) of AB 32 define two key terms:

> "’(m) Statewide greenhouse gas emissions’" means the total annual emissions of greenhouse gases in the state, including all emissions of greenhouse gases from the generation of electricity delivered to and consumed in California, accounting for transmission and distribution line losses, whether the electricity is generated

[3] ARB, online California Greenhouse Gas Inventory for 2000-2006 by IPCC Category, accessed October 29, 2009 at: [http://www.arb.ca.gov/cc/inventory/data/tables/ghg_inventory_ipcc_00-06_all_2009-03-13.pdf]

> in state or imported. Statewide emissions shall be expressed in tons of carbon dioxide equivalents."
>
> "'(i) Greenhouse gas emission source' or 'source' means any source, or category of sources, of greenhouse gas emissions whose emissions are at a level of significance, as determined by the state board, that its participation in the program established under this division will enable the state board to effectively reduce greenhouse gas emissions and monitor compliance with the statewide greenhouse gas emissions limit."[4]

It is clear from definition (m) that the emissions caused by out-of-state generation of electricity consumed in California constitute part of California's statewide greenhouse gas emissions. Therefore it is logical to include these emissions under the fee regulation. Without including imported electricity in the Board's regulatory approach to reduce and monitor compliance with the greenhouse gas emissions limit of AB 32, the full scope of AB 32 would not be satisfied.

ARB has consistently considered imported electricity to be a source or category of sources with emissions at a level of significance such that "its participation in the program established under this division will enable the state board to effectively reduce greenhouse gas emissions and monitor compliance with the statewide greenhouse gas emissions limit."

The approach to electricity was modified in part due to concerns voiced by many about Commerce Clause implications. Under the regulation as originally proposed, electricity generating facilities in-state would have been indirectly subject to the fee imposed on fossil fuels used to produce electricity, while imported electricity would have been directly subject to the fee on a per megawatt-hour basis, based on the carbon emitted in the production of the imported electricity. The expectation was that fees on fuels used for electricity generation would have been passed through to the in-state electricity generating facilities. However, such an approach may have appeared, on its face, to treat electricity generated out-of-state differently than electricity generated within California, in violation of the Commerce Clause.

Therefore, the regulation's approach to electricity was modified to adopt a "first deliverer" regulatory approach to all electricity. Such an approach was recommended to ARB by the CPUC and the CEC, as discussed in greater detail below. In the adopted first deliverer approach, the fee will apply to all electricity generated at electricity generating facilities in California and to all imported electricity that is consumed in California. Under this approach, the point of regulation at which the fee is charged is the point where electricity is first delivered to the California transmission and distribution system. This means that electricity generated in California is subject to the fee at the busbar where an in-state power plant first connects to the California system. Similarly, electricity generated out of state is subject to the fee at a point in the California

[4] Health and Safety Code, Division 25.5, Part 1, Chapter 3, Section 38505(i) and (m), respectively.

transmission and distribution system where it is first delivered for California consumption.

The first deliverer approach was recommended to ARB as the appropriate point of regulation for electricity in a greenhouse gas regulatory framework. The joint decision of the CEC and CPUC[5] considered input from many stakeholders as to the feasibility of the first deliverer approach, and its legality under the Federal Power Act and the Commerce Clause. After weighing public comment on legal and other issues, the two energy agencies chose the first deliverer approach as the best among all alternatives considered, and recommended that approach to ARB.

5.2 **Comment:** Second, if the Board desires to approve staffs proposal to apply the fee to imported electricity, SCPPA recommends that the Board modify the proposed regulations so that the fee will not apply to various power transmission arrangements in which imported electricity passes through California but is not consumed within California.

Agency Response: Staff agrees. Staff modified the definition of “imported electricity” [Section 95202 (a) (54)] to make it clear the fee will not apply to power transmission arrangements in which imported electricity passes through California but is not consumed in California. Specifically, we added to the definition of imported electricity the words “with a final point of delivery in California.” Electricity must be consumed virtually simultaneously with its generation. As a result, when electricity has a final point of delivery in California, it is consumed in California. Pursuant to section 95201(A)(4)(a), the fee is applicable to imported electricity and to electricity generated in California. The fee does not apply to electricity generated outside of California that does not have a final point of delivery in California because such electricity does not meet the definition of imported electricity. Thus the modification has addressed SCPPA’s concern. Furthermore, the definition of “imported electricity” now specifically excludes both wheeled power and power transactions in which imported power is simultaneously exchanged for exported power.

5.3 **Comment:** Third, if the Board desires to approve staffs proposal to apply the fee to imported electricity, SCPPA recommends that the proposed regulations be modified so that the fee will not apply to electricity that is imported as part of an exchange arrangement that involves the return of an equivalent amount of specified California-generated electricity or unspecified system supply to an out-of-state counterparty.

Agency Response: We do not agree and have not modified the regulation to exclude electricity that is imported as part of an exchange agreement, except in the case of electricity that is simultaneously exchanged (see response to Comment 53.2 SCPPA.) See our response to comment 5.22 SCPPA.

[5] CEC and CPUC Joint Agency Decision, Interim Decision on Basic Greenhouse Gas Regulatory Framework for Electricity and Natural Gas Sectors, March 2008.

5.4 **Comment:** Lastly, SCPPA urges the Board to consider putting a cap on the amount of funds that can be obtained annually through the fee to guard against future excesses that might detract from the integrity of the fee and erode public support for the AB 32 program.

Agency Response: See response to Comment 60.3 SCPPA regarding a cap on the fee.

5.5 **Comment:** The Board should evaluate the legality of the staff's proposal to extend the administrative fee to imported electricity. The Board should scrutinize the staff's belated proposal to extend the scope of the fee to include imported electricity. There is a question about whether the application of the fee to imported electricity is beyond the scope of the statutory provision that authorizes the ARB to adopt a schedule of administrative fees. Additionally, the discriminatory application of the administrative fee to imported electricity but not to electricity generated within California is suspect on Constitutional grounds. Also, the application of the fee to imported electricity may be preempted by federal law.

Agency Response: ARB has addressed legal concerns voiced by commenters by modifying the approach taken for electricity to a "first deliverer" approach, which staff believes will withstand legal challenges.

Second, we do not agree that the application of the fee to imported electricity is beyond the scope of statute, and we provide details in our response to Comments 5.9 and 5.10 SCPPA.

Third, the originally proposed regulation could have appeared discriminatory in its treatment of imported electricity; therefore, the regulation was modified to treat all electricity the same.

Finally, as discussed in greater detail in response to Comment 5.19, staff do not believe that the application of the Fee to imported electricity is preempted under federal law, because the regulation is an environmental regulation that applies to deliveries of electricity for California consumption. The Fee is not an attempt to regulate interstate commerce because it is not a fee on a transaction, but instead it is an environmental fee on the delivery of a commodity that is a source of pollution in the form of greenhouse gas emissions.

5.6 **Comment:** The staff's proposal to apply the administrative fee to imported electricity came late in the public process of developing the regulation that is now pending before the Board. At the initial "concept workshop" convened by the staff on January 27, 2009, the staff proposed a fee that would apply to four fuels: gasoline, diesel, coal, and natural gas. Staff Presentation, Slide 5 (January 27, 2009). Additionally, the fee would apply to "process emissions from refineries and cement manufacturers." Ibid. The Director of the Office of Climate Change, Charles Shulock, explained that the fee would apply neither to electricity that was generated within California nor to imported electricity. Mr. Shulock said that in the staff's view there was "no practical way" to extend the fee to imported electricity.

Agency Response: The commenter is referring to concepts discussed in workshops before notice of the regulation was published and before staff finished evaluating all the options.

It is true, as indicated by the commenter, that prior to the release of the 45-day language, staff originally proposed not to apply the fee to imported electricity. However, many parties commented that the fee should be broader and should include imported electricity. Staff analyzed emissions data from the ARB emissions inventory and determined that imported electricity was indeed a major source of statewide greenhouse gas emissions. Furthermore, although staff originally thought that it would be difficult or perhaps infeasible to easily cover imported electricity, staff determined that the concern for fairness and breadth of coverage outweighed the additional complexity that would be added to the regulation in order to cover imported electricity. Fee regulation staff worked together with ARB staff responsible for the inventory and the MRR and found that it was, in fact, feasible to include imported electricity, and that such inclusion could be clearly explained in the regulation.

Staff developed and a proposal to cover imported electricity by charging a fee per megawatt-hour of electricity that was based on the carbon content of each megawatt-hour. The feasibility of this approach is demonstrated in the ISOR's explanation of the calculation of the fee for megawatt hours from specified sources and from unspecified sources, and in the explanations of the calculations of emission factors, and in Appendix D of the ISOR that explains the choice of the emissions factor to be used for unspecified sources. The carbon content for each out-of-state generating facility can be determined by consulting public data available from the EIA and the US EPA, as discussed in the ISOR. Therefore, the staff did include language to cover imported electricity in the 45-day language submitted to OAL on May 8, 2009. Later, based in part on comments submitted by SCPPA and others, the regulation was changed to a first deliverer approach, explained in our response to Comment 5.1 SCPPA.

5.7 **Comment:** The staff convened a second workshop on February 25, 2009. For this workshop, the staff released a "Proposed Regulation Order" proposing a new Article 3 containing sections 95200 to 95209 to be added to Title 17 of the California Code of Regulations. Section 95201 was labeled "Applicability." It stated that the new Article 3 would apply to various entities including operators of gas utilities, operators of interstate or intrastate gas pipelines, producers or importers of California gasoline or diesel, owners of facilities that combust coal in California, refineries, cement manufacturers, and operators of oil fields. Proposed Regulation Order, §95201 (February 25, 2009). Once again, neither imported electricity nor California-generated electricity were identified as being subject to the administrative fee.

Agency Response: The commenter is referring to concepts that were discussed in workshops before notice of the regulation was published and before staff finished evaluating all the options. See the response to Comment 5.6 SCPPA, above for additional information on the decision to include imported electricity, and see our response to Comment 53.1 SCPPA for our explanation of the first deliverer approach to electricity adopted in the regulation.

5.8 **Comment:** The staff scheduled its third and final workshop for April 20, 2009. On April 17, 2009, the staff released a "Proposed Regulation" for discussion at the workshop. The Proposed Regulation revealed that the staff had switched positions on applying the fee to imported electricity. The Proposed Regulation contained a new section 95201(a)(5) entitled "Retail Providers and Marketers of Imported Electricity." The new section would apply the fee to "[a]ny retail provider or marketer of imported electricity." The section provided: "A fee shall be paid for each megawatt/hour of imported electricity." Although the scope of the fee was extended to reach imported electricity, there was still no application of the fee to electricity generated within California.

The April 17, 2009 Proposed Regulation contained a new and complex set of provisions for calculating the assessment of the fee of imported electricity. See Proposed Regulation, §95203 (April 17, 2009). The staff's slide presentation for the workshop revealed the complexity of the calculation. Staff Presentation, slides 29-31, (April 20, 2009). Staff said without any further elaboration or explanation that the staff now thought that extending the fee to imported electricity would be lawful. SCPPA was concerned about the lack of any staff explanation for its newly announced view that applying the fee to imported electricity would be lawful. Shortly after the April 20, 2009 workshop, SCPPA submitted a comment to the staff in which SCPPA explained its concern:

> The extension of the fee to cover imported electricity but not electricity generated in California may violate the Commerce Clause of the United States Constitution. The Commerce Clause provides for federal regulation of interstate commerce. (U.S. Const., art I §8, cl. 3.) The courts have recognized that "this affirmative grant of authority to Congress also encompasses an implicit or 'dormant' limitation on the authority of the States to enact legislation affecting interstate commerce." Healy v. The Beer Institute (1989) U.S. 324, 326, fn 1. If a state regulation discriminates on its face against out-of-state businesses, then it is per se unlawful under the Commerce Clause: "When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry." Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth. (1986) 476 U.S. 573, 579.

SCPPA Comment at 2 (April 24, 2009). SCPPA urged that in order to "avoid the legal complications that could arise from adopting a fee that violates the

Commerce Clause and to avoid the practical inequities that could result from adopting such a fee," the staff should revert to its earlier position and avoid any application of the fee to imported electricity. Ibid. SCPPA further recommended that if the staff continued to believe it should include imported electricity within the scope of the fee, the staff should, at minimum, "include in the ISOR a comprehensive discussion of the legal basis for proposing an application of the administrative fee" to imported electricity." SCPPA Comment at 3 (April 24, 2009).

The staff released the ISOR on May 8, 2009. Even though SCPPA had pointedly urged the staff to include an explanation of the legality of extending the fee to imported electricity, the ISOR is devoid of any explanation of the staff's new view that the application of the fee to imported electricity would be lawful.

Agency Response: The commenter begins by referring to the staff draft proposed regulation that was released on April 17, 2009 and was discussed by staff and stakeholders at the April 20, 2009 workshop, before notice of the regulation was published and before staff finished evaluating all the options. At that time, ARB staff had come to the conclusion (discussed in our response to Comment 53.1 SCPPA, above and to comment 5.6 SCPPA, above) that it was indeed feasible to include imported electricity under the fee regulation, and that such inclusion would make the fee regulation broader and more equitable.

After the April 20 workshop, SCPPA submitted a Comment dated April 24, 2009 bringing to the attention of staff that SCPPA believed that the proposed regulation, in its pre-notice form released April 17, would probably violate the Commerce Clause. Following receipt of said comment, staff considered the Commerce Clause issue. At that time, staff believed that the Commerce Clause would likely not be violated by the regulation as proposed, because the actual fee cost to the electricity user, would be the same for imported electricity and electricity generated in California. Essentially, all electricity would be either directly or indirectly (through increased prices for fuel) subject to the fee, which in all cases would be based on the Common Cost of Carbon. It was expected that both in-state electricity generation facilities (who paid the fee passed through in the price of natural gas or other fuels) and electricity importers (both marketers and retail providers) would ultimately passed the cost on to electricity users, who are both the ultimate source of the emissions through their demand for electricity, and also the ultimate payers of the passed-through fee. Thus, staff believed that since imported and in-state electricity would be *essentially* treated the same, that the Commerce Clause prohibition of discrimination against interstate commerce would not be violated.

As a result of staff's thinking about the commerce clause and the equivalent treatment of all electricity, staff issued the proposed regulation and ISOR on May 8, 2009 based on staff's then current thinking about the Commerce Clause issue. Before the notice of the regulation and ISOR, SCPPA recommended that staff include an explanation of the legality of extending the fee to imported electricity. In fact, in the ISOR staff explained their current thinking that all electricity would be treated equally. This Comment letter (June 18, 2009) provided much more detail about SCPPA's reasons for believing that the proposed regulation of May 8, 2009 might violate the commerce clause; in our response to Comments 5.1 SCPPA and 5.2 SCPPA we explain how the regulation was modified to address these issues.

5.9 **Comment:** Applying an administrative fee to imported electricity would be inconsistent with the AB 32 provision that authorizes the ARB to assess administrative fees, Health & Safety Code ("HSC") section 38597. That section explicitly provides for fees that are to be paid by *sources* of greenhouse gas emissions: "The state board may adopt by regulation, after a public workshop, a schedule of fees to be paid by the *sources* of greenhouse gas emissions regulated pursuant to this division…." HSC §38597 (emphasis added). Imported electricity is not a source of emissions. The generation facilities that are used to generate the electricity are sources of emissions, but imported electricity itself is not a source.

Agency Response: Regarding the contention that imported electricity is not a source of emissions, see responses to Comments 53.1 SCPPA and 5.10 SCPPA.

5.10 **Comment:** Imported electricity is neither a source of emissions nor a fuel that is consumed by a source. In the ISOR, the staff recognized that section 38597 requires that the fee be applied to sources of greenhouse gas emissions. Staff explained that some of the entities to which a fee would be applied are clearly "sources" of greenhouse gas emissions:

"First, some of the entities on which fees are imposed are clearly "sources" of greenhouse gas that are directly emitted into the atmosphere. These entities include refineries and cement producers (who generate process emissions from their operations) and facilities that burn coal. Stakeholders have not suggested otherwise."

ISOR at 35. The staff also recognized that the fuels to which the fee would be applied – natural gas, gasoline, and diesel – are not in themselves "sources" of emissions, but the staff argued that the application of the fee to the fuels would provide a mechanism for recovering the fee from the actual sources that combust the fuels:

> "Second, to address emissions from natural gas and transportation fuels, the proposed regulation is simply an administrative mechanism for efficiently collecting fees on downstream "sources" of greenhouse gas emissions based on the assumption that the costs of the fees will be passed on to downstream end users who actually combust the natural gas and transportation fuel. Gasoline and diesel fuels are burned by millions of individual motorists, as well as millions of individuals who operate small combustion sources such as construction and farm equipment, water

> pumps, lawn mowers, chainsaws, stoves and water heaters in homes, boats, off-highway all-terrain vehicles, snowmobiles and many others. Equipment that burns natural gas, gasoline, or diesel fuel is owned and operated by virtually every household and business in California. It would be inefficient, impractical and overly burdensome to impose fees on all of the individuals who own or operate such equipment. To do this, a fee would need to be imposed on essentially every person who resides in California. *Ibid.*

Imported electricity is neither a source of emissions nor a fuel such that imposing a fee on it would result in the cost of the fee being passed downstream to entities that are, themselves, actual sources of emissions. Users of imported electricity do not combust anything. For imported electricity, the points of combustion are the generation stations that are *upstream* of the point at which the fee would be assessed, not downstream of that point. Applying the administrative fee to imported electricity would not result in the fee being imposed on any actual sources of emissions either directly or indirectly.

It would be consistent with section 38597 to impose the administrative fee on electricity generators, but it would not be possible for the ARB to impose the administrative fee on the out-of- state generators of imported electricity. The administrative fees cannot be applied to generators that are located outside of California because, as the staff recognizes, “California does not have jurisdiction over these entities.” ISOR at 20. Similarly, the fee cannot be applied to entities that supply fuel to the out-of-state generation facilities because the ARB lacks jurisdiction over such suppliers. ISOR at 39. The staff correctly observes: “It is not possible for fees to be applied to out-of-state suppliers of electricity generation fuels, or to use [by] the generation facility located out of state as the point of regulation, because California does not have jurisdiction over these entities.” Ibid.

Agency Response: As discussed above, to carry out the full scope and intent of AB 32, for reasons of equity, and to avoid possible violation of the Commerce Clause, it is necessary to apply the fee equally to electricity as an emission source, whether that electricity is generated in California or elsewhere.[6]

Regarding imported electricity not being a source of emissions, see response to Comment 53.1 SCPPA.

The commenter quotes from the ISOR’s explanation of how an “upstream” approach to fuels is part of the overall approach. The same kind of “upstream” approach is not feasible for imported electricity. As noted in the ISOR, because California does not have jurisdiction outside of its borders, it is impossible for the fee to be applied to fuels used for producing imported electricity, or to stationary sources that are power plants from which importers import electricity. The only way to cover the large share of greenhouse

[6] Health and Safety Code, Division 25.5, Part 1, Chapter 3, Section 38505(i) and (m), respectively.

gas emissions caused by imported electricity is to apply the fee to the electricity. The fee will then be passed through to end-users of electricity who are the ultimate sources of the greenhouse gases emitted in order to generate electricity.

AB 32 and prior ARB rulemakings consistently consider imported electricity to be a source of greenhouse gas emissions. ARB's mandatory reporting regulation defines "source" and "greenhouse gas source" as: "any physical unit, process or other use or activity that releases a greenhouse gas into the atmosphere."[7] Imported electricity is a use that directly causes the release of greenhouse gases. If not for California's consumption, those emissions either would not occur, or, if other parties were to use the electricity from those out of state emitting power plants, those parties would not have to buy electricity from other greenhouse gas emitting sources,

Furthermore, application of the fee to imported electricity is the only administrative mechanism possible to ensure that out-of-state power plant emissions caused by California electricity consumption are subject to a fair share of the Fee. California citizens and entities consume imported electricity that, in its generation, emits greenhouse gases. For all practical purposes, electricity, through its generation by combusting fossil fuels, constitutes a source of emissions. It is California's demand for, and use of, that imported electricity that causes greenhouse gases to be emitted. Furthermore, it is clear that greenhouse gas emissions are a global phenomenon with global consequences. AB 32 was designed to show California's leadership in dealing with climate change, in part to influence other regions to follow California's lead and regulate greenhouse gas emissions. To ignore emissions contributions caused by California electricity consumption by using a narrow definition of "source" would be inconsistent with the legislative intent expressed in AB 32.

The commenter claims that "Applying the administrative fee to imported electricity would not result in the fee being imposed on any actual sources of emissions either directly or indirectly." This is not true, because the fee is expected to be passed through to the ultimate source of emissions, the consumer of electricity.

5.11 Comment: AB 32 did not authorize the application of the administrative fee to all "Statewide greenhouse gas emissions" as defined in AB 32. Upon recognizing the ARB's lack of jurisdiction over either the sources of emissions associated with imported electricity or the fuels that are consumed by those sources, staff appears to argue that insofar as the AB 32 definition of "statewide greenhouse gas emissions" includes emissions from the generation of electricity "delivered to and consumed in California…whether the electricity is generated in the state or imported," it would be permissible to extend the administrative fee to imported electricity. The staff says:

[7] California Air Resources Board. (2009). *Article 2 Title 17,CCR Regulation for the Mandatory Reporting of Greenhouse Gas Emissions.* Retrieved January 2009, from: [http://www.arb.ca.gov/cc/reporting/ghg-rep/ghg-rep.htm].

> AB 32 includes in its definition of “statewide greenhouse gas emissions” all emissions of greenhouse gases from the generation of electricity “delivered to and consumed in California, accounting for transmission and distribution losses, whether the electricity is generated in the state or imported” (HSC section 39505). Thus, AB 32 specifically requires ARB to consider imported electricity in the implementation of the statute. (ISOR at 19.)

It is true that HSC section 38505(m) defines “statewide greenhouse gas emissions as meaning “the total annual emissions of greenhouse gases in the state, including all emissions of greenhouse gases from the generation of electricity delivered to and consumed in California, accounting for transmission and distribution line losses, whether the electricity is generated in state or imported.” However, it cannot be concluded that AB 32 authorized the extension of the administrative fees to cover all “statewide greenhouse gas emissions” as defined in section 38505(m).

If the Legislature wanted the administrative fee provision of AB 32 to apply to all “statewide greenhouse gas emissions” as defined in HSC section 38505(m), the Legislature could have made it clear that the provision had such broad coverage. The Legislature did so in other instances. For example, in requiring the ARB to adopt mandatory GHG reporting rules, the Legislature provided that “the state board shall adopt regulations to require the reporting and verification of statewide greenhouse gas emissions…” to make it clear that the ARB’s reporting regulations shall apply to emissions associated with imported electricity. HSC §38530(a). The Legislature further required in HSC section 38530(b) that the reporting regulations shall “account for greenhouse gas emissions from all electricity consumed in the state, including transmission and distribution line losses from electricity generated within the state or imported from outside the state.” HSC §38530(b)(2). Thus, the Legislature was well aware of how it needed to craft a provision of AB 32 so that the provision would extend to all “statewide greenhouse gas emissions” as defined in HSC section 38505(m).

However, the Legislature elected not to craft the section on administrative fees so that the fees would apply to “statewide greenhouse gas emissions” as defined in HSC section 38505(m). The Legislature might have crafted the section on administrative fees so as to read: “The State Board may adopt by regulation, after a public workshop, a schedule of fees to be assessed on statewide greenhouse gas emissions.” Instead, the Legislature wrote the section on administrative fees to provide: “The State Board may adopt by regulation, after a public workshop, a schedule of fees to be paid by the sources of greenhouse gas emissions regulated pursuant to this division…” HSC §38597 (emphasis added).

Agency Response: As discussed above in the response to Comment 53.1 and 5.10 SCPPA, imported electricity is both a source of GHG emissions and, because the ultimate source is California’s demand for electricity, imposing a fee on it is also an administrative mechanism to allow the fee to be passed on to the electricity users who create the demand.

5.12 Comment: The ARB should recognize the plain meaning of the language in the section of AB 32 that permits the Board to adopt administrative fees. The "fundamental task of statutory construction is to 'ascertain the intent of the lawmakers so as to effectuate the purpose of the law.'"[2] The courts begin by examining the language of the statute: "Because the statutory language is generally the most reliable indicator of legislative intent, we first examine the words themselves, giving them their usual and ordinary meaning and construing them in context."[3] The actual "'statutory language… is the best indicator of legislative intent'" and reliance on the statutes' plain language is 'the most powerful safeguard for the courts' adherence to their constitutional role of construing, rather than writing, statutes…'"[4] If the statutory language is clear, courts "must generally follow its plain meaning unless a literal interpretation would result in absurd consequences the Legislature did not intend."[5]

The plain language of HSC section 38597 provides for a schedule of fees that shall "be paid by the sources of greenhouse gas emissions…." The ARB should craft its administrative fee regulation to be consistent with the plain meaning of that provision. The administrative fee cannot apply to imported electricity insofar as imported electricity is not, itself, a source of greenhouse gas emissions, and neither the generators of imported electricity nor the fuels that are used by those generators are within the jurisdiction of the ARB.

Footnotes:
[2] *Medical Board of California v. Superior Court (Lam)*, 88 Cal.App.4th 1001, 1012, 106 Cal. Rptr. 2d 381
(2001), *quoting People v. Cruz*, 13 Cal.4th 764, 774-775, 55 Cal. Rptr. 2d 117, 919 P.2d 731 (1996).
[3] *Esberg v. Union Oil Co.*, 28 Cal. 4th 262, 268; 47 P.3d 1069; 121 Cal. Rptr. 2d 203 (2002).
[4] *Medical Board*, 88 Cal.App.4th at 1014, *quoting Williams v. Superior Court*, 5 Cal.4th 337, 350 (1993).
[5] *Coalition of Concerned Communities, Inc. v. City of Los Angeles*, 34 Cal. 4th 733, 737, 101 P.3d 563, 21
Cal. Rptr. 3d 676 (2004).

Agency Response: Regarding imported electricity not being a source of emissions, see response to Comment 53.1 SCPPA.

5.13 Comment: Applying the Administrative Fee to Imported Electricity Would Conflict with the Dormant Commerce Clause. The proposed fee regulation suffers from another important legal defect: the application of the fee to electricity imported into California from other states, but not to electricity generated in California, would violate the Commerce Clause of the United States Constitution.

Because the proposed rule would discriminate on its face between electricity generated in California and electricity generated in other states, it would be subject to strict Constitutional scrutiny, which the U.S. Supreme Court has described as "a virtually per se rule of invalidity." The proposed regulation would be invalid under the applicable legal tests established by the U.S. Supreme Court.

Agency Response: Whether or not the regulation as initially proposed would have conflicted with the Dormant Commerce Clause, we modified the regulation in response to the commenter's concerns. The regulation was modified so that all electricity, whether generated in-state or out-of-state, is treated the same. We modified Section 95201(a)(4) to make the fee applicable to all first deliverers of electricity. See responses to Comment 5.1 SCPPA and Comment 60.5 SCPPA.

5.14 Comment: The Dormant Commerce Clause Limits State Power to Tax or Regulate Interstate Commerce. The Commerce Clause of the U. S. Constitution authorizes Congress to regulate interstate commerce.[6] U.S. Constitution, article I, §8, cl. 3. The courts have recognized that "this affirmative grant of authority to Congress also encompasses an implicit or 'dormant' limitation on the authority of the States to enact legislation affecting interstate commerce." Healy v. The Beer Institute, 491 U.S. 324, 326, fn 1, 109 S. Ct. 2491, 105 L. Ed. 2d 275 (1989). The dormant Commerce Clause limits the power of a state to regulate or tax interstate commerce, even in the absence of federal legislation on the subject.

State statutes and regulations which impose taxes or administrative fees on interstate commerce are subject to Commerce Clause scrutiny.[7] See generally, Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 97 S. Ct. 1076, 51 L. Ed. 2d 326 (1977). The transmission of electricity between states has been recognized to constitute interstate commerce. New York v. Federal Energy Regulatory Comm'n, 535 U.S. 1, 7, 122 S. Ct. 1012, 152 L. Ed. 2d 47 (2002). Thus, the application of the proposed administrative fees to imported electricity is subject to scrutiny under the dormant Commerce Clause.

The first step in analyzing any law subject to scrutiny under the dormant Commerce Clause is to determine whether it discriminates on its face against interstate commerce.

As we use the term here, "discrimination" simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter. . . . It is well established . . . that a law is discriminatory if it 'tax[es] a when it occurs entirely within the State."'

Oregon Waste Systems, Inc. v. Dep't of Environmental Quality, 511 U.S. 93, 99, 114 S. Ct. 1345, 128 L. Ed. 2d 13 (1994); quoting *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334, 342, 112 S. Ct. 2009, 119 L. Ed. 2d 121 (1992), and *Armco Inc. v. Hardesty*, 467 U.S. 638, 642, 104 S. Ct. 2620, 81 L. Ed. 2d 540

(1984). *Oregon Waste Systems* reviewed an Oregon statute that imposed a surcharge on out-of-state shipments of solid waste to Oregon landfills. The surcharge was not imposed on shipments originating in-state. The statute was held to be facially discriminatory and invalid under the Commerce Clause.

If a state law discriminates on its face against businesses operating in interstate commerce, it is subject to strict scrutiny that the Supreme Court has described as "virtually per se invalid". *Oregon Waste Systems*, 511 U.S. 93, 99. "When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry." *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.,* 476 U.S. 573, 579, 106 S. Ct. 2080, 90 L. Ed. 2d 552 (1986). The Supreme Court has observed that under this strict scrutiny the State's burden of justification is so heavy that "facial discrimination by itself may be a fatal defect." *Oregon Waste Systems*, 511 U.S. 93, 101.

Footnotes:
[6] The Commerce Clause provides that "Congress shall have Power... To regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes." U.S. Const., art. 1, § 8, cl. 3.
[7] The ISOR makes clear that the purpose of the proposed regulation is to raise revenue: "The purpose of this proposed regulation is to repay loans that were used to fund ARB and the California Environmental Protection Agency's (Cal/EPA) implementation of AB 32 in fiscal years 2007/2008 and 2008/2009 and to create a stable and steady funding source for state agencies to carry out AB 32 in future years." ISOR, pp. 28-29. *See also*, ISOR, Appendix C, "Program Costs

Agency Response: This comment was made before staff modified the regulation to adopt a first deliverer approach, as explained in our response to Comment 5.1 SCPPA. By this modification, the regulation treats all electricity equally. In addition, as discussed in our response to Comment SCPPA 5.13, it is not clear whether the regulation as initially proposed conflicted with the Commerce Clause, but staff is convinced that the regulation as modified does not.

5.15 Comment: The proposed regulation imposes different burdens on imported electricity. The proposed regulation would impose fees on electricity generated in other states and imported into California. Specifically, the fee would be imposed upon: "Any retail provider or marketer that is the purchasing/selling entity at the first point of delivery in California of imported electricity. Fees shall be paid for each megawatt-hour of imported electricity." ISOR at 66, §95201(a)(5),

The amount of the fee on imported electricity ("Imported Electricity Fee Rate") would be based upon a calculated emissions factor for specified sources of out-of state generation, or upon a "default" emissions factor based on a regional average for the Western states. ISOR at 80-82, §§95203 (e) and (f); see also

> ISOR at 20-21. [Commenter's footnote 8 is omitted here and responded to below.]
>
> However, no fee would be imposed upon electricity generated in California. This creates an explicit distinction in the regulation between electricity generated in California and electricity imported from other states. As a result, there is a clear distinction in the treatment of entities who supply electricity generated in California and entities who supply electricity imported from other states.

Agency Response: As stated in our response to Comment 5.14 SCPPA, we have modified the regulation to take a first deliverer approach to electricity so that electricity is treated the same, whether it is imported electricity or electricity generated in California. See our response to Comment 5.1 SCPPA for more explanation of the first deliverer approach.

5.16 Comment: [**Note,** this is footnote 8 from previous comment (5.15).] The default emissions factor was set to be artificially high, based upon certain administrative considerations, and not necessarily upon the most accurate estimates of the actual emissions. ISOR, Appendix D, p. 134.

Agency Response: As discussed in the ISOR, Appendix D, we chose to use the emission factor of 0.499 MTCO2 per megawatt-hour (equal to 1,100 lbs CO2 per megawatt-hour) primarily because it was recommended by the CPUC and CEC in CPUC Decision 07-09-017 (referenced in ISOR App. D). The two energy agencies stated:

> We recommend that ARB use a uniform regional default emission factor for purchases from unspecified sources, and that it be set at a level that reduces incentives to claim unspecified sources. We recommend that ARB use 1,100 lbs CO2e/MWh as an interim regional default emission factor for purchases from unspecified sources. This value is close to the WECC regional average, and is higher than the emission factors for the most modern natural gas combined cycles and for hydropower and nuclear systems. Cleaner facilities and power systems will have the opportunity to have ARB verify and certify their emissions as a specified source with a known emissions factor.
>
> As the Western states have now committed to developing a regional tracking system, California can best demonstrate its willingness to collaborate by not adopting at this time our own quantification system for default emission factors for imports from unspecified sources. Instead, we recommend that ARB use a uniform regional default emission factor for all unspecified sources on an interim basis. This would remove the incentive to arbitrage among regions based on differences in default emission factors, and, in this respect, would level the playing field among similar types of units in different regions. This interim default emission factor should be replaced with values derived from a common set of rules that will be developed by the Governors' Western Climate Initiative. We

anticipate that this new tracking process will be in place before the start of the first GHG compliance year in 2012. (pp. 41-42)

CPUC and CEC made this recommendation to ARB for use in the reporting and tracking of greenhouse gases as ARB was developing the Mandatory Reporting Regulation (MRR).

ARB is using the 0.499 MTCO2/MWh default emission factor for the fee regulation on an interim basis. In the future, staff plans to modify the fee regulation's default emission factor to conform with either with a WCI agreed upon regional factor and/or a default emission factor determined in the course of developing our planned Cap and Trade regulation.

We chose to use the factor recommended by California's energy agencies because it is a reasonable approximation of what an average annual default emission factor would likely be, if it were possible to determine such an average. We chose a conservative emission factor to avoid unintended negative consequences such as contract shuffling. Furthermore, any deliverer of electricity to the California grid has the option to deliver electricity from sources that are known, referred to in the regulation as specified sources.

Appendix D of the ISOR does not assert that the default emissions factor was set to be artificially high. However, in Appendix D, staff did explain several administrative reasons why choosing a low estimate would have negative consequences that could be alleviated by choosing a higher estimate.

Appendix D contains a discussion of number of different emission factors suggested by various parties in the joint energy agency proceeding known as California Energy Commission Docket # 07-OIIP-1 and California Public Utilities Commission Rulemaking 06-04-009. However, in choosing the adopted default emission factor, we relied upon the recommendation of the energy agencies for a factor to be used on an interim basis.

5.17 Comment: The proposed regulation facially discriminates against interstate commerce. The proposed fee regulation, by its application to imported electricity but not to electricity generated in California, facially discriminates against interstate commerce. The proposed regulation has the effect of favoring in-state interests and burdening out-of-state interests. This is precisely the problem that is addressed by the dormant Commerce Clause.

The distinction between interstate and intrastate commerce is explicit in the regulation. The fee would be imposed "at the first point of delivery in California of imported electricity," ISOR at 66, §95201(a)(5), but no such fee would be imposed on electricity generated in California. The proposed fee is facially discriminatory because it plainly imposes a burden on interstate commerce that is not imposed upon intrastate commerce.

Because the proposed regulation is discriminatory, the rule of virtual per se invalidity applies. The proposed regulation will be invalid unless it “advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *Oregon Waste Systems,* 511 U.S. 93, 100-101, quoting *New Energy Co. of Indiana* v. *Limbach*, 486 U.S. 269, 278, 108 S. Ct. 1803, 100 L. Ed. 2d 302 (1988).

In this case, the purpose of the proposed regulation – to raise revenue – does not justify imposing a fee on out-of-state interests. The discriminatory treatment of imported electricity would raise more revenue, but only by placing a greater burden on interstate commerce. Further, there are reasonable nondiscriminatory alternatives. It would be possible and appropriate to treat imported electricity on the same basis as electricity generated in California by excluding imported electricity from the fee.

Agency Response: We have modified the regulation to take a first deliverer approach to electricity so that electricity is treated the same, whether it is imported or generated in California. Therefore, the regulation does not facially discriminate against interstate commerce.

5.18 Comment: The facial discrimination cannot be justified by Compensatory Tax Doctrine.

The staff asserts in the ISOR that the proposed fee on imported electricity would be equivalent to the fees on natural gas and coal:

> Although the units (therms of natural gas, short tons of coal, MWh of electricity) to which the Fee is applied may vary, the impact of the fee is equivalent for electricity generated in-state or out-of-state, because it is based on CO2 emitted in the generation of electricity. For electricity generated in-state, fees would be paid by entities that deliver natural gas for electricity generation, and facilities that consume coal for electricity generation. For imported electricity, it is not feasible for fees to be applied to suppliers of fuels, or to use the generation facility located out of state as the point of regulation, because California does not have jurisdiction over these entities. Instead, the fee would be applied to imported electricity when it is first delivered into California. The basis for calculating the Fee, the CO2 emissions, is the same. However, the mechanism for collection and the entities subject to the Fee would be distinct.

ISOR at 20. On that basis, it might be argued that the proposed fees would not violate the Commerce Clause because the fee on imported electricity compensates for the fees on natural gas and coal, which may be passed along to in-state electric generators.

The Supreme Court has developed a specific test under the dormant Commerce Clause for taxes or fees on interstate commerce that are intended to compensate for a similar, offsetting burden borne by intrastate commerce. The proposed regulation does not satisfy the constitutional test that the Supreme Court has established.

In *Henneford v. Silas Mason Co*., 300 U.S. 577, 81 L. Ed. 814, 57 S. Ct. 524 (1937), the Supreme Court approved a use tax that was imposed upon certain goods when they were brought into the state for the first time. Although the use tax discriminated against interstate commerce, the Court ruled that the tax did not violate the Commerce Clause because the use tax offset and compensated for a sales tax on similar goods that were first sold within the state. The Court approved the pairing of the sales and use taxes, imposed at the same rate on similar goods when they were sold in the state (sales tax) and first brought into the state from elsewhere (use tax).

Subsequent cases have developed a three part test of a valid compensatory tax. First, the State must identify the intrastate tax for which it seeks to compensate, and this intrastate tax must serve some purpose for which the State may otherwise impose a burden on interstate commerce. Second, the tax on interstate commerce must roughly approximate – but not exceed – the amount of the tax on intrastate commerce. Third, the compensating taxes must fall on substantially equivalent events. *Fulton Corp. v. Faulkner*, 516 U.S. 325; 116 S. Ct. 848; 133 L. Ed. 2d 796 (1995); *Oregon Waste Systems, supra*, 511 U.S. 93; *Maryland v. Louisiana*, 451 U.S. 725, 101 S. Ct. 2114, 68 L. Ed. 2d 576 (1981).

To satisfy the first prong of the test, the State must identify the intrastate tax for which it seeks to compensate, and this intrastate tax must serve some purpose for which the State may otherwise impose a burden on interstate commerce. For example, in *Maryland* v. *Louisiana*, 451 U.S. 725, 101 S. Ct. 2114, 68 L. Ed. 2d 576 (1981), Louisiana imposed a “first use” tax on natural gas brought into the state, mostly from production in federally-owned areas on the Outer Continental Shelf. The State claimed that the first use tax offset the State’s severance tax on natural gas produced in Louisiana. The Supreme Court ruled that Louisiana’s first use tax could not be offset by the severance tax, because, unlike the State’s interest in the severance of resources from lands within the state, Louisiana had no sovereign interest in being compensated for the severance of resources from the federally owned OCS land. *Maryland* v. *Louisiana*, 451 U.S. 725, 758-759. Similarly, in *Fulton Corp. v. Faulkner, supra*, 516 U.S. 325, the Supreme Court rejected a compensatory tax argument because the State of North Carolina had no sovereign interest in taxing income earned out of state.

In this case, it might be argued that the proposed fee on imported electricity is intended to compensate for the fees on coal and natural gas. But, as the ISOR notes, California does not have the jurisdiction to impose fees on electric generation or fuel consumption in other states. ISOR at 20. Therefore, the supposedly “offsetting” fees would not serve a purpose for which the State may impose a burden on interstate commerce, because California lacks the right to tax electric generation or fuel consumption in other states.

Second, the tax on interstate commerce must roughly approximate – but not exceed – the amount of the tax on intrastate commerce. In this case, there is no direct comparison between the fees proposed for in-state and out-of-state electric generators, because no fee would be imposed on in-state generators. Further, an indirect comparison between the fees proposed for out-of-state electric generation and the fees on coal or natural gas requires speculation about what, if any, burden would actually be passed along to in-state electric generators.

The staff asserts that the financial burden of the fees on fuels may be passed along to end users, including in-state electric generators. ISOR at 13. However, the pass-through is not assured. Further, even if some of the fee burden is passed along, it is impossible to estimate the degree to which the fees may be passed along to various parties in the chain of distribution, e.g., from gas pipeline operators to gas users such as electric generators.

In addition, comparison of the proposed fees is problematical due to the complexity of the emissions calculations, the use of a default emissions factor for unspecified sources based upon regional averages, the adjustment of the default emissions factor based on administrative considerations, and the uneven application of the fee to various electricity wheeling and exchange arrangements. Thus, it is impossible to say that the fees on interstate commerce (i.e., on imported electricity) will approximate the fees on intrastate commerce.

Third, the compensating taxes must fall on substantially equivalent events. This prong of the test requires a close correspondence between the allegedly compensating taxes, so that instate and out-of-state interests may compete on even terms. As the Supreme Court stated in *Fulton Corp. v. Faulkner, supra*:

> Although we found such equivalence in the sales/use tax combination at issue in *Silas Mason*, our more recent cases have shown extreme reluctance to recognize new compensatory categories. In *Oregon Waste*, we even pointed out that ‘use taxes on products purchased out of state are the only taxes we have upheld in recent memory under the compensatory tax doctrine.’

Fulton Corp. v. Faulkner, 516 U.S. 325, 338. In *Fulton*, the Supreme Court invalidated a state intangibles tax on the value of foreign corporation stock owned by state's residents. The intangibles tax did not apply to shares of in-state corporations, but in-state corporations were subject to the state’s income tax. The Court held that the intangibles tax and corporate income tax were not compensatory, in part because they were not imposed on substantially equivalent events.[9]

The State argued that corporate earnings and stock price are related, and that an apportionment formula had been used to tie the percentage of share value subject to the intangibles tax directly to the percentage of income earned within the state. However, the Court declined to consider such an economic incidence analysis, due to the complexity and uncertainty of such calculations. “[T]he general difficulty of comparing the economic incidence of state taxes paid by different taxpayers upon different transactions goes a long way toward explaining why we have so seldom recognized a valid compensatory tax outside the context of sales and use taxes.” *Fulton*, 516 U.S. 325, 342.

In this case, the proposed fees would not be imposed on substantially equivalent events. The fees would be imposed on different commodities, i.e., kilowatt hours of electricity, therms of natural gas, and emissions from coal combustion. They would be paid by different parties, i.e., electricity marketers or retailers, natural gas utilities and pipeline operators, and owners or operators of facilities that combust coal. Finally, the proposed fees would be based on fundamentally different activities, i.e., importing electricity into California, supplying natural gas to end users or combusting coal. Although the ISOR claims that the economic impact of the fees would be “equivalent” due to the calculations of CO2 emissions, this is the same sort of economic incidence argument that the Supreme Court expressly rejected in *Fulton*.

Given the substantial differences in the imposition of the proposed fees, they could not be sustained as valid compensatory taxes. The proposed fee regulation does not meet any of the three tests of the “compensatory tax” doctrine. Since the proposed fee on imported electricity facially discriminates against interstate commerce, and cannot be sustained under the well established doctrines of the dormant Commerce Clause, the proposed fee regulation would be invalid under the Commerce Clause.

<u>Footnote:</u>
[9] Other examples, where courts have found that two supposedly compensating state taxes were not imposed on substantially similar events, include *South Central Bell Telephone Co. v. Alabama*, 526 U.S. 160; 119 S. Ct. 1180; 143 L. Ed. 2d 258 (1999), (state franchise tax imposed on a foreign corporation’s operations in the state was not similar in substance to a domestic shares tax imposed upon the ownership of shares in domestic corporations) and *Maryland* v. *Louisiana*, 451 U.S. 725, 758-759, (Louisiana’s first use tax on natural gas brought into the state, and the state’s severance tax on natural gas produced in Louisiana, were not imposed on substantially equivalent events.)

Agency Response: As discussed in our response to Comment 5.1 SCPPA, we have modified the regulation to take a first deliverer approach to electricity so that electricity is treated the same, whether it is imported electricity or electricity generated in California.

Therefore, there is no facial discrimination against imported electricity in the regulation that would need to be justified.

5.19 Comment: Applying the administrative fee to imported electricity would be preempted under the Federal Power Act.

Section 95201(a)(5) would apply the administrative fee regulation to “any retail provider or marketer that is the purchasing/selling entity at the first point of delivery in California of imported electricity.” ISOR at 66, §95201(a)(5). However, the FPA grants exclusive jurisdiction over wholesale sales of electricity in interstate commerce to the Federal Energy Regulatory Commission (“FERC”). Thus, the application of the administrative fee to wholesale sales of electricity “at the first point of delivery in California of imported electricity” would intrude into a federally occupied field.[10]

Federal preemption of the wholesale sales of electricity in interstate commerce has its roots in a series of early twentieth century Supreme Court decisions limiting, under the Commerce Clause of the Constitution, the states’ ability to regulate interstate transactions involving electricity and natural gas. See Nicholas W. Fels & Frank R. Lindh, Lessons from the California “Apocalypse:” Jurisdiction Over Electric Utilities, 22 Energy L.J. 1, 2 (2001); Frank R. Lindh, Federal Preemption of State Regulation in the Field of Electricity and Natural Gas: A Supreme Court Chronicle, 10 Energy L.J. 277, 285-86 (1989). These Supreme Court cases culminated in Public Utilities Commission v. Attleboro Steam & Electric Co., 273 U.S. 83 (1927) (“Attleboro”). Attleboro involved an attempt by the Rhode Island Public Utilities Commission to regulate the rate at which a Rhode Island utility sold electric power at wholesale, effectively across a state line, to a utility in Massachusetts. The Supreme Court found that this regulation of the wholesale transaction places “a direct burden upon interstate commerce, from which the State is restrained by the force of the Commerce Clause….” Id. At 89.

Part II of the FPA was enacted in 1935. The Natural Gas Act (“NGA”) was enacted three years later. Both were intended to “fill the gap” in utility regulation left by the Attleboro line of cases:

> Part II [of the FPA] is a direct result of Attleboro. They are to be read together. The latter left no power in the states to regulate licensees’ sales for resale in interstate commerce, while the former established federal jurisdiction over such sales. Discussion of … that statute and the Natural Gas Act in recent cases supports this conclusion. Especially in the litigation arising under the Gas Act has this Court expressed the view that the limitations established on Commission jurisdiction therein were designed to coordinate precisely with those constitutionally imposed on the states.

*United States v. Pub. Util. Comm’n of Ca*l., 345 U.S. 295, 311 (1953) (citations omitted).

It has been recognized that the Attleboro line of case does not reflect modern Commerce Clause jurisprudence, where the trend is “to look in every case to the nature of the state regulation involved, the objective of the state and the effect of the regulation upon the national interest in the commerce.” Ark. Elec. Coop. v. Ark. Pub. Serv. Comm’n, 461 U.S. 375, 392 (1983) (internal quotations omitted). However, that modern trend in Commerce Clause jurisprudence does not change the preemption analysis under the FPA. That is because, as a matter of statutory interpretation:

> What Congress did [in enacting the FPA] was to adopt the test developed in the Attleboro line which denied state power to regulate a sale “at wholesale to local distributing companies” and allowed state regulation of a sale at “local retail rates to ultimate consumers.”

Fed. Power Comm’n. v. S. Cal. Edison Co., 376 U.S. 205, 214 (1964). *See also Ark. Elec. Coop.Corp. v. Ark. Pub. Serv. Comm’n,* 461 U.S. 375, 392 (1983).

As noted in California ex rel. Lockyer v. Dynegy, Inc., 375 F.3d 831 (2004) (“Dynegy”) the authorities under the Federal Power Act (“FPA”) and the Natural Gas Act (“NGA”) are relied on interchangeably in cases where the two Acts contain materially parallel provisions. See Fed. Power Comm’n v. Sierra Pac. Power Co., 350 U.S. 348, 353 (1956); Permian Basin Area Rate Cases, 390 U.S. 747, 820-21 (1968). The provisions of the Acts concerning federal jurisdiction over wholesale transactions are an example of provisions that are materially parallel.

NGA cases hold that exclusive federal jurisdiction over wholesale transactions in interstate commerce extends to matters in addition to rates. N. Natural Gas Co. v. Kansas, 372 U.S. 84 (1963) (ratable purchase obligation imposed on interstate pipeline); Transcont. Gas Pipe Line Corp. v. State Oil & Gas Bd. Of Miss., 474 U.S. 409 (1986) (same).

The Dynegy decision refers to the interchangeability of FPA and NGA authorities concerning federal jurisdiction. Dynegy also deals with the issue of whether state regulation unrelated to price is preempted under the FPA. The decision holds that it is:

> California does not contest FERC’s exclusive jurisdiction over interstate wholesale power rates; rather, it urges that such authority does not extend over every aspect of the wholesale market….
>
> We cannot agree with California’s theory…., our cases specifying the nature and scope of exclusive FERC jurisdiction make clear that interstate “transmission” or “sale” of wholesale energy pursuant to a federal tariff – not merely the “rates” – falls within FERC’s exclusive jurisdiction…. [W]e have

> enunciated a bright line distinction between wholesale sales, which fall within FERC's plenary jurisdiction, and retail sales, over which the states exercise jurisdiction.

Cal. Ex. Rel. Lockyer v. Dynegy, 375 Fd.3d 831, 850-51 (2004) (citation omitted). Thus, federal preemption of the field of wholesale transactions goes well beyond pricing issues. The FERC regulation of wholesale power attaches to all aspects of a jurisdictional seller and a jurisdictional transaction. The administrative fee would constitute a state intrusion into this fully federally occupied field and, accordingly, would be unlawful.

Footnote:
[10] Field preemption exists when a federal scheme is comprehensive, leaving no room for state regulation. Conflict preemption exists when state regulation would conflict with federal regulation. *See Public Utility v. Dynegy Power Marketing* (9th Cir. 2004) 384 f.3d 756 *(Snohomish); Public Util., Grays harbor, WA v. Idacorp* (9th Cir. 2004) 379 F.3d 641 *(Grays Harbor); California ex rel. Lockyer v. Dynegy, Inc.* (9th Cir. 2004) 375 F.3d 831 *(Dynegy).*

Agency Response: We do not agree that applying the fee to imported electricity would be preempted by the FPA. We note that SCPPA and LADWP took this position in the Joint CPUC-CEC rulemaking R.06-04-009 and that the Public Utilities Commission and the California Energy Commission decided, and recommended to ARB, that the first deliverer point of regulation (also sometimes called first seller) was not likely to be preempted by the FPA.

The CPUC and the CEC jointly summarized the alleged FPA preemption issue on page 81 of the previously referenced CEC and CPUC Joint Agency Interim Decision on Basic Greenhouse Gas Regulatory Framework for Electricity and Natural Gas Sectors:

> LADWP argues that a GHG regulatory structure using a deliverer point of regulation may be struck down by the courts on the grounds that it regulates wholesale sales of electricity and therefore is preempted by the FPA, which applies, inter alia, to "the sale of electric energy at wholesale in interstate commerce" (16 U.S.C. § 824(b)(1)). We believe, however, that the use of a deliverer point of regulation should be upheld by the courts on the grounds that it is an environmental regulation whose purpose is to decrease the impact of global warming on California insofar as that impact is caused by electricity used or generated in California. The deliverer point of regulation does not single out wholesale sales of electricity, but rather applies uniformly to electricity consumed in California and electricity generated in California. As Morgan Stanley points out, the deliverer approach does not regulate wholesale generators, marketers, or transmission as such.

1. Preemption

The Supremacy Clause of the United States Constitution declares unlawful state laws that "interfere with, or are contrary to," federal law. Hillsborough County, Fla. v. Automated Med. Labs., Inc., 471 U.S. 707, 712 (1985) (quoting Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 211 (1824)); see also U.S. Const. art. VI, cl. 2. Preemption analysis starts "with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947). "[T]he purpose of Congress is the ultimate touchstone of preemption analysis." Cipollone v. Liggett Group, 505 U.S. 504, 516 (1992) (internal quotation marks omitted).

Federal law can preempt state law in three ways. First, Congress may expressly preempt state law. Second, preemption may be inferred where Congress has occupied a given field with comprehensive regulation. Third, a state law is preempted to the extent that it actually conflicts with federal law. An "actual[] conflict" exists when "'compliance with both federal and state regulations is a physical impossibility[.]'" Automated Med. Labs., Inc., 471 U.S. at 713.

A preemption claim involving state actions that conflict with the Federal Power Act ("FPA") are predicated on the Supremacy Clause. See Duke Energy Trading & Mktg., L.L.C. v. Davis, 267 F.3d 1042, 1055 (9th Cir. 2001). The FPA grants to FERC "'exclusive authority to regulate the transmission and sale at wholesale of electric energy in interstate commerce.'" Transmission Agency of N. Cal. v. Sierra Pac. Power Co., 295 F.3d 918, 928 (9th Cir. 2002) ("TANC") (quoting New England Power Co. v. New Hampshire, 455 U.S. 331, 340 (1982)). Through the FPA, "'Congress meant to draw a bright line easily ascertained, between state and federal jurisdiction …. This was done in the Power Act by making [FERC] jurisdiction plenary and extending it to all wholesale sales in interstate commerce except those which Congress has made explicitly subject to regulation by the States.'" Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953, 966 (1986) (quoting Fed. Power Comm'n v. S. Cal. Edison Co., 376 U.S. 205, 215-16 (1964)).

Staff believes the approach taken in the regulation is unlikely to be preempted because it applies to greenhouse gas emissions, which California has power to regulate under the Clean Air Act.

"Field preemption occurs when the federal statutory scheme is sufficiently comprehensive to infer that Congress left no room for supplementary regulation by the states." Gadda v. Ashcroft, 363 F.3d 861, 869 (9th Cir. 2004). "When the federal government completely occupies a given field or an identifiable portion of it . . ., the test of preemption is whether 'the matter on which the State asserts the right to act is in any way regulated by the Federal Act.'" Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 212-13 (1983) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 236 (1947)).

One purpose of the federal statutory scheme concerns the reasonableness of interstate power rates and nondiscriminatory access to interstate power transmission. In contrast, California's purpose for enacting AB 32 was to "reduce emissions of greenhouse gases." Therefore, this regulation is a separate field related to the regulation of greenhouse gas emissions unrelated to the rates or access to power transmission.

It was suggested in the CPUC/CEC proceeding that preemption could be avoided if ARB: (1) ensures that the costs of complying with California's GHG regulations for wholesale electricity sellers is included in the FERC rate-making process and that California's requirements do not purport to supersede or interfere with that process; (2) ensures that California's program does not stand as an obstacle to Congress' goal of ensuring just and reasonable rates for wholesale power; and (3) makes clear that the intent of California's cap-and-trade program is to reduce GHG emissions. Because the load-based and first-seller approaches could impose California emissions regulations on wholesale power transactions that rely on interstate transmission, and if California is not careful with how it structures its cap-and-trade program, a court could find that California exceeded the scope of its authority and trespassed into FERC's exclusive jurisdiction.

ARB believes that the fee does not interfere with FERC's authority and is less likely to be preempted.

2. Conflict Preemption

If it is impossible to comply with both state law and federal law, then the state law is preempted. *See Gade v. Nat'l Solid Waste Management Ass'n*, 505 U.S. 88, 108 (1992). Staff believes the proposed first-seller approach does not clearly conflict with the FPA.

Taking into consideration arguments made by many parties and submitted as part of the Joint Agency rulemaking of the CEC and CPUC, the joint energy agencies found that:

> The arguments that a deliverer point of regulation is preempted by the FPA do not take into consideration the subject-matter scope of the FPA and FERC's regulations. Here, we are proposing to regulate the environmental impacts of electric generation and consumption, whereas the FPA's regulation of wholesale sales does not cover the environmental impacts associated with electric generation, wholesale sales of electricity, or the consumption of electricity.25 Because the FPA expressly leaves room for state regulations dealing with electricity and because there is nothing in the FPA that deals with the regulation of emissions (either generally, or GHG emissions specifically), the deliverer approach is not preempted by the FPA. The deliverer regulations we are recommending to ARB do not have as their central purpose the regulation of matters that Congress intended FERC to regulate. Even though ARB's regulations will wind up requiring some sellers of wholesale electricity to surrender allowances that fact does not establish preemption just because FERC regulates wholesale transactions for other purposes. The FPA does not address

GHG emissions and therefore the recommended regulations do not fall within the limits of the comprehensive regulatory scheme enacted by Congress.

In short, there is no FPA field preemption here because, under AB 32, California will not be regulating the same subject matter as the FPA, nor will its regulations be for the same intended purpose. The objectives sought by AB 32 and the use of a deliverer point of regulation for the electricity sector are not the same as those sought by the FPA.

PacifiCorp argues that the FPA would preempt a deliverer point of regulation, because (i) under that approach the state of California would unilaterally determine which parties are allowed to participate in the wholesale energy market and (ii) the cost of buying allocations will affect the costs of wholesale energy. The deliverer point of regulation does not determine which parties are allowed to participate in the wholesale energy market. Any party that wishes may participate in the market, subject to a requirement that GHG allowances are surrendered after the end of the compliance period (or compliance is shown by another method). While this may impose costs on some participants in the wholesale energy markets, that does not mean that such regulation is preempted by the FPA. Pollution control requirements normally impose costs on participants in wholesale energy markets (such as generators), but that fact does not preempt states from imposing pollution control requirements.

Although these findings of the CEC and CPUC were made in consideration of recommendations for other greenhouse gas regulations, they also apply to this Fee on greenhouse gas emissions. Additionally, under the Clean Air Act, California has the authority to regulate greenhouse gas emissions. See response to Comment FS-4 WAPA.

5.20 Comment: Given that the proposal to apply AB 32 administrative fees to imported electricity is legally suspect, SCPPA continues to recommend as it did in its April 24, 2009 comment to staff that the staff and the Board return to the more cautious approach that was reflected in the materials that were made available for the staff's January 27, 2009 and February 25, 2009 workshops and desist from extending the administrative fee to imported electricity. The flow of revenues derived by the ARB from assessment of the administrative fee would be made more secure insofar as eliminating the application of the fee to imported electricity would reduce the potential for future litigation over the legality of the administrative fee.

Narrowing the scope of the administrative fee so that it would not apply to imported electricity would not significantly impair achieving the staff's goal "to cover greenhouse gas emissions as broadly as possible to spread the cost burden over the majority of emission sources." ISOR at 8. As proposed in ISOR, the fee "would cover three different groups of emission sources that together comprise approximately 85 percent of California's total greenhouse gas emissions." Ibid. Imported electricity accounts for only 10-13 percent of total California greenhouse gas emissions. ISOR at 19. Thus, eliminating imported electricity from the scope of the administrative fee would result in the fee applying to 72-75 percent of California's total greenhouse gas emissions. The fee would still meet the staff's objective of spreading the cost burden over the "majority of emission sources" even if imported electricity were excluded from the scope of the fee.

If, contrary to SCPPA's recommendation, the Board elects to approve the staff's proposal to apply the fee to imported electricity, SCPPA recommends that the Board take the precaution of seeking a formal opinion from the California Attorney General assessing the legality of applying the administrative fee to imported electricity, given the narrowness of HSC section 38597 and the Constitutional issues that would arise if the fee were applied to imported electricity. Additionally, if the Board elects to adopt the staff's proposal, SCPPA recommends that the FSOR contain a comprehensive discussion of all factors and arguments that the Board views as supporting the legality of extending the administrative fee to imported electricity.

Agency Response: For the reasons discussed in our response to Comment 5.1, we do not accept the commenter's recommendation not to apply the fee to imported electricity. We do not accept the commenter's premise that applying fees to imported electricity is legally suspect for two primary reasons: 1) we have modified the fee regulation to ensure that it does it does not discriminate against interstate commerce, and it does not appear on its face to be discriminatory against interstate commerce; and, 2) as discussed in our response to Comment 5.19 SCPPA, we do not believe the this fee regulation is subject to preemption under the FPA.

Having responded to these legal concerns, there remains no reason to narrow the scope. We retain the goal of covering GHG emissions as broadly as possible; 10-13 percent is a significant portion of Statewide GHG emissions. While SCPPA believes that dropping coverage of the 10-13 percent of the emissions represented by imported electricity would still result in spreading the cost burden adequately, we believe that it is important to cover these emissions.

As discussed in our responses to Comments 5.13, 5.14, 5.15, 5.16, 5.17, and 5.18, we believe any legal challenges to the regulation as modified based on the Dormant Commerce Clause or Federal Power Act would be not upheld.

5.21 Comment: If the Board desires to approve the staff's proposal to apply the administrative fee to imported electricity, the proposed regulation should be modified so the fee will not be applied to arrangements in which electricity is transmitted through California without being consumed in California.

If, contrary to SCPPA's recommendation, the Board adopts the staff's proposal to apply the administrative fee to imported electricity, SCPPA recommends that the

Board revise the definition of “imported electricity” as proposed by the staff to assure that the fee will not be applied to electricity that is transmitted or “wheeled” from one point outside of California to another point outside of California regardless of how the transmission arrangement is structured.

If electricity is wheeled through California from one state such as Arizona to another state such as Oregon without being consumed in California, the electricity that is wheeled through California should not be subject to the administrative fee. Accordingly, the definition of “imported electricity” in staff’s proposed section 95202(a)(45) provides that power wheeled through California would not be considered to be “imported electricity.”

> “Imported electricity” means electricity that is generated outside of California and delivered into California. Imported electricity does not include power wheeled through California, which is power that is imported into California that terminates in a location outside of California.

ISOR at 73. This definition of “imported electricity” clearly applies to a situation in which title to the electricity does not pass to a California retail provider that provides “wheeling through” service without taking title to the electricity. However, power may be wheeled through California under a buy-sell arrangement in which a retail provider or marketer buys electricity from a party at a delivery point outside of California, imports the electricity into California, and simultaneously sells the same amount of electricity to the same party at a different delivery point outside of California.

It appears that “wheeling through” under a buy/sell arrangement would be exposed to the administrative fee even though the electricity is not consumed in California. Section 95201(a)(5) of the staff’s proposed regulation provides that the fee applies to a “retail provider or marketer that is the purchasing/selling entity at the first point of delivery in California of imported electricity.” ISOR at 66, §95201(a)(5).

If the electricity that is wheeled through California is not consumed in California, the electricity should not be exposed to the administrative fee regardless of whether the electricity is wheeled without title passing to the party that provides the wheeling service or the electricity is wheeled with title passing in a buy/sell transaction. Thus, SCPPA recommends that the proposed regulation be modified to assure that, in addition to wheeling arrangements in which title does not pass to the party that is performing the wheeling function, wheeling that is performed through buy-sell arrangements would be exempt from the administrative fee. Specifically, SCPPA recommends that the definition of “imported electricity” in the proposed regulation be modified by adding a clarifying phrase to the proposed section 95202(a)(45) definition of “imported electricity” as shown below:

> “Imported electricity” means electricity that is generated outside of California and delivered into California. Imported electricity does not include power wheeled through California, which is power that is imported into California that terminates in a location outside of California <u>regardless of whether the import into California and simultaneous export to a location outside of California is performed without title passing to the retail provider or marketer that provides the wheeling service or is performed through a buy sell arrangement in which title does pass to the retail provider or marketer.</u>

Agency Response: The definition of imported electricity in Section 95202(a)(54) was modified to clarify that wheeled power that is transmitted from outside California to another point outside of California is not subject to the fee regardless of how the transmission arrangement is structured. The commenter was concerned that the fee might have been applied in a buy/sell transaction in which title passes to a California retail provider, and in situations in which there is an import of electricity that is simultaneous with the sale and export of the same amount of electricity at a different delivery point outside of California.

Although staff did not use the commenter’s wording recommended here, staff agreed with the recommendation regarding wheeling and the treatment of and modified the definition of imported electricity to exclude “Power transactions in which imported power is simultaneously exchanged for exported power” in addition to excluding wheeled power. Staff believe that this is broader than the exclusion that would have resulted from the commenter’s proposed wording. Staff communicated with the commenter about this language and understands that the commenter accepts this response as satisfactorily resolving the issue. See also our response to Comment 53.2 SCPPA.

5.22 Comment: If the board desires to approve the staff’s proposal to apply the admininstrative (sic) fee to imported electricity, the proposed regulation should be modified so that electricity that is imported under an exchange agreement with California-generated electricity or system supply being returned to an out of state counterparty would not be subject to the fee.

If, contrary to SCPPA’s recommendation, the Board adopts the staff’s proposal to apply the administrative fee to imported electricity, SCPPA recommends that the Board further revise the definition of “imported electricity” as proposed by the staff so that electricity that is imported under an exchange agreement with specified California-generated electricity or unspecified system supply being returned to any out-of-state counterparty would not be subject to the fee.

Electricity exchanges are important tools that are used by retail providers to reduce the cost of electricity for the benefit of California electricity consumers. Exchanges often involve counterparties that are located outside of California in, for example, the Pacific Northwest (“PNW”). It might be more costly for a California party to generate electricity at a time when it is less costly for the PNW party to generate electricity. Conversely, it might be less costly for a California party to generate electricity when generation is more costly for the PNW party. An exchange arrangement enables the PNW party to generate when it costs are lower and permits the California party to generate when its costs are lower. The result is a more efficient use of generation resources.

As proposed by the staff, the administrative fee regulation could discourage exchange arrangements by impairing the economics of the arrangements because the fee would be assessed on both legs of the exchange transaction. Under the proposed regulation, an administrative fee would be assessed when a California party imports electricity in an exchange arrangement from, for example, the PNW. The fee would be assessed again either directly or indirectly on the export of power to the out-of-state exchange partner. For example, if the California party is required to return electricity at a later time by generating the electricity in California using specified gas-fired generation, the California party involved in the exchange arrangement would be billed for the cost of the administrative fee on natural gas by the serving natural gas utility. Likewise, if the electricity is to be returned from unspecified system supply, the fee would have been paid indirectly on the gas-fired generation portion of system supply and directly on any imported electricity that is included in system supply.

It would be both uneconomic and unfair to charge an administrative fee twice on exchanges by charging a fee directly on the initially imported electricity and charging another fee indirectly through the fee on the natural gas used to generate the returned electricity or directly on imported electricity that is included in system supply. The effect would be to burden the California consumer with two administrative fees even though only the kilowatt hours that were delivered through one side of the exchange were actually consumed in California by the California consumers.

In order to avoid the unfair double imposition of administrative fees on California consumers, SCPPA recommends that the reporting regulations be amended to permit an exclusion for imports that are tied to exports through an exchange arrangement. To this end, SCPPA recommends that a sentence be added as a further modification to section 95202(a)(45) definition of “imported electricity” to exclude imports that are tied to exports of California generated electricity or system supply in an exchange:

> “Imported electricity” means electricity that is generated outside of California and delivered into California. Imported electricity does not include power wheeled through California, which is power that is imported into California that terminates in a location outside of California regardless of whether the import into California and simultaneous export to a location outside of California is performed without title passing to the retail provider or marketer that provides the wheeling service or is performed through a buy sell arrangement in which title does pass to the retail provider or marketer. <u>Imported electricity also does</u>

not include imports that are tied to exports of specified California-generated electricity or unspecified California system supply in an exchange arrangement.

This further modification of the definition of “imported electricity” in the proposed regulation would assure that administrative fees would not be applied twice in the course of an exchange arrangement, remedying the inequity in the regulations as proposed in the ISOR.”

Agency Response: We decline to allow the “netting out” of imports and exports that are two separate legs of a non-simultaneous exchange, and we do not believe that the regulation charges an administrative fee twice by charging the fee on imported electricity, and also on electricity exported at a different point in time. Electricity that enters the California transmission and distribution system must be consumed immediately. If there is a simultaneous export of the same amount as the corresponding import, then the electricity is not consumed in California. The grid can be thought of as a bucket of electrons. Once you put power (megawatt hours) into the grid, the power is indistinguishable from all other power. However, to balance the system and prevent blackouts, the same amount (less losses to heat) must always be taken out simultaneously. We consider a simultaneous exchange to be a “virtual” wheel and do not charge the fee on such an exchange, as explained in our response to 5.21 SCPPA.

However, if the exchange is an arrangement to buy electricity for immediate consumption in California, and at some other time, export electricity for consumption outside of California, it is logical to charge the fee on both transactions. Both of these cases are part of California emissions.

ARB agrees with the commenter that electricity exchanges are important tools to reduce the cost of electricity. With the fee as approved in place, exchanges will continue to be important tools to keep electricity costs lower than they would be without exchanges, because the cost of the fee is very small compared to the cost of a megawatt-hour of electricity. Below we explain why.

The California Independent System Operator (CAISO) publishes monthly Market Performance Reports that summarize electricity prices in California. The reports provide information on electricity prices in California. In July and November, 2009, the average prices were $37.26 and $34.40 per megawatt-hour[8]. These prices are much lower than prices in 2008 because natural gas prices fell from 2008 to 2009. The staff presentation at the September 25, 2009 Board meeting, in which the regulation was approved by the Board, estimated the fee cost per megawatt-hour of electricity at approximately $0.085. The fee would be somewhat lower for electricity generated at efficient natural gas power plants, which are among the likely sources for exchange electricity. Thus, when electricity prices are relatively low, the fee would be less than

[8] These are weighted average default Load Aggregation Point day-ahead prices for electricity throughout California. CAISO, Market Performance Report, July, 2009, accessed January 5, 2010 at [http://www.caiso.com/2414/24149b7e1ccd0.pdf] and CAISO, Market Performance Report, November, 2009 accessed January 5, 2010 [http://www.caiso.com/248c/248cb27755f40.pdf].

0.25 percent of the cost of electricity. Fees at this rate, or even at several times this rate, are unlikely to be significant enough to discourage socially beneficial exchange transactions.

Furthermore, many exchange agreements to which SCPPA members are parties involve importing excess hydropower from the Northwest during the summer, and exporting power generated from fossil fuel and other resources in the winter. Much of the hydro-power imported by LADWP and other SCPPA members is from Bonneville Power Authority (BPA). Under the fee regulation, SCPPA members have the opportunity to designate power imported from BPA as power from a specific source that is an asset-owning or asset-controlling supplier, provided that BPA follows the reporting requirements under ARB's MRR and is assigned a specific source identification number for mandatory reporting. In fact, BPA has requested and received such a number with respect to 2008 reporting, and is expected to do so in future years.

When an asset-owning or asset-controlling supplier meets the MRR requirements, a specific emission factor, and a specific fee rate per MWh can be assigned for all megawatt hours imported from that supplier. The emission factor and fee rate would be based on the average emissions for all of the power owned or controlled by the supplier. Since most of BPA's power is hydropower, the emission factor, and hence the fee rate, will be low, reflective of actual emissions associated with the production of electricity that BPA puts on the market.

In addition to exchanges involving hydropower, in some exchanges imported and exported electricity is likely to be fossil fuel-generated electricity from natural gas power plants. In these cases, there are emissions associated both with the generation of the imported electricity that is imported to serve California consumption, and there are emissions associated with the electricity generated out in state and exported electricity to serve out-of-state consumption. As explained above, it is logical and reasonable to apply the fee to both fossil imports and fossil exports, regardless of whether they are part of a non-simultaneous exchange agreement.

Note that this is different from the way that simultaneous exchanges are treated. In a simultaneous exchange, the imported electricity is not consumed by California consumers, but rather essentially passes through California for consumption out-of-state. Thus, electricity in simultaneous import-export exchanges does not fall into the category of "Statewide greenhouse gas emissions."

5.23 **Comment:** Under the regulation as proposed in ISOR, there is no cap on the revenues that might be recovered in any given year through the administrative fees that are proposed in the rules. Section 95303(a) defines the "Total Required Revenue" ("TRR") would be recovered annually through the administrative fee as including the following four components:

1. The Required Revenue (RR) shall be the total amount of funds necessary to recover the costs of implementation of AB 32 program expenditures for each

Fiscal Year, based on the number of personnel positions, including salaries and benefits and all other costs, as approved in the California Budget Act for the fiscal year.
2. For Fiscal Years 2009/2010, 2010/2011, 2011/2012, 2012/2013, and 2013/2014, the RR shall also include the payments required to be made by ARB on the Debt.
3. The RR shall also include any amounts required to be expended by ARB in defense of this article in court.
4. If there is any excess or shortfall in the actual revenue collected for any fiscal year, or if any collections are less than the Revenue Requirement, such shortfall or excess shall be carried over to the next year's calculation of the Total Revenue Requirement. The annual Total Revenue Requirement is equal to the annual RR adjusted for the previous fiscal year's excess or shortfall amount. ISOR at 77-78.

It appears from section 95303(a)(1) as quoted above that the primary parameter for determining the TRR would be "the number of personnel positions, including salaries and benefits and all other costs, as improved in the California Budget Act for that fiscal year." Appendix C to the ISOR lists a plethora of programs for which funding would be provided through the administrative fee. The list and the accompanying staffing requirements could grow substantially in the future unless there were some reasonable constraint on the TRR that could be recovered each year through the administrative fee. SCPPA encourages the Board to expand the regulation proposed in the ISOR so as to include a provision for a reasonable cap that would apply to administrative fees.

Agency Response: See response to Comment 60.3 SCPPA.

Comment 31: MID, June 24, 2009

31.1 Comment: The Regulation should include provisions to ensure that electricity that is not generated or consumed in California is not subject to the Fee. The Proposed Regulation applies to retail providers and marketers of imported electricity, charging a Fee for each megawatt-hour of imported electricity. However, there is no provision to offset or net the electricity imports into California against electricity exports that serve load outside of California. Without such a clarification and netting or offset provisions, retail providers or marketers could be charged a Fee on financial transactions in which no generation or emissions occurred. In addition it is possible that Fees could be assessed on electricity neither generated nor consumed in California, or on load located outside of California. Charging AB 32 costs on electricity imports without any netting or offsets for electricity exports will result in an unfair over-collection of fees. It could also be outside the authority of AB 32.

Agency Response: This comment was made before the staff had proposed, and the Board had adopted, modifications to the regulation to treat imported electricity and electricity generated in-state the same. The fee does not apply to financial transactions in which no generation or emissions occurred. See responses to Comments 5.22 SCPPA and 53.6 SCPPA.

31.2 Comment: Provisions should be included in the Regulation for a dispute resolution procedure to be applied before late fees or penalties are assessed.

Section 95205 provides that CARB will issue a Fee determination notice and if the Fee is not paid within 60 days a late fee set by the Executive Officer shall be imposed. There is no provision for the Fee paying entity to challenge the calculated Fee or any of the input data underlying such Fee, or work through potential resolution with CARB. Further, Section 95206 provides for the imposition of enforcement penalties for each day the Fee is not paid. Since resolution of such disputes can often take a lengthy period of time due to information gathering, schedule coordination and other issues, provisions should likewise be included to defer such penalties during the periods disputes regarding the underlying "violation" are going through resolution.

Agency Response: See response to Comment 44.3 MID.

31.3 Comment: Dispute resolution procedures should be applied to all violations potentially acting as a basis for enforcement penalty. For example, in addition to Fee calculations, Section 95206 (c) imposes a penalty for each day a report contains incomplete or inaccurate information. Provision should be made for CARB to notify the submitting party that its report is deemed incomplete and allot time to correct the deficiency or confer with staff to resolve the dispute over whether there is a deficiency, before a penalty is imposed. In addition, penalties for such reporting deficiencies under the Fee Regulation must not duplicate or interfere with enforcement activities under the already existing Reporting Regulations.

Agency Response: See response to comment 44.3 MID.

31.4 Comment: It is not clear why the definition of generating facility includes future planned locations at which electricity could be produced.

"Section 95202, subsection (40) contains the following definition of Generating facility: "an existing or planned location or site at which electricity is or will be produced." The Fee is related to the emissions from fuel combustion. Only facilities at which fuel is actually burned (and electricity actually produced) could by definition be subject to the Fee."

Agency Response: We agree that only electricity generating facilities at which fuel is actually burned and electricity produced are subject to the fee. This comment was made before staff proposed modifications that were approved by the Board. The separate definition of "Generating facility" is no longer part of the regulation. In the approved regulation, the definition of “Electricity generating facility” or “Generating facility” is under Section 95202(a)(34) and makes no reference to planned locations or sites.

31.5 Comment: California’s electric ratepayers should not be responsible for funding Regulations that are struck down through court action or any actions by CARB to defend such Regulations. Section 95203 provides that the required revenue for the Administrative Fee includes “any amount required to be expended by ARB in defense of this article in court.” If a Regulation is challenged and survives the legal challenge, costs related to such defense could understandably be included within the revenue requirement for the Fee. However, if the Regulation cannot survive a legal challenge and is struck down Californians should not be made to bear CARB’s cost of defending the improper regulation. No justification or support for imposing such costs that are unrelated to the reduction of emissions has been provided.

Agency Response: The fee regulation is designed to cover the costs associated with the administration of AB 32. Government Code section 11040 requires state agencies to use lawyers from the Office of the Attorney General to represent them in any judicial proceedings unless advance permission is obtained for other representation. ARB is charged an hourly rate for time spent by each Deputy Attorney General and paralegal on its cases; currently, the rate for a Deputy Attorney General is $170 per hour, the time is tracked in 15 minute increments by case and billed monthly, and the monthly payment is directly transferred from ARB to the Department of Justice. The Attorney General Office’s charges that could be incurred in connection with this fee regulation could include defense in cases challenging AB 32’s implementing regulations and also affirmative litigation, such as collection of unpaid AB 32 administrative fees. If the fee regulation itself is challenged and is upheld either in its entirety or in part, the cost of defense would be part of the administration of AB 32 although the prevailing party would likely petition the court to have the reimbursement provision reduced for the portion of any unsuccessful defense. If the entirety of the fee regulation is found unconstitutional or unenforceable, there would be no fee, no mechanism for recovering costs, and the concern reflected in this comment is moot.

31.6 Comment: Some certainty must be provided as to the level of costs to be incurred by California’s electric ratepayers under the Fee Regulation. The Initial Statement of Reasons for Rulemaking estimates that the cumulative cost per household per year resulting from the Fee would be $4.00. While this cost appears small, the estimated amount may not be reflective of the economic impact from the Fee.

The estimated costs are just that – estimated. Though the amount is relatively small now when viewed in isolation, it will still have a cumulative impact on ratepayers that are also facing increased costs to deal with the additional requirements of AB 32, as well as other State and Federal programs. California citizens are already facing higher costs of living, a reduction of government services, and higher unemployment. Many businesses in California struggle to operate and compete with very small margins. Even a small additional impact to the bottom line from the Fee will be felt.

Agency Response: See responses to Comment 60.3 SCPPA, Comment 43.3 IEP, Comment 17.1 WSPA, and Comment 44.4 MID.

31.7 Comment: There are no assurances that the Fee will remain at the estimated level. The Proposed Regulation contains no cap or other protections, but provides broad authority for CARB to include in the Total Required Revenue any amounts "necessary to recover the costs of implementation of AB 32 program expenditures." It is more likely than not that such costs will only increase over time. Costs passed to ratepayers should also be contained by setting limits on the administrative costs that natural gas corporations and other entities required to pay the fee directly pass through to their end-users.

Agency Response: See response to Comment 60.3 SCPPA.

31.8 Comment: It is critical to avoid imposing multiple levels of charges on the same person (be it individual, business or government) for the same emission. The electricity sector which emits less than 25% of greenhouse gas emissions has been asked to provide 40% or more of the emission reductions required by AB 32. In addition, the electricity sector will be required to partake in a cap and trade program. For publicly owned utilities such as Modesto ID ratepayers are the only resource available to bear the cost of all these obligations. This burden has been placed on electric ratepayers in recognition that the utilities that serve them are easily identifiable and able to be regulated, and thus such methodology is the best way to spread the cost of these important programs over the broadest array of Californians, without actually going through the formal process of enacting and imposing a "tax".

The potential result is that the single electric ratepayer will pay a cost to cover the Fee for all the emissions from the generation used to serve their load and then will additionally have to bear whatever costs are associated with obtaining (eg., purchasing) allowances for those same emissions. The Initial Statement of Reasons for Rulemaking recognizes that if a cap and trade program is adopted that would generate revenue and "it would be appropriate to evaluate funding the State's implementation of AB 32 from that revenue instead of this fee." Modesto ID urges CARB to incorporate such phase-out as part of the Fee Regulation.

Agency Response: See responses to Comments 38.2 NCPA and BHJ-06.2 NCPA, and Comment 43.6 IEP.

Comment 34: LADWP, June 24, 2009

34.1 Comment: Our main concern with the proposed AB32 Fee Regulation is the double counting of emissions with regard to energy exchanges and electricity imports/exports. We understand that ARB staff is planning to propose changes to the Regulation for a supplemental 15-daycomment period and we will continue working with staff to address our concerns. Enclosed are our detailed comments on the proposed AB32 Fee Regulation.

In addition, we recommend that ARB revisit the Mandatory Reporting of Greenhouse Gases Regulation and make appropriate amendments to resolve the issues regarding energy Exchanges that have come to light as part of the AB32 Fee rulemaking.

Agency Response: See our responses to Comments 5.22 SCPPA and 53.6 SCPPA for an explanation of why there is no double counting of emissions. See our response to Comments 53.9 SCPPA and 53.10 SCPPA regarding the Mandatory Reporting Regulation.

34.2 Comment: AB32 Fees Should Not Be Assessed On Electricity Not Consumed In California

At the April 20, 2009, AB 32 fee Regulation workshop, staff stated the objective of this regulation is to assess AB 32 fees only on electricity that is consumed in California. However, the draft regulation would assess AB 32 fees on 100% of fossil-fueled electricity generated in California (source-based approach), as well as 100% of fossil-fueled or unspecified electricity imported into California (load-based approach), without subtracting out emissions for electricity that leaves California. In effect, ARB will be charging AB 32 fees on electricity that is consumed both inside and outside California.

AB32 clearly applies to electricity <u>consumed in California</u>, whether generated in-state or imported.

> AB32 section 38505 (m) defines Statewide Greenhouse Gas Emissions as "the total annual emissions of greenhouse gases in the state, including all emissions of greenhouse gases from the generation of <u>electricity delivered to and consumed in California</u>, accounting for transmission and distribution line losses, whether the electricity is generated in state or imported. Statewide emissions shall be expressed in tons of carbon dioxide equivalents."

AB32 section 38530 (b)(2) says the ARB shall "Account for greenhouse gas emissions from all electricity consumed in the state, including transmission and distribution line losses from electricity generated within the state or imported from outside the state. This requirement applies to all retail sellers of electricity, including load-serving entities as defined in subdivision (j) of Section 380 of the Public Utilities Code and local publicly owned electric utilities as defined in Section 9604 of the Public Utilities Code." It would appear the intent of AB32was to regulate only the electricity that is consumed in California. However, the regulatory approach taken by staff in designing the AB 32 fee Regulation (as well as discussions at the June 5 workshop on Imported Electricity) is analogous to a one-way valve for electricity to flow into California, but fails to acknowledge or account for the flow of electricity out of California. Taking this approach with the AB32 Fee Regulation will result in the assessment of AB 32 fees on electricity that is not consumed in California. We are concerned about the precedent this approach will set for the future cap and trade regulation, for which the cost implications are significantly higher.

Agency Response: At the time this comment was made, the fee as proposed would have been assessed only on imported electricity consumed in California, and on fuels used for generation in California. However, the regulation was modified, and the fee now applies to all electricity generated in California, regardless of where it is consumed, and to imported electricity that is consumed in California.

See our responses to Comment 5.22 and 53.6 SCPPA for an explanation of why both electricity generated in California and electricity imported and consumed in California are subject to the Fee.

34.3 Comment: Energy exchange transactions between a California retail provider and an out-of-state party are a prime example of where this regulatory approach will result in double counting.

Energy Exchanges: In general, energy exchanges are agreements to trade energy due to limitations in generating resources, transmission capacity, or other operational constraints. The exchange may occur simultaneously (receive energy at one point and deliver energy at a different point), or involve a time delay between receipt and return of the energy. The generating resources and electrical grid serving the western portion of North America was designed for electricity to flow between states. Power exchange agreements are both efficient and economical, and help keep the cost of electricity down for California ratepayers and avoid the need to build additional generating capacity in California.

ARB's Regulation for the Mandatory Reporting of Greenhouse Gas Emissions (Mandatory GHG Reporting Regulation) requires the California Retail Provider to report the exchange transaction as a separate purchase and a sale, and does not distinguish between an import that is part of an energy exchange and a straight import. We recommend that the Mandatory GHG Reporting Regulation be amended to report energy exchange transactions in a separate category rather than mixing them in with regular energy purchases and sales.

In the case of an energy exchange between a California Retail Provider and an out-of-state provider, the energy received would be reported as an import, and the return energy would be reported as an export. As written, the proposed AB32 Fee Regulation would assess fees on both the import half of the energy exchange as well as the return half, effectually charging fees on two kilowatt hours of electricity when only one of the two kilowatt hours was actually consumed in California.

The AB32 regulations need to be designed to account for the flow of electricity between states, both imports and exports. There is an administratively simple solution to account for exports in the AB32 Fee calculation using data that is already being collected under ARB's Mandatory GHG Reporting program. The AB32 Fee Regulation contains a methodology to calculate emissions for specified and unspecified electricity imports. This same methodology could be used to calculate emissions for exported electricity as well, which could then be subtracted from the imported electricity emissions, and the AB32 fees could be assessed on the difference (see Attachment A for suggested calculation methodology).

Agency Response: See responses to Comments 5.21, 5.22, 60.6, and 53.2 to 53.11 SCPPA and Comment 38.11 NCPA.

34.4 Comment: The proposed regulation does not establish an annual limit on the AB 32 fees that can be imposed on regulated entities each year. Rather, the annual revenue requirement is left open-ended, to be determined each year as part of the annual state budget process.

Section 95203 (a)(1) The Required Revenue (RR) shall be the total amount of funds necessary to recover the costs of implementation of AB32 program expenditures for each Fiscal Year, based on the number of personnel positions, including salaries and benefits and all other cost, as approved by the California Budget Act for that fiscal year.

Agency Response: See responses to Comment 60.3 SCPPA and Comment 43.3 IEP.

34.5 Comment: Many cities and businesses prepare and adopt their annual budgets by June of each year, and need to know what their AB32 fee liability will be for budgeting purposes. Not knowing what the AB32 program budget will be for the upcoming year will make it difficult for regulated entities to calculate a reasonable estimate of their AB32 fee liability and budget the appropriate amount. To provide regulatory certainty, we request that the Board set a not-to-exceed cap on the annual AB32 Revenue Requirement. Based on historical and current AB32 program budgets, $40 million seems like a reasonable cap.

AB32 Program Costs (from the 5-8-09 AB32 Fee Regulation staff report)

FY 07-08	$25.19 million	Updated Table 3a
FY 08-09	$38.89 million	Updated Table 4a
FY09-10	$36.2 million	Table 8

Given the current state of the economy, cost containment is very important. Setting a cap on the annual Revenue Requirement will enable regulated entities to calculate a reasonable estimate of their AB32 fee liability for their annual budgets, and avoid unexpected increases in the fee that might occur if the AB32 Revenue Requirement is left open ended. In addition, setting a cap on the fees in consistent with the approach by ARB with their *Nonvehicular Source, Consumer Products and Architectural Coating Fee Regulations*, which has a $20 million cap on the fees ARB can collect to fund the Stationary Source Program (see California Code of Regulations, Title 17, Sections 90800.8 to 90806).

Agency Response: See response to Comment 60.3 SCPPA and Comment 43.3 IEP.

34.6 Comment: "Need to Harmonize the Mandatory GHG Reporting, AB 32 Fee, and Cap and Trade Regulations. We recommend that ARB reopen the Mandatory GHG Reporting Regulation no later than December 2009, and harmonize the data collection structure with the intended use of the data. For example, amending how energy exchange transactions are reported would resolve the issue with double assessment of the AB32 fees on the import and return halves of an energy exchange. In addition, the reporting requirements need to be reviewed and streamlined now that the overall design of the AB 32 program has been laid out in the AB 32 Scoping Plan.

In addition , a reopener provision should be added to the AB 32 Fee Regulation to revisit the fees in the event that an alternate source of funding for the AB 32 program is created, such as through the cap-and-trade regulation. For example, if ARB receives revenue from auctioning of emission allowances in the cap-and-trade program, that funding should be used to operate the AB 32 program and the AB 32 fees should be reduced or eliminated. Without a sunset clause or requirement to revisit the AB32 Fee Regulation in the future, the AB32 fees will be come permanent regardless of other sources of funding the AB32 program may generate.

Agency Response: Numerous stakeholders in the electricity sector have requested that the Mandatory Reporting of Greenhouse Gas Emissions (Mandatory Reporting Regulation or MRR) allow reporting of exchanges. ARB has noticed only section 95104 in the MRR; see response to 53.9 SCPPA. ARB is working with the MRR tool to accommodate the Fee, and guidance will be provided as needed.

See response to Comment 43.6 IEP regarding a sunset clause for the fee.

Comment 38: NCPA, June 24, 2009

38.1 Comment: AB 32 authorized CARB to impose the fee, and there can be little doubt that the State needs a source of income to support its efforts in implementing the wide range of emissions reduction strategies proposed in the Scoping Plan. One essential element that is missing from the ISOR, however, is any discussion regarding a potential cap for the total amount of the Fee. As more fully set forth below, the fact that the Fee will be set in place to collect *whatever amounts* the state agencies may require in the coming years is problematic for the entities that will be required to pay the Fee. Regardless of the current amounts due, the Fee has the potential to be large, and emphasize the need to address some of the details regarding the manner in which the Fee is implemented, and its impacts on various sectors of the economy. NCPA fully supports the notion that the imposition of the Fee should be as administratively simple as possible (indeed, a complex Fee structure would only result in an even greater overall Fee obligation). However, such simplicity should not be achieved at the cost of a select few compliance entities.

Accordingly, NCPA is very concerned with conclusions in the ISOR that reference the de minimus impacts of the proposed Fee, the benefits of administrative simplicity over accuracy, and the fact that the amount of the Fee is perceived to be insufficient to adversely impact behaviors. With CARB only at the nascent stages of implementing the provisions of the Scoping Plan, the total amount of the Fee obligation from year to year is not known. Hence, any reference justifying the structure of the Fee based on the overall amount must be disregarded.

Agency Response: See response to Comment 60.3 SCPPA regarding setting a cap on the fee.

38.2 Comment: A “fee” imposed on only a few entities is actually deemed a tax.[3] Since CARB’s Fee is designed around the premise that the costs will be passed through to end users, the Proposed Regulation attempts to meet the requirement of a fee, rather than be a tax. The ISOR states that CARB believes upstream suppliers are, in fact, sources of GHG emissions upon which the Proposed Regulation may be imposed. (ISOR, p. 35) CARB asserts that imposition of the Fee on these upstream sources of GHG emissions meets the nexus necessary under California law to avoid the fee being deemed a tax.[4]

The ISOR notes that “some of the entities on which fees are imposed are clearly ‘sources’ of greenhouse gas that are directly emitted into the atmosphere.” However, as it pertains to natural gas and transportation fuels, the ISOR argues that “the proposed regulation is simply an administrative mechanism for efficiently collecting fees on downstream ‘sources’ of greenhouse gas emissions based on the assumption that the costs of the fees will be passed on to downstream end users who actually combust the natural gas and transportation fuel.” (ISOR, p. 35, emphasis added) A mere *assumption* is not sufficient to substantiate the claim that the Fee is actually being imposed on the source of greenhouse gas emissions. For natural gas, gasoline, or diesel fuels, the ISOR notes that it would be "inefficient, impractical and overly burdensome to impose fees on all of the individuals" that operate equipment that burn these fuels. When read literally, this statement supports the position that the proposed Fee is more analogous to a tax, and not the position that the upstream sources of the underlying fuels are in fact, "sources" of GHG emissions as contemplated in AB 32.

Footnotes:
[3] *Sinclair Paint Co. v. State Board of Equalization,* 15 Cal.4th 866 (1997).
[4] Id., at 877-878.

Agency Response: The Commenter does not correctly state the difference between a tax and a valid regulatory fee. For the fee to be upheld, ARB must show "(1) the estimated costs of service or regulatory activity, and (2) the basis for determining the manner in which the costs are apportioned, so that charges allocated to a payor bear a fair or reasonable relationship to the payor's burdens on or benefits from the regulatory activity." (Sinclair Paint v. State Board of Equalization 1997) 15 Cal.4th 866, 878, quoting San Diego Gas and Electric Co. v. San Diego County Air Pollution Control District (1988) 203 Cal.Appl3d 1132, 1146.)

Imposing the fee on upstream sources of GHG emissions is analogous to imposing the Childhood Lead Poisoning Prevention Fee at issue in the Sinclair Paint case on gasoline and paint manufacturers based on the amount of lead they put into their products. These manufacturers did not "directly" emit the lead into the environment: rather, the consumers did.

This fee only reimburses actual costs, as the amount of money spent each year is the sum adopted by the Legislature. The fee is fairly apportioned among the fee payors so that each payor only bears the burden of the payor's own GHG emissions. As such, the fee is not a tax under California law. Regarding the sources of greenhouse gas emissions, see also response to Comment 53.1 SCPPA.

38.3 Comment: The Fee is Based on an Uncapped Revenue Amount

As noted in the ISOR, the total amount of the proposed Fee is unknown for future years. The Fee itself, as well as the underlying economic analysis, is based on current budget levels that may be changed by the Legislature. (ISOR, p. 42) Furthermore, the Proposed Regulation is largely based on the Nonvehicular Source Fee Program (NVSF) that was developed as a result of 1999 legislation (Assembly Bill 1103), which extended indefinitely CARB's authority to collect permit fees from large nonvehicular sources of air pollution. While there are aspects of the NVSF that are similar to the Proposed Regulation (this fee is "intended to help defray the ARB's cost of implementing the nonvehicular provisions of the [California Clean Air Act]"[5]), there is an important difference in that the NVSF is based on a *capped amount*, not subject to annual adjustments. This distinction is crucial.

In the Proposed Regulation, the total amount of the revenue requirement is uncapped. Affected entities' total Fee obligation can potentially fluctuate widely from year to year and it is inevitable that the total amount of the Fee will only increase as implementation of AB 32 becomes more complex, and rigorous monitoring and enforcement mechanisms are implemented. The fluctuating and uncapped obligation becomes especially problematic when entities are trying to budget for their annual fee obligation, or determine the manner in which to pass the costs along to end users (this is also discussed below in the context of § 95206, Payment and Collection).

Footnote:
[5] 2002-2005 CCAA Nonvehicular Source Fee Program Overview, October 17, 2008.

Agency Response: While, like many fee regulations, there are similarities between this AB 32 Fee Regulation and the NVSF fee, ARB disagrees that this regulation is based on the NVSF fee. Regarding the fee being uncapped, see response to Comment 60.3 SCPPA.

38.4 Comment: There is No Guarantee the Affected Entities Can Pass-Through the Costs of the Fee
The Proposed Regulation is based on the premise that the costs will be passed along to end users. In the ISOR, CARB "expects that most businesses paying the Fee" will be able to pass the costs through to consumers. (ISOR, p. 46) However, there is no real data to support this supposition, nor the impact of this pass through on consumers. As it pertains to repayment for past amounts, the costs associated with the retroactive bill amounts cannot necessarily be captured in a pass through. A realistic analysis of the economic impact must consider the impact directly on the upstream entity charged with paying the Fee to the State, and not merely the disbursed amount of that Fee if pass-through is possible.

Agency Response: See responses to Comment 38.5 NCPA and Comment 47.3 KernOil regarding passing through the costs of the fee.

38.5 Comment: Impacts of the Fee on Electricity Imports Are Not Substantiated.
The ISOR notes that "electric importers . . . should be able to pass the Fee cost on to the load-serving entities. The load-serving entities can then recover the passed-through Fee cost as a price increase over all of their deliveries. ARB believes that the imposition of the Fee is too small to affect wholesale market dispatch." (ISOR, p. 46) There is no underlying data, however, to support this conclusion. Since the Fee would not be imposed on electricity generated in-state, the pass-through of the Fee for imported electricity will not impact all retail providers or load-serving entities in the same way. Some load-serving entities have long-term contracts and obligations that require them to take the imported electricity, whereby subjecting them to greater cost burdens under the current

> Proposed Regulation. There is no data to support the supposition that the impact of the fee on retail providers will be 'too small to affect wholesale market dispatch.'"

Agency Response: This comment was made prior to modifications to the regulation to adopt a first deliverer approach for all electricity, as explained in our responses to Comments 5.1 and 5.5 SCPPA. With this modification, all utilities will be subject to fees on electricity whether it is generated in California or imported. As discussed in our response to Comment 46.1 EPUC, all entities, including load-serving entities (LSEs), will pay the Fee in an amount proportional to carbon emissions.

LSEs include investor-owned utilities (IOUs) and publicly owned utilities (POUs). The CPUC, which regulates IOUs, stated in its comment:

> "We do not foresee any impediment to retail providers' or marketers' ability to pass the costs of the fee downstream to subsequent purchasers or end users of imported electricity. To the extent the fee results in additional costs to investor-owned utilities, the CPUC will be able to allow them to recover the costs via appropriate regulatory proceedings. Thus, we are supportive of the approach to imported electricity as proposed."

POUs, such as the members of Northern Calif. Power Agency (NCPA), have rates that are set by their governing boards, city councils, or other governmental officials. The boards and similar bodies have the authority to pass through the costs of the fee to electricity end users.

In addition, consulting firm E3 did an analysis of the effect of a cap and trade program on electricity in California and the Western Electricity Coordinating Council (WECC) region. E3 concluded that until prices per metric ton of CO2 reach at least $50, market dispatch would not be effected. E3 also states:

> "Gas generators in California are also dispatched in economic order, from the most efficient combined cycle units (CCGTs) first to the least efficient combustion turbines (CTs) last. This dispatch order corresponds with their emissions intensity rank order. The introduction of a CO2 price increases the variable cost of natural gas generation, however, it does not change the relative costs of different natural gas generators."

See also our response to Comment 5.22 SCPPA which explains why ARB believes that the fee is too small to discourage energy exchanges. For these reasons, we continue to believe that the fee would not affect wholesale market dispatch.

38.6 Comment: The ISOR notes that the AB 32 Fee would apply to imported electricity that is consumed in California. (ISOR, pp. 24, 51). Proposed § 95201(a)(5) provides that the Fee applies to "any retail provider or marketer that is the purchasing/selling entity at the first point of delivery in California of imported electricity. Fees shall be paid for each megawatt-hour of imported electricity. The ISOR opines that:

> *"it is necessary to include importers of electricity because the out-of-state generation of electricity to supply California consumers results in greenhouse gas emissions. These emissions must be included in the Fee base to ensure the widest possible base of fee payers. This method will result in a fee that is equitable to that proposed to be assessed on in-state electricity, however the method is different because ARB does not have the authority to regulate providers of fuel to electricity generators located out-of-state."* (ISOR, p. 51)

However, this rationale does not negate the fact that the Fee is being imposed on imported electricity and not on in-state generation, nor does it provide the necessary support for the assumption that the fee impact will be the same on both in-state and imported electricity."

Agency Response: This comment was made prior to modifications that adopted a first deliverer approach for electricity, treating all electricity the same. See response to Comment 5.1 SCPPA. The section referred to was replaced by section 95201(a)(4), which now explains the applicability of the fee to all electricity.

38.7 Comment: <u>The Proposed Regulation Violates the US Commerce Clause by Including Imported Power</u>.
CARB supports the inclusion of imported power on the premise that it would allow for the Fee to be spread across a larger segment of the economy, capturing more emissions sources, and ostensibly reducing the cost burden on any one sector or industry. (ISOR, pp. 8, 12, 14, 49) By imposing the Fee on the entities responsible for importing electricity into the State, CARB anticipates that it can capture approximately 85% of all greenhouse gas emissions sources contributing to pollutants in the State. Inclusion of imported power within the sources responsible for payment of the Fee creates disparate treatment of imported versus in-state electricity, as the Fee is not imposed on electricity generated within California. This facially discriminatory treatment likely violates the Commerce Clause of the United States Constitution (U.S. Const., Art I §8, cl. 3.) The Proposed Regulation creates a structure that discriminates against out-of-state electricity, which is contrary to the Commerce Clause.

Agency Response: See responses to Comments 5.1 and 5.13 SCPPA.

38.8 Comment: <u>The Proposed Regulation Applies the Fee to Imported Power Not Consumed in California.</u>
As drafted, the Proposed Regulation would impose the Fee on power that is imported into California, but never consumed in the State. Such an outcome is inconsistent with the exception set forth in proposed § 95201(b)(9) that specifically excludes application of the Fee to "any fuel exported for use outside

California." Proposed § 95204(g) (addressing reporting requirements for imported electricity) states that the entity is to report "the total quantity of MWh of electricity imported . . . with a final point of delivery in California." The reference to final point of delivery in California within the reporting requirements would appear to address only power consumed in the State. In its most basic sense, most people associate power imported but not consumed in California as power that is "wheeled" through the state. The common definition of wheeled power includes bringing power in at a single point, and exporting that same power at a different point.[6]

However, this definition alone would not cover all power that is imported, yet not consumed in California. Imported power is sometimes purchased pursuant to existing contracts, yet is not needed to meet customer load. That power – or similar power – may be subsequently sold out-of-state. As drafted, the Proposed Regulation does not properly exclude imported/exported power that does not meet the definition of wheeled power. CARB has noted that it is necessary to assess the Fee on imported power, even if it is subsequently exported and not consumed in California because AB 32 requires the tracking of all GHG emissions for electricity generated in California and imported for consumption in the State.

This logic is belied by CARB's proposed application of the Fee in a manner that does not treat all electricity equally. Electricity imported into California is assessed the Fee based on the actual volume imported. Electricity generated in California is not assessed a Fee. Rather the Fee is assessed against the underlying fuel source used to generate the electricity. Accordingly, CARB's failure to recognize the net power consumed in California fails to acknowledge its own assessment scheme as it pertains to the Proposed Fee (i.e. fuel fee versus power fee), which is unique and distinguished from the way in which GHG emissions are counted or reported to the State. This important distinction must be recognized in the Proposed Regulation in order to ensure that electricity providers are not assessed a greater amount of the Fee than warranted to address the amount of imported power consumed in California.

Footnote:
[6] Mandatory Reporting Regulation § 95111(b)(C) addresses reporting "Power Wheeled Through California."

Agency Response: See responses to Comments 5.1 and 5.13 SCPPA for a discussion of the first deliverer approach, which treats all electricity the same. See our responses to Comments 5.21 and 53.2 SCPPA for a discussion of how the regulation was modified to clarify that simultaneous import/export transactions are not considered imported electricity, and are not subject to the fee.

See responses to Comments 5.22, 53.6, and 53.7 SCPPA for additional detail on power exchanges.

38.9 Comment: Failure to Recognize Net Electricity Imports Adversely Impacts Efficiency of the Electricity Market.

If the Fee is imposed on all electricity imports without recognition of the electricity actually consumed in California, CARB risks jeopardizing the efficient and reliable provision of electricity throughout the State. The purpose of transactions that allow imported electricity to enter the State and at one point, change ownership, and be exported back at a different location is to leverage the most effective operation of the entire western electric transmission system, based on transmission constraints, differing peaks, and time of operating various facilities. This promotes efficiency not only in California, but throughout the entire western region. If entities know that they are going to be assessed an additional Fee on this electricity, they will be less motivated to act to promote the greatest efficiencies, but rather will need to adjust their transactions to address the need to avoid the unwarranted imposition of the Fee. Such an outcome should be avoided, and can be avoided by adjusting the proposed Fee to reflect that the charge will only be assessed against the net electricity imports, which actually reflects the electricity *consumed in California*.

Agency Response: We have addressed the issues concerning energy exchanges in responses to Comments 5.21 and 5.22 SCPPA. See response to Comments 5.22 SCPPA for more detail on the distinction between simultaneous and non-simultaneous exchanges, and why fees are charged on export and import portions of exchanges that are non-simultaneous.

See responses to Comments 5.22 SCPPA and Comment 38.5 NCPA regarding why staff does not agree that the fee is significant enough to discourage entities from promoting efficiencies in the electricity market. See also responses to Comments 53.6 to 53.8 SCPPA explaining that there are no “double” fees.

38.10 Comment: Use of Default Emissions Factors Could Penalize Certain Entities.

The ISOR proposes the use of default emissions factors for calculating the amount of the Fee on electricity imports from unspecified contracts. (Proposed § 95203(e)) Because use of the default emissions factor has the potential to adversely impact entities that have unspecified power contracts that come from geographic regions with a known emissions factor of less than 1,100 pounds of CO_2 per MWh, CARB should include a provision referencing the fact that regional or other default factors will be used in the future when they are adopted by the Agency.

Agency Response: As explained in the ISOR and in Appendix D of the ISOR, the 0.499 $MTCO_2$ per MWh default emission factor (equivalent to 1,100 pounds) is used because it was recommended by CPUC and CEC as an interim factor, until a regional agreement determines how a more permanent factor and/or methodology can be adopted. When a method is determined, staff expects to modify section 95203(e) and adopt an emission factor consistent with a regional approach used for the cap-and-trade regulation. See response to Comment 5.16 SCPPA for additional detail on our choice of the default emission factor.

38.11 Comment: Reporting Regulation Does Not Properly Capture Wheeled Power Exclusions

Not only does the Proposed Regulation not reflect the fact that power imported into California is not always consumed in California, neither do the existing Reporting Regulations capture the "net" of the total power imported. Accordingly, as drafted, electric retail providers may be assessed the Fee for electricity imports that are not subsequently consumed in the State. Entities are required to submit, consistent with the existing Reporting Regulation, the total quantity of imported power "with final point of delivery in California." The Reporting Tool, which CARB intends to require entities to use for purposes of meeting their reporting obligations under the statute, does not allow entities to properly categorize imported power as "wheeled power." Despite the provisions of proposed § 95202(45) that defines "imported electricity" as:

> *"Electricity that is generated outside of California and delivered into California. Imported electricity does not include power wheeled through California, which is power that is imported into California that terminates in a location outside of California."*

Under the Reporting Tool, entities are required to mark such electricity as "imported" and not merely "wheeled." To rectify this situation, which imposes a double burden for the Fee on entities that merely bring power through California, the Reporting Regulations should be revised to accommodate the need to exclude the power not consumed in California from the Fee calculation. Specifically, §95111(b) and (c) must be revised to ensure that these provisions do not prevent retail providers from reporting the net imported electricity for purposes of determining the amount of the Fee.

Agency Response: This comment pertains primarily to another regulation. Possible modifications to the Mandatory Reporting Regulation other than the modification to section 95104(e) are not being considered in this process.

The fee regulation has been modified to further clarify that simultaneous import-export transactions are excluded, as are wheeling transactions. See responses to Comments 5.21 and 53.2 SCPPA for details.

38.12 Comment: The Fee is Based on Test-Year Data
While CARB's need to move forward with imposition of the Fee as soon as possible may be understandable, it is still problematic at this juncture. One such manner is the fact that the Fee is being assessed – with no opportunity for correction or true-up – based on what is essentially test year data. The Reporting

Regulations and the Reporting Tool are being tested for the first time in 2009, and indeed this year there is no requirement for validation of the results. As such, inadvertent reporting errors could result in the payment of Fees by some entities in excess of what their actual obligation should be, while other entities may end up paying less than their actual responsibility. The data used for the Fee calucation (sic) should be verified or subject to future correction, and refund, if applicable.

Agency Response: While it is correct that ARB's mandatory reporting regulation does not require the verification of data submitted during the first year of the program, it does require that the reporter certify its accuracy. Additionally, data required under the fee regulation that is not required by the mandatory reporting regulation does not require verification for any year of the fee program. It is the reporting party's responsibility to provide accurate data. Additionally, the fee is applied to data that is over one year old, providing ample time for the reporter to ensure its accuracy

38.13 Comment: <u>Point of Reporting for Natural Gas</u>
The Reporting Requirements should be revised to clarify the point along the transmission system of natural gas at which CARB will assess Fees based on usage data.

Agency Response: While it is somewhat unclear as to the specific nature of the comment, we note that the regulation is specific as to which natural gas entities must report (section 95201), what they must report (section 95204), and how the fee will be calculated for each (Section 95203).

38.14 Comment: <u>The Proposed Regulation Provides Insufficient Time to Remit the Fee</u>
In proposed § 95205, the Regulation seeks annual payment of the Fee obligation from affected entities within 60 days of being noticed of the amount due. The amount due, revised annually and based on an unspecified and uncapped amount, has the potential to vary greatly from year to year, making estimating the total annual obligation problematic. Depending on the amount of the Fee due, 60 days is likely not sufficient time for entities to collect and remit the necessary funds, especially for the first year.

This problem is further exacerbated by the fact that the fees proposed will be initially borne by a small segment of the economy, in anticipation of having the amounts passed-through to end users. In order to realize the pass-through, affected entities must be given adequate time to bill and collect the amounts due from their customers and end users. Passing through the costs will require that entities include an additional line-item on their invoices for the initial transactions.

Since the Fee covers a 12-month period, it would take at least 12 months for entities to recover the amounts that owed the State. Requiring these amounts to be paid within two months of receiving a Fee notice is unreasonable. Affected entities must be given sufficient notice of their annual compliance obligation to develop a revenue stream to pay those costs, a task not easily accomplished in all instances since those being called upon to pay the current fee will not be the same customers upon which the relevant data reported to CARB was based.

Agency Response: See response to Comment 50.6 NCPA regarding the 60 day requirement to remit payment.

38.15 Comment: The Fee is Based on an Uncapped Amount
Unlike the NVSF upon which the Fee calculation is based, the fee at issue is not subject to a statutorily established cap, nor an open review and approval process. While the Fee is set for the next three years, the legislature can change the amount due annually, depending on the budgets submitted by the various state agencies, and indeed, even the State agencies eligible to receive funding under the Fee may change. For the average stakeholder – even sophisticated businesses – the opportunity for meaningful participation in the budget review process of any one agency, let alone at the legislature – is non-existent. Accordingly, those that will be burdened with the requirement to pay the Fee will have no opportunity to provide meaningful input on the amount of the Fee.

Even in future years, it will not be possible for entities to plan ahead for subsequent Fee determinations, as there are no checks or limitations on what the state's revenue needs are going to be. Since the revenue requirement is used in the calculation, it would be impossible for an entity to even estimate the total obligation and begin "passing through" a further expenditure to its customers. It is imperative that entities be given adequate time between the notification of the total annual assessment and the due date.
The AB 32 Fee must be revised to allow for the collection of the Fee in monthly or quarterly payments. This would allow the affected entities to reconcile their current budget and pass through collection with payments to the state.

Agency Response: See response to Comment 60.3 SCPPA.

38.16 Comment: Proposed Section 95205(d) Should be Clarified
The amount of the late fee referenced in § 95205(d) must be more clearly defined. The Proposed Regulation must provide clarity with regard to what the Board's "additional expenses incurred by the entity's untimely payment" may be.

Agency Response: Additional expenses may include staff time, collection agency fees or other funds expended to collect past due amounts.

38.17 Comment: Provisions Should be Added to Address Resolution of Disputes
The Proposed Regulation includes no provision for timely review of potentially disputed amounts owed, despite the inclusion of proposed § 95026 regarding enforcement and the imposition of penalties. A new section § 95205(f) should be added to include a procedure for addressing disputed amounts. At a minimum, the new section must allow affected entities at least 30 days from the date the

written fee determination notice is received to review the amount due and submit a written notice of dispute to CARB. Such a provision should also include a stay on collection of the Fee, and imposition or accrual of any late fees (proposed § 95205) or penalties (proposed § 95026) pending good faith resolution of such disputed amount.

Agency Response: See response to Comment 44.3 MID.

38.18 Comment: Elimination of the Administrative Fee with Cap-and-Trade
The Rulemaking should clarify that the Proposed Regulation will only be an interim funding measure, and that the Fee will be revised to ensure that there is no duplication in collection, and to determine if the Fee should be adjusted, reduced, or eliminated in its entirety with the implementation of the proposed cap-and-trade program. Because the Proposed Regulation could result in significant amounts, the need for the Fee, as well as possible alternative funding sources, should be reviewed in the context of a cap-and-trade program. Since it is anticipated that the cap-and-trade program will generate revenue for the State, consideration should be given to utilizing some of those revenues to fund the implementation of AB 32, and eliminate the Fee.

Agency Response: See response to Comment 43.6 IEP.

38.19 Comment: Proposed regulation should be clarified to note that imported electricity from renewable energy resources are not subject to the fee. The proposed Fee does not state unequivocally CARB's intent that renewable energy not be subject to the Fee. The Proposed Regulations should be revised to clearly state that the Fee is not imposed on renewable energy, including renewable energy generated from large hydroelectric facilities, nor on null power.

Agency Response: It is not necessary to state what the Fee is not imposed on. It is clearly stated in the applicability section for electricity (Section 95302(a)(a)) that the fees apply to electricity generated by combustion of fossil fuels (except California diesel, which is excluded because fees are paid by refineries and fuel importers on this fuel.) Renewable energy and electricity from hydroelectric facilities is not generated from fossil fuels, and therefore is not subject to the fee.

Null power is power from a specified renewable source that has been stripped from its claim to be renewable, generally because its renewable attributes have been sold or traded separately to someone that wants "credit" for having purchased renewable power, but does not want the actual electricity. Since null power is not generated by combustion of fossil fuels, the fee is not applicable.

38.20 Comment: Renewable Gas Should Not be Subject to the Fee
The Proposed Regulation should be amended to address instances in which renewable gas, such as biogas, is injected into the same pipeline as natural gas to ensure that the Fee is not assessed on the biogas resources. In order to effect

this clarification, the Proposed Regulation should be revised to include an exception for biogas in proposed § 95201(b), which lists the exceptions to the applicability of the Fee. Entities that have biogas in the pipeline would be able to verify those amounts, and any Fees that would otherwise be applicable would be credited against any Fee obligation of the compliance entity. Failure to recognize biogas and other "renewable" fuel sources as not being subject to the Fee has the potential to adversely impact the behavior of those seeking renewable energy resources. Indeed, investments in biofuel projects would be avoided, hampering the ability of retail energy providers to meet not only their AB 32 compliance obligations, but also the ever increasing mandate to increase the procurement of renewable energy resources.

Agency Response: Staff clarified the definition of natural gas. The definition is specific and excludes biogas and renewable gases. ARB also clarified the applicability section of natural gas in the regulation.

It is not necessary to specifically exclude renewable gas from the fee, because renewable gas, including biogas, is not fossil fuel. We have worked with the investor-owned natural gas utilities (Sempra and PG&E) so that they will not charge the fee on biogas transported over their pipelines. Furthermore, when biogas is used for electricity generation at a specified source, the biogas emissions will not be used in calculating the emissions factor and the corresponding fee rate for the specified source. Because the mandatory reporting regulation requires separate reporting of emissions by fuel, there will be no difficulty in calculating electricity fee rates without subjecting renewable gas to the fee.

38.21 Comment: Clarification Regarding Repayment Period

The ISOR states that payback of the 2007/2008 and 2008/2009 loans used to carry out AB 32 will be accomplished over the course of the next four years: 2009/2010, 2010/2011, 2011/2012, and 2012/2013. (ISOR, p. 30). Proposed § 95203(a)(2) provides that:

For Fiscal Years 2009/2010, 2010/2011, 2011/2012, 2012/2013, and 2013/2014, the RR shall also include the payments required to be made by ARB on the Debt.

The Proposed Regulation must be corrected to clarify the repayment period discussed on page 30 with the five year repayment period set forth in proposed § 95202(a)(2).

Agency Response: ARB made these changes and they were included in the first 15 day modifications to the regulation.

Comment 2: ElPaso, June 17, 2009

2.1 Comment: The Administrative Fee Regulatory Language as Proposed Conflicts with AB 32's Enabling Legislation and Sound Public Policy.
As an initial matter, El Paso conceptually supports an equitable, prospective, and transparent GHG fee imposed on sources of GHG emissions to recover CARB's reasonable costs of administering, implementing and enforcing California's AB 32 regime. As set forth in El Paso's comments below, our concerns center on the proposed allocation of those administrative costs *away* from those actors on whom the statute clearly intended such costs be imposed and *toward* those actors who are not GHG "sources" within the meaning of the statute. CARB's proposal thus runs impermissibly afoul both of the statutory command and sound public policy.

CARB's Proposal is *Ultra Vires* in Relation to the Enabling Statute.
The administrative fee currently proposed by CARB directly conflicts with AB 32's enabling legislation. California's Health and Safety Code Section 38597 states that the contemplated administrative fees are to be "paid by the *sources* of greenhouse gas emissions regulated pursuant to this division, consistent with Section 57001" (emphasis added). The AB 32 legislation defines a "[g]reenhouse gas emission source" or "source" to be any source, or category of sources, of greenhouse gas emissions whose emissions are at a level of significance, as determined by the state board, that its participation in the program established under this division will enable the state board to effectively reduce greenhouse gas emissions and monitor compliance with the statewide greenhouse gas emissions limit. Cal Health & Safety Code § 38550(i).

The statute could hardly be clearer. It unambiguously and unequivocally specifies that fees are to be collected only from *sources* of GHG emissions – i.e. the point of emission. Indeed, CARB's own Scoping Plan supports this reading of the statute. In the Scoping Plan, CARB lists recommended greenhouse gas reduction measures for both capped and uncapped sectors.[2] The cap and trade measure adopted by the Board is essentially a "hybrid" design, where electric generating facilities and large industrial sources are covered at the "*point of emission*". With respect to natural gas, small industrial combustion and the residential commercial sectors are covered "where the fuel enters into commerce". This is widely considered to be at the Local Distribution Company (LDC) level as noted in the Western Climate Initiatives (WCI) design recommendations released on September 23, 2008.

Footnote:
[2] *See* "Climate Change Propose Scoping Plan," Table 2: Recommended Greenhouse Gas Reduction Measures, issued October 2008.

Agency Response: See response to Comment 53.1 SCPPA.

2.2 Comment: CARB's Proposal Collides with Sound Public Policy In the Regulation of Externalities.

In addition to the statutory and legal infirmities that burden it, CARB's proposal also suffers from a head-on collision with well-established public policy in the sound regulation of micro-economic externalities. The statute's requirement that "sources" pay administrative "fees" is intended to ensure that emitters internalize the full costs of their GHG emissions and to ensure that sound cost-causation principles govern recovery of governmental administrative costs. Such a cost-causation and cost-internalization approach has the salutary effect of encouraging behavioral change on the part of GHG emitters to reflect the true, total costs to society (including state government) resulting from their behavior. Recovering the administrative costs associated with implementing California's GHG program far upstream,[4] away from the actual source of the GHG emission – away from the point of combustion – defeats the basic public policy purpose that the Legislature embraced in mandating that administrative fees be collected from sources. This is so because actual *sources* of GHG emissions, after all, are the only actors in the regulatory framework that can actually respond to the "signal" from the administrative fee by modifying their behavior based on rational, cost-benefit decision making.

El Paso believes that these profoundly important principles of efficient and effective regulation of externalities militate powerfully in the direction of a modification of CARB's proposal: a modification that would ensure that the proposed administrative fee is only levied on those source-entities that are actually responsible for GHG emissions within the meaning of AB 32.

AB 32 Fees Should be Transparent to Actual GHG Emitters In addition to requiring emitters to internalize the true costs of climate change externalities, all AB 32 fees should be *transparent* to the entity responsible for GHG emissions. Such transparency is essential to ensuring the emitter receives an accurate compliance price signal, reflecting the true and total costs arising from the emitter's behavior. The statute's expectations for substantial emissions reductions are highly dependent on the effective transmission of such signals. In El Paso's view, a fee imposed far upstream of the ultimate consumer (*i.e.,* the emitter) would be opaque, would send confusing price signals, and would contravene the AB 32 enabling legislation. By contrast, a transparent fee – one that is imposed directly on the actor immediately and ultimately responsible for the GHG emission – would ensure regulatory efficiency, effectiveness, accountability and optimal decision-making by the emitter.

Footnote:
[4] The "upstream" sources in the natural gas sector include natural gas producers, processors and importers of natural gas (including LNG), transmission/storage and distribution companies. These facilities typically have relatively insignificant emissions compared to the end users like a power plant or a large industrial facility.

Agency Response: See response to Comment 17.26 WSPA.

2.3 Comment: The Ability of Interstate Pipelines to Pass Through Compliance Costs to Emitters is Uncertain, At Best.

CARB states that a "major goal of the proposed regulation is to equitably impose fees on the widest possible spectrum of greenhouse gas sources in an administratively feasible manner." CARB believes this "cannot be done unless some type of administrative mechanism is used to impose a fee on upstream entities, which can then pass on the cost of the fee by increasing the cost of the fuel supplied to downstream entities." While CARB's goal of "equitable" distribution is admirable, the regulatory mechanism currently proposed is flawed. The costs of implementation, administration, and enforcement of AB 32 cannot be said to be "equitably" distributed when payment is required of entities that are not "sources" of greenhouse gas emissions within the meaning of AB 32. This inequity is magnified when such costs cannot be passed through to the actual emitters of GHG emissions, who are the true generators of CARB's administrative costs. Initially, whether a Federal Energy Regulatory Commission ("FERC") jurisdictional pipeline can successfully pass on the cost of CARB's proposed fee is highly uncertain. As federally regulated entities, EPNG and Mojave generally may only recover their prudently incurred costs via rates in two ways. First, a pipeline may file a general rate case under Section 4 of the Natural Gas Act, which is an expensive and time consuming process. It is highly unlikely that the timing of new rates incorporating CARB's proposed fee would or could coincide with the imposition of the proposed fee.

This federal-state regulatory lag effect would itself be a strong source of compliance price signal distortion. Further, pipelines often settle rate cases with a provision precluding the pipeline from filing a general rate case for a specified period of time. This type of settlement provision prevents a pipeline from even attempting to file for rates that would have the effect of timely passing through the costs of the proposed administrative fee. Second, pipelines may file to implement a mechanism to track costs, such as CARB's proposed administrative fee. "Tracker" mechanisms are strongly disfavored, however, by EPNG and Mojave's rate regulating authority, the FERC.

Additionally, due to broad sweeping changes in FERC policy over the last two decades, regulated interstate pipelines increasingly confront pipeline-on-pipeline competition in the provision of natural gas transportation services to their customers. Such competition can often result in rate discount arrangements and other mechanisms to meet competition that result in effective rates that are charged below the maximum recourse rate permitted by FERC-approved natural gas tariffs. This fact of head-to-head rate-competition means that the well established micro-economic phenomenon of "tax incidence"[5] could routinely apply to FERC-regulated pipelines. Stated differently, marketplace conditions will determine whether, and to what extent, a pipeline can pass through CARB's administrative fee to customers in their rates. Again, such uncertainty risks distorting compliance price signals beyond recognition by emitters, resulting in suboptimal cost-benefit decision-making about emission behavior.

Just as important, the relevant economic actor (*i.e.,* the carbon emitter) probably would not incur or even be aware of the fee, even if the pipelines *were* able to recover the CARB-proposed administrative fees in their regulated rates. As noted earlier, the carbon emitter should confront a transparent fee to ensure efficient economic compliance with the goals of AB 32. The problem with imposing CARB's administrative fee on regulated interstate pipelines is that transportation rates are paid by *shippers*, who are not necessarily *emitters*. For example, shippers include companies that merely produce natural gas at the well head. Shippers include entities that perform a purely merchant trading function in the marketplace. Shippers include other regulated interstate pipelines that choose, under their FERC-approved tariffs, to hold off-system capacity on a given pipeline. None of the foregoing shippers actually emits CO2, and yet each would pay the proposed CARB administrative fee if it were embedded in the host pipeline's general transportation rates. Conversely, actual carbon emitters routinely do not contract for capacity on interstate pipelines, choosing instead to purchase their natural gas at the “end” of the pipeline – at a designated delivery point – and sometimes in the “spot” market. In that case, the pipeline has no contractual relationship at all with the emitter that supports charging a transportation rate, including CARB's administrative fee. Thus, contrary to CARB's expectations under its proposal, pipelines are not only at risk for cost recovery but, even if they were able to pass through CARB's proposed administrative fee, it is unlikely that the fee would be borne by carbon emitters. Such a haphazard assessment of the administrative fee, in which it would fall randomly on nonemitters and emitters alike, would result in an inefficient and inaccurate compliance price signal to carbon emitters. Again, expectations for emission reductions are highly dependent on the effective transmission of the compliance price signal. In El Paso's view, a fee imposed far upstream of the ultimate emitter simply cannot successfully induce a change of behavior, is certainly not transparent and direct, and contravenes the spirit and intent of the AB 32 statute.

<u>Footnote:</u>
[5] In economics, tax incidence is the analysis of the effect of a particular tax on the distribution of economic welfare. Tax incidence is said to “fall” upon the group that, at the end of the day, bears the burden of the tax.

Agency Response: The regulation has been modified so the interstate pipeline is no longer a point of regulation for the fee.

2.4 Comment: Imposition of CARB's Proposed Administrative Fee on Interstate Natural Gas Pipelines Would Constitute an Economic Barrier to Natural Gas Deliveries Into California.

Finally, imposing additional fees on California natural gas deliveries could potentially create a strong disincentive for shippers to select California delivery points for their natural gas supplies, choosing instead delivery points outside of California that serve other demand regions. This phenomenon could result in unintended constraints on available natural gas supplies, precisely at a time when California needs natural gas both as a clean-burning alternative to coal-fired power generation, as a reliability "backstop" for intermittent renewable energy sources such as wind and solar, and as a "bridge" to a new generation of sustainable energy technologies. In addition, imposition of CARB's proposed administrative fee could inadvertently burden proposals for expansions of existing natural gas pipelines and development of new pipeline projects serving the Golden State, by making California a relatively less attractive destination for natural gas supplies. El Paso respectfully urges CARB to consider these potential, unintended supply consequences from the broad sweeping reach of the proposed fee to recover the costs of administering, implementing, and enforcing AB 32.

Agency Response: While it is not clear that these unintended consequences may occur, we agree that placing the point of regulation at the interstate natural gas pipeline is problematic. The regulation has been modified so that the interstate pipeline is no longer a point of regulation for the fee.

Comment 11: BP, June 12, 2009

11.1 Comment: The summary of the Proposed AB32 Administrative Fee Regulation describes the fee as applying "only to certain entities from specific industry sectors" – a description that while accurate is a clear departure from the requirements of the enabling legislation that the fee be paid by the sources of emissions. Instead, the fee regulation as proposed will collect over 50% of the total fee from a refining industry that is responsible for approximately 4% of state emissions.

Agency Response: The product produced by the refining industry, gasoline and diesel, account for the remaining 46% of the greenhouse gas emissions noted by the commenter. To minimize complexity and administrative costs the fee regulation is designed to minimize the administrative burden of fee collection by placing the point of regulation at the supplier of the product who will then pass it on to the end-user. Also see response to Comment 53.1 SCPPA.

11.2 Comment: For emissions attributable to the combustion of transportation fuels, the "sources of greenhouse gas emissions" are the vehicles in which the fuel is combusted. Although BP manufactures transportation fuels, the refinery is not the emitting entity for emissions from the combustion of transportation fuels, nor does the refinery control the efficiency of vehicles or the volume of fuel consumed for transportation. **We believe that both as a matter of basic fairness and as a requirement for compliance with AB32, the administrative**

fee should be collected at, or as close as possible to, the point of emission. In the case of emissions from fuels combusted for transportation, where it may not be practicable to collect a fee directly from individual fuel consumers, the fee should be assessed at the closet possible point upstream of the emitter – in this case at either the pump or at the rack. (Emphasis in original.)

Agency Response: See responses to Comment 11.1 BP, Comment BHJ-O9.1 WSPA and Comment BHJ-O9.2 WSPA.

11.3 Comment: In meetings with your staff, and in reading the Proposed Regulation, it appears that CARB intends to apply the fee 'upstream" in order to "minimize the number of entities subject to the fee and reduce the complexity and the administrative burden of the fee." In doing so, CARB appears to design the fee to meet an objective not mentioned in the legislative language while at the same time ignoring an objective explicitly called for in the legislation – i.e. that the fees will be paid by the sources of greenhouse gases regulated.

Agency Response: ARB disagrees. The intent of the regulation is that the fee be passed through to the final consumer. The fee will be applied to all gasoline and diesel sold for use in the state, there is no competitive disadvantage for in-state producers. This, combined with the low cost of the fee when applied to a gallon of gasoline or diesel, will mean that there is no impediment to the refinery or importer's ability to pass through the cost of the fee. Also see response to Comment 47.3 KernOil. Regarding the sources of greenhouse gas emissions, see response to Comment 53.1 SCPPA.

11.4 Comment: In the case of refiners, shifting the collection of administrative fees away from the rack or pump to the refiners will increase the fee they are subject to by approximately a factor of ten. So, a refiner who would otherwise pay $500,000 in fees based on direct emissions will instead pay approximately $5,000,000 according to the proposed regulation. This is an unreasonable burden to place on a single sector and on individual companies, especially when better options are available. It would be quite a different scenario were CARB shifting a relatively small incremental burden onto a single sector in order to ease the administrative burden on many. But in this case, the Proposed Regulation shifts what would be a small burden on many – and concentrates a large burden on a few.

Aside from the issues of fairness and compliance with the legislative language of AB32, CARB's design of the fee appears to hinge on the ability of those subject to the fee to recover the costs of the fee in the sales price (even though BP believes that ability to pass through is irrelevant to the question of the Proposed Regulation's adherence to the statute). CARB staff assert throughout the Proposed Regulation that regulated parties should be able to pass on the cost of the fee to downstream consumers - even though the regulation uses terms like "if" and "likely" regarding an entity's ability to recover its cost in the sales price. In fact, there is and can be no certainty in the ability of regulated parties to pass on these costs. It is a virtual certainty that the fee will not be recovered in its entirety at all times. As such the fee, as designed, clearly does not meet the requirement of the legislation.

Agency Response: See response to Comment 47.3 KernOil.

11.5 Comment: Finally, CARB should make clear in the rulemaking how the fee program will change in the event that the California cap and trade program is pre-empted by a federal cap and trade program. As we expect that a federal cap and trade system will cover both direct refinery emissions as well as transportation fuels, we expect that the majority of a fee on refiners, regardless of how the fee collection if designed, will go away in the event of federal pre-emption.

Agency Response: See response to Comment 43.6 IEP.

Comment 17: WSPA, June 22, 2009

Note: WSPA's letter of June 22, 2009 was also included as an attachment in 45 WSPA, but responses to the June 22 letter are found here.

17.1 Comment: …we believe the approach taken by CARB in developing the administrative fee regulation concept and the proposed regulatory language is fundamentally flawed. In WSPA's view, the state's AB 32 administrative fee program should have the following key characteristics:

- the fee program must be broad-based and economy-wide;
- the fee program must be equitable;
- the fee should be emissions-based;
- program costs to be recovered by the fee must be reasonable, direct and prospective, with the actual costs accurately determined and documented, and transparent; and,
- the fee must be transparent to the ultimate GHG emitter.

Agency Response: The regulation is broad-based, covering approximately 85 percent of all greenhouse gas emissions in California. It will be applied to fuel use throughout the State's economy. This fee does not single out any one industry or group of businesses within an industry. Rather, the fee will be applied to the sectors that contribute the majority of the greenhouse gas emissions in the State. This method treats the entities required to pay the fee as equitably as is reasonably possible. ARB is not applying the fee to the remaining 15 percent of emitters in the state for three reasons. First, ARB is considering developing a regulation for a statewide fee applied to high global warming potential gases (HGWP); this fee will address some of the remaining 15 percent of emitters that are not subject to the fee regulation. Second, as a practical matter, the administrative burden of pursuing the small remaining percentage of emitters is infeasible and would significantly increase the administrative costs of collecting the fee. Third, many of these emitters are also diffuse sources of greenhouse gases such as landfills or agricultural fields, from which accurate measurement of greenhouse gas emissions is not possible. Also see response to Comment 46.1 EPUC regarding the common carbon cost.

The process for determining the fee and its collection process has been designed to provide transparency to all participants and interested parties and goes beyond what is statutorily required of ARB. This regulation was developed through an extensive public process involving a broad range of stakeholders through multiple workshops, meetings and material made available. State AB 32-related program expenses, and details on loans that require repayment are all accessible to the public and actual amounts are set by the Legislature in each year's budget. See response to Comment 43.3 IEP for additional information about the annual budget process. See also the response to Comment 17.26 regarding transparency of the fee to the ultimate greenhouse gas emitter.

Based upon staff estimates presented at the September 25, 2010 Board hearing, the fee would cost an average Californian less than $1.60 per year. Staff also estimates the cost to a small business (100 person office) is expected to be approximately $9 per year and the cost to a full-service grocery store is estimated to be $170 per year.[9] ARB believes that these costs are "reasonable." See response to Comment 44.4 MID regarding the costs to consumers.

The costs to the State that will be covered by this fee are direct costs, based on actual costs incurred by ARB or other agencies engaged in AB 32 implementation. See response to Comment 62.3 Pills in its entirety. As stated above, ARB has added additional documentation of expenditures to the public record.

See response to Comment BHS-O2.1 WSPA regarding prospective billing.

17.2 Comment: CARB's Rulemaking Process Is Flawed

Since CARB's first workshop on the draft Administrative Fee Regulation, WSPA and other commenters have repeatedly remarked on the need for justification and documentation of the AB 32 implementation costs that CARB seeks to recover through the fee. Requests for information have been made.

Despite these requests, CARB failed to provide any documentation of its costs. Consequently, numerous organizations formed a coalition to seek specific information from CARB related to its estimates of AB 32 implementation expenses.

As part of that effort, the coalition filed a Public Records Act request with CARB, seeking specific records related to the costs and other aspects of AB 32 implementation by CARB and other state agencies whose expenses are

[9] ARB Web Site, found at: [www.arb.ca.gov/board/books/2009/092409/09-6-5pres.pdf]

proposed to be covered by the Administrative Fee. To date, CARB has not provided a full response to the records request.

CARB's failure to provide a timely and complete response to the coalition's Public Records Act request regarding cost data and background on the regulatory design has prejudiced parties commenting on the rule proposal. Their ability to meaningfully evaluate and comment on all aspects of the costs proposed to be recovered by the proposed fee, as well as on the background and rationale for CARB's design of the fee program has been severely compromised. Decisions from California courts and the Office of Administrative Law have invalidated agency rulemakings that were based on information not made available to the public. Accordingly, the Public Records Act violations and inadequate data availability violate Administrative Procedure Act requirements for information availability and public participation in rulemakings, and violate commenters' due process rights to meaningful participation in agency actions. CARB should take immediate steps to assure that all relevant materials are available for meaningful review and comments before the agency takes action on the rule proposal.

Agency Response: This comment was submitted during the pendency of the coalition's lawsuit regarding the records in question. ARB produced approximately 43,000 pages comprising approximately 5,300 documents in response to the Public Records Act requests. The commenter and ARB disagreed over whether the commenter was entitled to additional documentation. ARB maintains that all "relevant materials" have been made available either initially or pursuant to a 15-day notice consistent with the provisions of the Administrative Procedure Act. All information relied upon in the formulation of the regulation has been made available to the public.

Further, the litigation pending at the time the comment was submitted was subsequently decided in ARB's favor. The court found that <u>all</u> documentation withheld were subject to the deliberative process privilege exception to the Public Records Act. (Gov. Code §6255).

17.3 Comment: The AB 32 Administrative Fee Regulation Must Be Broad-Based and Economy-Wide

AB 32 authorizes CARB to establish "a schedule of fees to be paid by the sources of greenhouse gases regulated pursuant to [AB 32]." Health and Safety Code § 38597. This language contemplates that the administrative fee regulation should cover all sources regulated under AB 32. Such an approach would include sources subject to the mandatory GHG reporting regulation adopted in 2007 as well as sources in industry sectors that are identified in CARB's AB 32 Scoping Plan as slated for GHG emissions regulation. CARB has stated that its objectives for the AB 32 administrative Fee Program include establishment of a program that is fair, equitable, broad-based, transparent and simple. The proposed regulation significantly misses achieving these objectives. CARB's regulatory concept and the regulatory text propose to assess fees only from manufacturers and importers of four fuels (gasoline, diesel, coal and natural gas), electricity imports, and on process emissions from petroleum refineries and cement plants.

Agency Response: See response to Comment 17.1 WSPA regarding the fee being broad-based. By limiting the number of fee payers, ARB has lessened the administrative burden and complexity of collecting the fee. Although there are a limited number of fuels and processes from which are subject to the fee, it covers 85 percent of the state's greenhouse gas emissions.

17.4 Comment: WSPA believes the proposed administrative fee does not meet the legislative intent of AB 32 or CARB's stated objectives. The small number of industries subject to the fee requirement still can hardly be considered "broad-based" or "economy-wide." Similarly, while CARB asserts that the proposed regulation applies to 85% of the state's greenhouse emissions, this is still not an economy-wide approach.

Agency Response: See response to comment 17.1 WSPA.

17.5 Comment: The AB 32 Administrative Fee Regulation must be Equitable
The text of AB 32 directs that all parts of the AB 32 program be equitable. For example, the mandatory GHG emissions reporting regulations must include emissions reporting from "sources or categories of sources that contribute the most to statewide emissions." CARB's AB 32 Scoping Plan must "take into account the relative contribution of each source or source category to statewide greenhouse gas emissions…"

And when it adopts emission reduction measures under AB 32, CARB must "consider the significance of the contribution of each source or category of sources to statewide emissions of greenhouse gases." Thus, the most significant GHG emission source categories are likely to be covered by the reporting regulation, the Scoping Plan, and/or the eventual GHG emission control requirements, providing numerous sources for inclusion in a broad-based fee schedule.

Inclusion of all AB 32-regulated sources in the fee schedule would be the first step to an equitable administrative fee program.

Court decisions on regulatory fees and various provisions of AB 32 support the concept that any regulatory fee must be equitable. For example, in *Sinclair Paint Co. v. State Bd. of Equalization* (1997) 15 Cal.4th 866, the California Supreme Court reviewed and upheld a fee that was based on paint manufacturers' market shares.

In contrast, in *California Farm Bureau Federation v. California State Water Resources Control Board* (Jan. 17, 2007, Third Appellate Dist., C050289; Petition for Review pending), the Court of Appeals rejected a fee program that applied to only 40% of the facilities regulated under a program of the State Water Resources Control Board ("State Board").

In this case, the court determined that the State Board had failed to demonstrate "the basis for determining the manner in which costs are apportioned, so that charges allocated to a payor bear a fair or reasonable relationship to the payor's burden on or benefits from the regulatory activity." *Id*., at 40. Consequently, imposing a fee on only one category or a few categories of GHG sources does not result in a regulation that is "equitable."

As we have stated in our comments on the drafts of the fee rule and in conversations with CARB staff, CARB's approach to the proposed Administrative Fee Regulation is not equitable, even with the inclusion of imported electricity and other changes from the draft regulation.

Agency Response: See response to Comment 17.1 WSPA and Comment 38.2 NCPA.

17.6 Comment: The Administrative Fee Regulation would apply to only six of the many source categories that are or will be regulated under AB 32, and covers only about 85% of the state's GHG emissions. Applying fee requirements to only a few source categories means that sources in those categories will bear all the implementation costs of CARB's AB 32 program, while other non-paying sectors of the economy are not burdened with such costs.

CARB apparently believes that the entities subject to the fee regulation (i.e., refineries that produce transportation fuel) will be able to pass their costs on to their customers, so that the person or entity who ultimately combusts the fuel and is the actual GHG emitter will indirectly pay the fee as part of the price of its fuel. CARB apparently believes that in this indirect manner the fee becomes equitable and broad-based. However, in competitive markets for commodities such as transportation fuels, the presumption that costs such as the AB 32 administrative fee can simply be passed along to customers is false.

Unless CARB establishes a specific mechanism for passing the fee along the chain of commerce to the ultimate customer, as both a legal and a practical matter the fee is being paid by the entities specified in the draft rule, and so cannot be considered equitable.

One specific example of inequity in the administrative fee proposal is the situation related to transportation fuels. CARB's workshop presentation on the proposed administrative fee indicated that about 50 to 60% of the total fee revenue would be paid by manufacturers and importers of transportation fuels. However, combustion of transportation fuels results in only about 40% of California's GHG emissions inventory.

…We also note that at least 10.5% of the reported administrative costs result from work pertaining to regulation of High GWP gases. These costs clearly should not be paid for by fees on transportation fuels, for which there is no nexus whatsoever. Three other items – inventory, reporting, and cap and trade – account for 18.7 % of the identified regulatory costs. These costs should be spread (either on an emissions basis or per capita) among all of the mandatory reporting parties that will be subject to the cap and trade rule.

Another aspect of equity is the ability of facilities and companies located in California to remain competitive in the global market. Imposition of emission fees on California entities but not on their competitors will reduce the competitiveness of California business, particularly for those in commodity markets, like transportation fuels, where these new costs are unlikely to be able to be passed on to customers.

Job losses resulting from reduced competitiveness will only add to the existing record 11.5% unemployment level in our state.

Agency Response: While there are six major sector categories affected in the construct of the fee, the fee covers all industries, homes and businesses, and is dependent upon the Fee being passed through to the ultimate consumer. All residential, commercial and industrial users of natural gas and electricity, and users of diesel and gasoline will be affected. ARB uses a limited number of sectors to collect the Fee, thus ARB uses the "upstream" approach to assess the Fee, simplifying administration of the Fee. See also response to Comment 62.2.2 Pills.

As the fee will be applied to all gasoline and diesel sold for use in the state, there is no competitive disadvantage for in-state producers. Combined with the low cost of the Fee when applied to a gallon of gasoline or diesel, will mean that there is no impediment to the refinery or importer's ability to pass through the cost of the fee. Also see response to Comment 47.3 KernOil.

The upstream approach was taken in part for administrative simplicity, and covers 85% of the greenhouse gas inventory. High GWP gases are not part of this regulatory action. See also response to Comment 17.1 WSPA.

17.7 Comment: The AB 32 Administrative Fee Regulation Must Be Emissions-Based

AB 32's language requiring that any adopted schedule of fees is "to be paid by the sources of greenhouse gases regulated pursuant to this division…" requires that CARB's administrative fee schedule apply to sources of greenhouse gas emissions.

Clearly, process GHG emissions from refineries and cement plants would meet this criterion. However, manufacturing or importing the four fuels covered by the proposed fee regulation (gasoline, diesel, coal and natural gas) does not represent a source of greenhouse gas emissions.

Fuels in and of themselves are not “sources of greenhouse gases.” The “source” of GHG emissions related to use of these fuels is the facility or equipment in which the fuel is combusted. Combustion clearly does not occur at the producer/importer level as used by CARB in the proposed regulation, so fuel producers and importers cannot be considered “sources of greenhouse gas emissions.”

In order for CARB to deliver a fee regulation that meets the stated objectives of fairness, equity, broad-base, transparency and simplicity, and that meets the legislative intent, the regulation must begin with the presumption that the fee should be levied as directly as possible on those responsible for the emissions – in other words, as close as possible to the point of actual GHG emissions.

If CARB reasonably determines that it would be administratively difficult to levy a fee directly on emitters who combust transportation fuels (which it has not demonstrated), then instead of attempting to assess the fee at the point of manufacture or import (which is well upstream of the ultimate consumer), CARB must consider other fee collection methods.

Agency Response: The intent of the regulation is that the fee be passed through to the final consumer. See responses to Comment 47.3 KernOil and Comment 53.1 SCPPA.

17.8 Comment: In this regard, WSPA proposes that CARB adopt a fee structure that parallels the current federal and state collection points for motor fuel excise taxes. This proposed structure would reduce compliance costs and avoid the need for expansive and successive new regulations to address a novel point of collection at the refinery gate.

The Federation of Tax Administrators, the Internal Revenue Service, the American Petroleum Institute and WSPA have endorsed “tax at the rack” as the most efficient and uniform point for tax and fee collection on distributed motor fuels. This point of taxation has been widely adopted to reduce the risk of evasion and to streamline administration of motor fuel taxes and fees.

This established approach would also minimize the risk of litigation from consumers in other states or countries who receive gasoline and diesel through production or importation of gasoline and diesel fuel originating in or passing through the state by excluding from the fee calculations exports from California.

Finally, collection at the terminal rack or where the product “breaks bulk” for distribution within California strikes a balance between reasonable administrative practicalities and imposing the fee as close as possible to the end consumer of these products.

To be more specific about the proposal, the inventory position holders at distribution terminals and refineries would be responsible for the AB 32 fees when the product is removed for distribution within the state. The terminal operators already file reports with the Board of Equalization regarding position holder inventories and distributions as a check for tax remittances by the inventory position holders at these locations.

In some cases, the inventory position holder and the terminal operator may be the same party. Today that party files reports with both the Internal Revenue Service and the Board of Equalization in its dual capacity as a terminal operator and as taxpayer.

Agency Response: In this, and subsequent comments, commenter suggests that ARB should use the Board of Equalization's (BOE) system for collecting taxes from transportation fuels at the terminal rack. See response to Comment 45.1 WSPA for a discussion of why ARB does not believe the terminal rack is the appropriate location for fee collection. In addition, see response to Comment 17.13 WSPA regarding why ARB does not believe that BOE's current tax collection system is appropriate for collection of the AB 32 Fee. In addition, because transportation fuels only account for a portion of the fees that would be collected, Using BOE's system to collect the fee on transportation fuels would require ARB to set up two parallel systems – one for transportation fuels and one for all other sources. See response to Comment BHS-O2.1 WSPA for additional information. The cost of using the BOE system for collecting taxes to assess the fee was also substantial and could have added up to $840,000 to the fee payer which would be paid throughout the fee but would only benefit the transportation fuel sector. This would not be equitable to the other fee payers and would add additional administrative costs to ARB. See also response to Comment 17.13 WSPA.

The commenter also argues that applying the fee at the terminal rack would minimize the risk of litigation from the possibility that the fee might be imposed on some out-of-state sales. This comment is addressed in the response to Comment BHS-O2.1.

17.9 Comment: This proposal builds upon a longstanding and highly efficient tax administrative regime developed and used both by the federal government and California relying upon existing business records and actual inventory data. Also, the IRS and the Board of Equalization audit both the taxpayers and terminal operators to ensure accurate reporting and tax calculation and remittance, thereby providing assurance of the reliability of AB 32 fee remittances from this point of collection.

CARB's proposed approach, to assess fees on transportation fuels at the point of manufacture or import, is both novel and non-conforming with existing points of collection at both the federal and state level for motor fuel taxes. CARB's approach has numerous significant flaws.

It incorrectly assumes that all gasoline and diesel fuel produced in California refineries is distributed in California. There are both imports of gasoline and diesel fuel and significant exports of gasoline and diesel fuel from the state. This situation will require a complex set of regulations to provide for credits and refunds for exports as well as a significantly more complex fee return document tracing the "ins and outs" of products unnecessarily.

Tax at the rack would avoid this needless complexity by significantly sorting out exports from the state based upon bill of lading generation at the terminal level. All imports would be captured at the rack where distribution to California consumers commences.

Agency Response: ARB disagrees that our approach for applying the fee to gasoline and diesel assumes that all gasoline and diesel fuel produced in California refineries is distributed in California. ARB is aware that not all gasoline and diesel manufactured in the state is intended for use in the state. The regulation specifies that the fee only applies to "California gasoline or California diesel for use in California." It is incumbent on the reporting entity to report California gasoline and California diesel that are sold for use in the state.

Further, since the fee is based on sales data that is over one year old, the entities covered in this fee regulation have ample time to provide accurate data corrected for sales of California gasoline and diesel to out-of-state customers if they believe this is necessary.

17.10 Comment: Some CARB staff believes that imposing the fee upon refinery removals reduces the number of fee payers as compared to all other options. This is incorrect since CARB would have to also identify both bulk and non-bulk importers into the state as well as track exporters who would be entitled to credits and refunds. The Board of Equalization and the Internal Revenue Service have already identified and licensed fuel importers, and the Board's list of actual importers into California is limited.

WSPA has previously provided a list to the staff of the companies registered for gasoline distribution in the state and the active number of companies is approximately forty (40). The top dozen licensed suppliers represent over 95% of distributed gallons. There is no material benefit in administration of a new fee regime at a novel collection point versus the terminal rack.

Agency Response: Effectively, all importers of gasoline and diesel for use in the state report to ARB pursuant to Title 13, California Code of Regulations, sections 2250-2273.5 (the California Reformulated Gasoline Regulations) and sections 2281-2285 (the California Diesel Fuel Regulations), and Title 17, California Code of Regulations, sections 95480-94590, (the California Low Carbon Fuel Standard). Therefore, little if any additional administrative burden is placed on ARB to identify these fuel importers. Additionally, since the Fee will not apply to fuel that can be shown to be exported out of the state, staff does not believe there is a need for a credit and refund system.

The commenter then states that the number of companies registered for gasoline distribution in the state and the active number of companies is approximately forty based on a list of those entities subject to the fee under the current BOE tax collection regulations provided to ARB by the commenter. This list has approximately 125 possible tax payers listed, not the 40 noted in the comment. While it is accurate that only some of these entities may distribute gasoline in any given month (the period covered under this list), this varies monthly, and all potential tax payers would need to be included in the fee program as potential entities upon which the fee could be levied increasing the number of fee payers.

17.11 Comment: The cost and lead time necessary to develop a fee collection regime at the refinery and import level will be significant and will face many practical challenges which could easily be avoided if the fee is imposed in parallel with the states' existing taxes on gasoline and diesel fuel. In this case, the lack of experience of CARB staff in effective and efficient motor fuel tax administration is a substantial hurdle that would need to be overcome.

The state's leadership has called upon all state agencies to do whatever is reasonable to reduce costs and to leverage existing resources. Clearly, creating a new and non-conforming point of fee collection will be both more time consuming and costly than modeling a fee collection process after the current successful and efficient excise tax collection process, with or without administration of the new fee by the Board of Equalization. The intentional rejection of a successful model for an agency specific fee program will draw attention to intentional waste of state resources at tax and fee payer expense.

Agency Response: See responses to Comment 17. 3 WSPA, Comment 17.8 WSPA and Comment 17.13 WSPA.

17.12 Comment: The CARB proposal relies upon projections of calculations related to ethanol blending that could be done subsequently at a California terminal in order to calculate the fee liability at the refinery gate. This is unnecessary when the fee could be calculated upon the actual measured volumes of ethanol blended product distributed within California as captured at the terminal level. The projection and the reality will never match volumetrically and there will be a permanent variance the CARB staff will continuously struggle to overcome due to the adoption of a system that is not based upon business inventory records and long established inventory control processes.

Agency Response: Staff understands that not all of the gasoline sent from the refinery to a distribution terminal is put directly in to commerce. A minimal amount ends up as waste fuel. If this waste fuel is not put into commerce in California, the fee will not apply. Refineries can subtract the waste fuel from the amount that they report. This only occurs when diesel follows California Reformulated Gasoline Blendstock for Oxygenate Blending (CARBOB) or California Reformulated Gasoline (CARFG) in the pipeline, and this can be kept at a minimum by scheduling shipments of CARBOB and CARFG to minimize the occurrence of diesel following them in the pipeline.

17.13 Comment: If the fee regime is implemented in parallel with the current Board administered fuel taxes, the CARB fee regime would benefit from any administrative or legislative improvement to those long-established tax programs. Also, CARB may be able to utilize the Board audit results in its own administration of the fee program or to contract with the Board or obtain legislative authority for the Board to administer the fee program on the same basis as it does for fuel excise taxes. If CARB's staff create a new and non-conforming fee regime, CARB's management would irrationally throw away the opportunity for reduced administrative burdens and costs for the fee payers and the agency.

Agency Response: This comment does not take into account reporting already required by the California Energy Commission (CEC). The Petroleum Industry Information and Reporting Act (PIIRA) administered by the CEC, requires reporting of fuel imports and exports by truck, rail, marine, and pipeline, by fuel type, i.e., California reformulated gasoline, CARBOB, CARB diesel (PIIRA Form 700), and refinery production and shipment of these same fuel types (PIIRA Form 810).

Further, BOE's current tax collection system does not apply to tax exempt fuels, the most significant being off road, "red-dye" diesel. Off road equipment in the state consumes approximately one billion gallons of diesel per year, and produces approximately 10 $MMTCO_2$ per year. ARB does not intend to exempt any uses of gasoline and diesel from this Fee.

To collect this fee, modifications to the BOE's current tax collection system would be necessary. While the magnitude of this task is not known, it would certainly increase the administrative burden of implementing the fee. Additionally, based on experience with BOE on other ARB programs, a significant administrative fee would be charged by BOE. For example, BOE collects fees for the California Tire Recycling Management Fund. AB 923 (Firebaugh) raised the level of the fee and allowed for an administrative fee of up to 3%. The estimated fee in the first year of the program for gasoline and diesel is approximately $28 million. If an administrative charge of 3 percent were added, the additional cost for BOE to administer the fee would be as much as $840,000, significantly increasing the cost to the fee payer and agency.

17.14 Comment: Finally, the development of fee program that is different from the current excise tax system imposed upon the exact same products will naturally require an analysis of why there is a difference and what the difference is in terms of collections. The Board's process is the benchmark for any such comparison thereby driving ongoing analysis by CARB's staff of the differences in volumes and collections in comparison to the Board's published data. Clearly, CARB, in an effort to efficiently administer a fee collection program on gasoline and diesel fuel could avoid such diversions through the adoption of a parallel fee regime.

Agency Response: Responses to Comments 45.1 through 45.6 WSPA, Comment 17.3 WSPA, and Comment 17.8, WSPA have explained why the BOE's tax collection system will not work for the purpose of this fee. Also see responses to Comment 17.1 WSPA and Comment BHS-O2.1 WSPA.

17.15 Comment: CARB Must Identify the Reasonable, Direct Program Costs to be Recovered by the Fee
In its first workshop presentation on the proposed administrative fee regulation, CARB indicated that the AB 32 "revenue requirement" (i.e., the amount of state costs that the fee is intended to recoup) will be determined from "AB 32 expenditures **budgeted** for Fiscal Year for all State agencies based on approved State budget." In WSPA's view, this top-down budget approach is an inadequate and inappropriate methodology for determining the revenue needs for the fee program. CARB must instead identify the direct costs incurred in administering the reporting and emission reduction and compliance programs established by AB 32.

Agency Response: See response to Comment 60.3 SCPPA.

17.16 Comment: In the Staff Report, CARB asserts that its staff have "reviewed the person years and other expenditures" to confirm that funds "loaned" to ARB were spent on AB 32 related activities. However, the Staff Report does not include information to support the assertion that the costs incurred were AB 32 related.

Agency Response: ARB disagrees with this comment. Information pertaining to person years (PYs) and expenditures was included in the ISOR and subsequent documents released specific to AB 32 implementation. ARB also provided additional documentation in its first 15-day Notice of Modifications related specifically to AB 32.

17.17 Comment: Despite repeated requests for AB 32 implementation cost information, no substantial information or documentation has been provided by CARB. Following are examples of the many unanswered questions regarding CARB's AB 32 costs:

- How are activities of CARB and other state agencies determined to be AB 32 related?

Agency Response: As described in the ISOR report, (beginning on page 33, and continuing on page 125) activities must meet specific criteria before AB 32 program activities can be paid for under this fee. ARB reviewed each activity to be covered under the fee and compared the activity with the eligibility requirements included in the

ISOR:

- Staff related expenditures for the start-up and ongoing implementation of the AB 32 program that have been approved through budget change proposals (BCPs) after AB 32 was signed into law (September 2006).
- Other post AB 32 BCPs approved costs directly related to the administration of AB 32 programs to reduce greenhouse gas emissions, such as contracts, administrative overhead, and research directly related to the implementation of the AB 32 program.

For the 2009/2010 fiscal year and future fiscal years, ARB proposes that the following types of activities *not* be funded through AB 32 fees:

- Redirected staff positions working on AB 32 that were not approved in the formal budget process with an approved BCP;
- Costs incurred by non-state agencies such as air quality/pollution districts, other special districts, etc;
- Activities which are currently funding a part of an agency's principal responsibilities (water conservation, waste reduction, traffic planning, etc.) that achieve greenhouse gas emission reductions as a co-benefit;
- Specific greenhouse gas emission mitigation activities that started prior to the passage of AB 32 or were covered by earlier budget requests;
- Activities related to adaptation to climate change, including adaptation-related research;
- Activities related to compliance with the California Environmental Quality Act (CEQA) requirements for state agencies related to climate change/greenhouse gas emissions; and,
- Compliance with existing and future programs, regulations or other initiatives for state agencies which reduce their own greenhouse gas emissions.

The approach for determining which activities can be funded through this fee has not changed since the ISOR May 8, 2009 release.

17.18 Comment:

- Is any effort made to identify costs that are related to "sources of greenhouse gas emissions regulated" under AB 32? If so, how?

Agency Response: No. This option was evaluated as an alternative to the regulation (see ISOR page 37) and was determined to be infeasible.

17.19 Comment:

- Do the identified agency costs include the costs of any agency activities that are not related to the proposed affected entities (i.e., emissions from combustion of the fuels or refinery and cement plant process emissions)?

Agency Response: ARB and other state agencies implementing AB 32 are implementing activities described in ARB's Climate Change Scoping Plan (Dec. 2008) to meet the required greenhouse gas emission reduction goals. These activities address all sources of greenhouse gases in the state. The fee will be assessed on approximately 85 percent of the greenhouse gas emission sources due to practicality and challenges with assessing the fee on 100 percent of the emission sources. Also see response to Comment 62.2.2 Pills.

17.20 Comment:

- How do CARB and other agencies assure that their AB 32-related costs are "reasonable?"

Agency Response: ARB and other state agency budgets are subject to review and approval by the Legislature and Governor each year. Also see response to Comment 43.3 IEP and Comment 17.17 WSPA.

17.21 Comment: There is ample precedent for a cost-based approach. For example, air pollution control and air quality management districts carefully identify and calculate stationary source-related program costs in the process of identifying the district costs to be recovered through stationary source permit fees.

Due to the scope of AB 32, and of California's climate change activities generally, the budget-based approach proposed by CARB could easily result in CARB's imposition of fees to recover the costs of agency activities that are not directly related to "the sources of greenhouse gas emissions" regulated under AB 32.

In addition to CARB's anticipated future costs, the draft administrative fee regulation would include in the administrative fee an amount intended to provide funds for repayment of AB 32 program startup loans made to CARB and CalEPA from the Motor Vehicle Account, the Air Pollution Control Fund, and other state accounts. These loans are estimated by CARB to total approximately $57 million, and their repayment is proposed to occur over three years.

A regulation allowing collection of funds in excess of current program needs, such as the proposal to collect fees for past agency activities that were otherwise funded, raises serious concerns that the charge is in reality a tax rather than a fee. Apportionment of the costs of the regulation in a manner unrelated to the burden of the regulation also makes the charge more like a tax.

Agency Response: See responses to Comment 17.17 WSPA, Comment 38.2 NCPA, and Comment 62.2.2 Pills.

17.22 Comment: When some regulated parties are asked to pay for regulation of others who are not subject to the charge (as is the case here), the charge becomes a pure revenue measure rather than a means of paying for a self-contained regulatory program. Where the charge is apportioned on the ability to pay, ease of collection, or likelihood of compliance, its purpose is to raise revenue rather than regulate.

Agency Response: The commenter is incorrect. The fee is apportioned based on each source's contribution to greenhouse gas emissions.

17.23 Comment: The regulated entity is not paying for the burden it creates or the cost of regulating its own activities. Instead, it is serving a more general governmental purpose of subsidizing a program for the general welfare. In short, the regulated entity is paying a tax.

Agency Response: See response to Comment 38.2 NCPA and Comment 62.2.2 Pills.

17.24 Comment: WSPA's position is that if for any year CARB sets the AB 32 administrative fee at a level to repay the purported "loan" from the Motor Vehicle Account or to replenish previous Air Pollution Control Fund monies, this charge is a tax, not a fee.

Agency Response: ARB disagrees with this comment. Loan repayment is statutorily required and collected revenue is for a specific program only, therefore, it is not considered a tax, but a fee. See also Pennell v. City of San Jose (1986) 42 Cal. 3d 365, 375 fn. 10 and accompanying text.

17.25 Comment: Similarly, any program fee request for the current fiscal year that is not imposed on all who are subject to the Scoping Plan violates AB 32 mandates, is under-inclusive and is an improper tax, not a fee.

Agency Response: See response to Comment 38.2 NCPA and Comment 62.2.2 Pills.

The regulation covers approximately 85 percent of all greenhouse gas emissions in California. The remaining 15 percent of emissions are not subject to this fee because of the challenges with collecting fees from sectors, such as agriculture, and also ARB is considering development of a regulation for a statewide fee applied to high global warming potential (GWP) gases. Finally, the administrative burden of pursuing the small remaining percentage of emitters, for practical purposes, is infeasible.

17.26 Comment: **<u>AB 32 Fees Must be Transparent to Emitters</u>**
CARB's approach to the AB 32 Administrative Fee Regulation would impose the administrative fee in a manner that in many cases is far upstream of the actual point of GHG emissions. If the fee payer then simply includes the fee as part of the cost of fuel sold to those downstream in the supply chain, the administrative costs of AB 32 implementation will never be clear to the ultimate GHG emitter – the source or individual that actually combusts the fuel and thereby releases CO2 to the atmosphere.

This is in direct contrast to most, if not all, other environmental fee programs, under which the fee is imposed directly on the actual emitter/discharger, who can then see directly the costs for which it is responsible. If CARB is assuming that administrative fee costs imposed upstream on fuel manufacturers and importers will be passed on to the ultimate fuel user in a way that clearly identifies the administrative fee component of the fuel price to the consumer, we would appreciate an explanation as to how such a process would work.

WSPA believes that all AB 32 fees and charges should be transparent to the ultimate fee payer (i.e., the entity responsible for release of the GHG emissions which were subject to the fee). This transparency is needed to help assure accountability and to send clear price signals to the regulated community. A fuel-based fee imposed far upstream of the ultimate consumer cannot be transparent and so is the wrong approach to take in this regulation.

Agency Response: The commenter states that the fee should be transparent to the party that emits the GHG emissions (not just to the fee payer) and that this transparency is needed to help assure accountability and send clear price signals to the regulated community. ARB has designed the fee regulation to be transparent to the fee payers through invoicing. In addition, the Staff Report discusses at length how the fee is calculated. With regard to the consumer that ultimately uses the fuel, the fee is not intended to modify behavior through price signals. It is therefore not essential that the end users of the fuels (emitters) are provided this same level of transparency, and in any event the amount of the fee is too small to significantly impact behavior (see the response to Comment 17.1 WSPA). In addition, the “ultimate fuel user” includes the millions of California residents who operate small combustion sources such as lawn mowers, water heaters, stoves, chainsaws and other similar appliances. It is not possible to provide the requested level of transparency to so many individuals and it is not required by AB 32.

17.27 Comment: Inconsistent Handling of Renewables As specified in the proposed regulation, the AB 32 fee would apply to oxygenate but not to biodiesel and renewable diesel. WSPA has consistently advocated that all fuels should be treated equally.

For this reason, we believe that biodiesel and renewable diesel should be subject to the fees, along with ethanol. All fuels, including renewable fuels, should be subject to fees based on the carbon intensity of the fuel, excluding those portions of the carbon intensity already covered by portions of the cap and trade program. For example, for California produced gasoline, the carbon intensity includes carbon from the well production, refining process, transportation, and the actual carbon content of the fuel.

Since all but the actual carbon content of the fuel would already be accounted in portions of the cap and trade program, only the carbon content of the fuel should be subject to the fee. Similarly, for California produced biofuel, since the refining, transportation process and carbon content of the biofuel are already accounted for elsewhere in the cap and trade program, consistent with the LCFS carbon intensity, only the indirect land use portion of the carbon intensity should be subject to the fee.

Agency Response: While it is correct that the volume of ethanol would be included in determining the volume of California gasoline subject to the fee, it is not correct to make the statement that the fee applies to all ethanol.

To be certified as California gasoline, the fuel in question must meet certain specifications. However, California gasoline is not required to contain ethanol or any other oxygenate. In order to equitably apply the fee, staff determined that the volume of fuel used to calculate the fee should be that of finished California gasoline - some of which contains ethanol and some of which may not. It is this total finished volume of gasoline to which the fee will apply.

Further, California gasoline can not contain more than ten percent ethanol. However, motor vehicle fuel containing gasoline and as much as eighty five percent ethanol is sold in the State. The fee does not apply to fuels containing more than ten percent ethanol.

Conversely, the commenter states that the fee does not apply to biodiesel. This also is incorrect. Unlike California gasoline, the definition of California diesel is not dependent on the amount of biofuel it contains. If biofuel is blended into California diesel at the point of regulation of the fee, the refinery in this case, the biofuel adds to the total volume of California diesel. The fee will apply to the total volume of California diesel.

Finally, the commenter provides a discussion of how the fee should apply relative to the portion of the carbon content under the cap-and-trade program. This fee regulation does not, and is not intended to, address the cap and trade regulation. Fees collection under this regulation is independent of how fuels, including biofuels, are regulated under the Low Carbon Fuel Standard or how they may be regulated under the greenhouse gas cap-and-trade regulation. Therefore this discussion is not relevant.

17.28 Comment: Revise Fuel Gas Definition and Reporting Tool Upgrade for Fee Reporting

Under CARB's GHG Mandatory Reporting Rule, refinery GHG emissions are determined from (among other things) the total quantity of gas (refinery fuel gas) coming out of a refinery's blend drum(s). However, natural gas is frequently added to a refinery's fuel gas system, and is mixed in through the blend drums to assure a consistent fuel supply to refinery combustion devices.

Propane is a common constituent of refinery process gases, and may also be added to a refinery's fuel gas system, yet is exempt from the fee. To account for these issues, CARB should revise the definition of refinery fuel gas to specifically exclude propane, and should also amend the mandatory reporting rule and/or the reporting tool to assure that refineries have the ability to eliminate propane and natural gas from the total refinery fuel gas combusted.

Agency Response: To avoid double charging on the quantity of natural gas added to refinery gas, refinery operators will have the ability to report emissions from refinery gas less the portion that is natural gas. Section 95204(f)(4) of the Fee regulation provides this ability for reporters to subtract he amount of natural gas from refinery gas. However, if propane is added to refinery gas, it becomes a constituent of the total volume of this fuel, and subject to the fee. This is consistent with how the fee is applied to both gasoline and diesel fuel constituents, such as ethanol - also an exempt fuel.

Additionally, the commenter requests that the definition of refinery gas be changed to exclude propane. Since our intention is to apply the fee to the entire volume of refinery gas, changing the definition to exclude propane is unnecessary.

17.29 Comment: Agency Costs for Defense of the Fee Regulation CARB has included in the scope of “Total Required Revenue” “any amounts required to be expended by ARB in defense of this article in court.” §95203(a)(3). WSPA believes it is both inappropriate and unlawful for CARB to include in a fee the costs of the agency’s defense of that fee, particularly since this provision, as written, apparently would allow CARB to recover litigation costs through the fee even if some or all of the fee regulation was rejected by a court. The statutes and court rules governing litigation provide ample opportunity for CARB to seek to recover its costs, and in some cases, attorneys’ fees, if it prevails on a challenge to the fee regulation. This provision should be removed from the proposed rule.

Agency Response: See response to Comment 31.5 MID.

17.30 Comment: Other Agency GHG Emission Fees
CARB should specify that once the AB 32 fee is in effect, it supersedes any GHG emission fees of other agencies for duplicative work (such as inventories, regulatory development, etc.). To the extent that CARB requests assistance from air districts or other agencies on AB 32 implementation, the costs of that assistance should be reimbursed by CARB and included in the AB 32 fee.

Agency Response: ARB cannot dictate to other state or local agencies what mechanism they may pursue to fund their programs. ARB is committed to work collaboratively with other agencies to minimize duplicative work efforts. ARB has also committed to work with local agencies in a collaborative manner. The Fee applies to only to state agencies’ AB 32 implementation programs.

17.31 Comment: Petroleum Coke As with transportation fuels, much of the petroleum coke produced in California is exported to other states or countries. As proposed, the AB 32 fee appears to apply to all petroleum coke produced in the state. The fee should be clarified to apply only to petroleum coke that will be consumed in California.

Agency Response: The regulation has been modified so that the fee only applies to petroleum coke combusted in California and so that the point of regulation is the end-user rather than the refinery.

17.32 Comment: Catalyst Coke To avoid double counting, specific information on a refinery's combustion of catalyst coke should be submitted via the reporting tool only to the extent that combustion of catalyst coke was not included in a refinery's total reported emissions.

Agency Response: Since emissions from the combustion of catalyst coke are currently reported in the mandatory reporting tool under various processes, they can not be accurately disaggregated from a facility's total emissions for purposes of the fee regulation. While it will be necessary for a refinery to enter specific, aggregated information regarding catalyst coke combustion emissions, this data can only be entered as "supplemental" data in the mandatory reporting tool. Supplemental data is not included in a facility's total emission, thereby eliminating any potential for double counting.

17.33 Comment: Enforcement The enforcement provisions must be consistent with those in the emissions reporting rule, without creating a second potential penalty for a single violation. As this is a state-level fee, enforcement authority may not be delegated to air districts or other agencies.

Agency Response: The enforcement provisions, as written, are consistent with the provisions of ARB's Mandatory Reporting Regulation and will not create a second potential penalty for the same act. The responsibility to enforce the fee regulation rests with ARB, but it is appropriate for ARB to be assisted in its enforcement activities by employees of the local air pollution control and air quality management districts. For example, district employees are familiar with the stationary sources located within their districts and may assist ARB staff in auditing these sources or discovering violations.

<u>Comment 22: A&K, June 16, 2009</u>

22.1 Comment: The revised regulations continue to make the interstate pipeline the point of regulation for natural gas end-users receiving deliveries of gas supplies directly by an interstate pipeline. While this upstream approach may seem to promote administrative efficiency and be consistent with the manner in which the administrative fee is being imposed on utilities on behalf of their end-users, this structure will:

- Not fulfill AB 32 objectives if, marketers cannot pass-through their incremental costs to end-users,
- May be challenged as a state-imposed fee on FERC-jurisdictional services or facilities, and
- Lead to differential impact on marketers depending on the customers they serve.

Importantly, application of the fee directly on end-users served with natural gas supplies delivered by interstate pipelines will not significantly increase the administrative burden of this regulation. As a result, to ensure that the administrative fee structure is supportable under state law, is charged to end-users responsible for combustion of natural gas, and treats marketers of all gas supplies in the same manner, CARB should impose the fee directly on the end-users who receive natural gas deliveries directly from interstate supplies.

Agency Response: The regulation has been modified so that interstate pipelines are no longer fee paying entities.

22.2 Comment: Imposing the Administrative Fee on Interstate Pipelines Will Not Fulfill AB 32 Directives Where Natural Gas Marketers Cannot Pass Through Their Incremental Costs

AB 32 only provides CARB with the authority to impose an administrative fee on sources of greenhouse gas emissions:

> *38597. The state board may adopt by regulation, after a public workshop, a schedule of fees to be paid <u>by the sources of greenhouse gas emissions</u> regulated pursuant to this division, consistent with Section 57001. The revenues collected pursuant to this section, shall be deposited into the Air Pollution Control Fund and are available upon appropriation, by the Legislature, for purposes of carrying out this division.*[2]

While this language does not require CARB to impose an administrative fee directly on those entities that are the sources of GHG emissions, it does suggest that end-users must, at a minimum, be the entities that ultimately bear the fee. CARB has chosen an upstream approach to collect the fee from end-users. While this is an administratively efficient and effective way to recover the fees from end users served by natural gas utilities, it does not work for deliveries of natural gas by interstate natural gas pipelines.

<u>Footnote:</u>
[2] Ca. Health & Safety Code § 38597 (emphasis added).

Agency Response: The regulation has been modified so that interstate pipelines are no longer fee paying entities.

22.3 Comment: First, the FERC-jurisdictional interstate natural gas pipeline must file for a rate increase at FERC and such rate increase would be subject to requirements of the Natural Gas Act including administrative review and protests and challenges on jurisdictional grounds. This could result in a very lengthy proceeding at FERC and potential judicial review. If the inclusion of the AB 32 administrative fee to the transportation tariff is not approved by FERC, the pipeline will not be able to charge the fee.

Second, if the interstate pipeline is able to incorporate the fee in its rate schedules, the fee will be effective on a prospective basis. The pipeline would seek to collect the fee from the shipper/marketer and the interstate pipeline would then need to submit these revenues to the California Air Pollution Control Fund.

Third, the shipper or marketer may be forced to bear a portion of this responsibility if II is unable to pass all costs through to the end-users it serves. Based on the explicit language of AB 32, it would be inappropriate for marketers to absorb these incremental costs.

Pass-through of the administrative fee by a marketer under these circumstances is complicated and not assured. The marketer *may* be selling natural gas to the end user pursuant to an existing long-term contract that does not provide for the recovery of these new costs. Typically these contracts specify a sales price, including a commodity market index price that *may* not include the opportunity to incorporate these AB 32 administrative charges. If the sales price is based on a market index price, the index price will likely not reflect the full value of the administrative fee and the marketer would not be able to recover its incremental costs from its end use customer. The fact that the additional cost is a "fee", and not a "tax", also creates uncertainty as to which party should bear the cost under the terms of the contract. Additionally, it is not clear that future contracts can be structured in a manner that ensures full recovery of these costs. In short, pass through would not be assured and would require an undue disruption in contracts between marketers and their customers, and would add regulatory uncertainty to the market.

In sum, even if the AB 32 administrative fee can be imposed on interstate natural gas pipelines, there is no guarantee that end-users served by those interstate pipelines will bear the fee. To ensure that the point of regulation for these natural gas supplies comports with the language and intent of AB 32, CARB must move the point of regulation so that it lies directly with end-users.

Agency Response: The regulation has been modified so that interstate pipelines are no longer fee paying entities.

22.4 Comment: Application of the Administrative Fee to Interstate Pipelines Can Result in Differential Impact on Marketers Depending on Customers Served

If CARB imposes the administrative fee on interstate pipelines, it could lead to a differential impact on marketers. Under the regulations, where a marketer of out of-state gas sells gas to a utility or a utility end-use customer, the utility would pay the fee and pass it through to its end-use customers in transportation fees; this structure is consistent with AB 32 and such a marketer would not bear administrative fee obligations and need not be concerned about passing these costs through to end-users. In contrast, CARB proposes that interstate pipelines bear the fees for gas supplies used to serve end-users directly and not served by a utility. In this case, the interstate pipeline will attempt to collect the fees from the party transporting gas on its system: the transporting marketer, *not* the end-use customer. If a marketer is then unable to pass through the incremental costs associated with the administrative fee, it would be differentially impacted when compared with marketers delivering to utility customers.

Agency Response: The regulation has been modified so that interstate pipelines are no longer fee paying entities.

22.5 Comment: Application of the Fee Directly on End-Users Served by interstate Pipelines Will Not Significantly Increase Administrative Burden of the Regulation

CARB has generally chosen an upstream approach to promote administrative efficiency, but the burden of imposing the administrative fee directly on end-users supplied by the Interstate pipelines is minimal. There are only a select few end use customers that connect directly to an interstate pipeline. In fact, only 20-30 customers fall into this category. CARB could obtain a list of these customers from the interstate pipelines and receive monthly sales/purchase data from the end-user for volumes used for invoice billing purposes. All other end use customers or municipalities receive natural gas through deliveries made by intrastate pipelines, and the AS 32 administrative fee can be included *via* in-state transportation or distribution surcharges. Given the material drawbacks of imposing the fee on interstate pipelines, there is justification to deviate from the upstream approach for this select group of end-users.

Agency Response: The regulation has been modified so that interstate pipelines are no longer fee paying entities.

22.6 Comment: IP recommends that the following change be made to the revised regulations:

95201. Applicability

(a) This article applies to the following entities. The terms used below are defined in Section 95202.

(1) Natural Gas Utilities, Users, and Pipeline Owners and Operators.

(A) All public utility gas corporations

(B)Any~~ll~~ ~~owners or operators of interstate and intrastate pipelines~~ owner/operator or entity purchasing or consuming natural gas in California that has been transported directly by any interstate pipeline and not otherwise included in subpart (A) ~~that distribute natural gas directly to end users~~. Fees shall be paid for each therm of natural gas directly distributed to end users by interstate or intrastate pipelines.

Agency Response: While the exact language suggested by the commenter was not used, the regulation has been modified so that interstate pipelines are no longer fee paying entities.

Comment 24: CPUC, June 23, 2009

24.1 Comment: Natural Gas Utilities, Users, and Pipeline Owners and Operators Energy Division understands from ARB staff that the proposed regulations of May 8, 2009 will be revised to eliminate the requirement that a portion of the AB 32 administrative costs be collected from interstate pipeline companies regulated by the Federal Energy Regulatory Commission (FERC).

Instead, responsibility for this share of the costs will be placed the on those California end users served directly by the interstate pipelines. With regard to crafting these revisions, ARB should be aware that a FERC regulated interstate pipeline company could directly deliver natural gas to a publicly-owned utility (e.g., the City of Susanville), and these cases may need to be explicitly accounted for in the applicability of the regulation.

Regarding the recovery of the fee costs, Energy Division believes that the CPUC can easily accommodate the gas utilities ' need to recover the costs of the fee from ratepayers.

Agency Response: The regulation now includes natural gas publicly-owned utilities as an entity to which the fee applies under the applicability section of the regulation. Staff has worked with CPUC to ensure that gas utilities will be able to recover the cost of the fee and appreciate the input on the part of the Commission.

24.2 Comment: Retail Providers and Marketers of Imported Electricity
ARB staff proposes in the ISOR that any retail provider or marketer that is "the purchasing/selling entity at the first point of delivery in California of imported electricity" be subject to the fee regulation. This characterization of the entity obligated to pay the fee is consistent with the proposed point of regulation for a cap-and-trade program recommended in the joint decision issued by the CPUC and the Energy Commission. Marketers and retail providers that import electricity on transmission paths that cross the California border will need to incorporate the cost of the carbon fee into the power they se ll. We do not fore see any impediment to retail providers' or marketers ' ability to pass the costs of the fee downstream to subsequent purchasers or end users of imported electricity. To the extent the fee results in additional costs to investor-owned utilities, the CPUC will be able to allow them to recover the costs via appropriate regulatory proceedings. Thus, we are supportive of the approach to imported electricity as proposed.

Agency Response: ARB is pleased the CPUC agrees.

<u>Comment 27: KernRiv, June 23, 2009</u>

27.1 Comment: The plain language of the statute does not support the initial draft of the fee Regulations.

The Global Warming Solutions Act, AB 32, explicitly provides for the establishment of "a schedule of fees to be paid *by the sources of greenhouse gas emissions*" (emphasis supplied) by the Board.[2] Interstate natural gas transportation companies are not significant emissions "sources" within the meaning of AB 32. In balancing the need to impose the fees upstream whenever possible to minimize the number of entities subject to the fee and reduce the complexity and the administrative burden of the regulation, the Board should be mindful that placing the costs associated with implementing California's emissions-reduction program retroactively and too far upstream from the source, as is the case for interstate natural gas pipelines, defeats the basic purpose of the legislative mandate. In the case of interstate pipelines, however, plain language is not the only objection: the imposition of the state program fees on interstate pipelines is complicated further by the factors discussed herein.

<u>Footnote:</u>

[2] Moreover, the legislation requires that the source be "significant," in the Board's estimation, in order "to enable [it] to effectively reduce greenhouse gas emission and monitor compliance" with California's stringent emissions reduction goals. The requirement that "sources" pay the "fees" is an issue of fairness: those who cause significant emissions should support the programs to curb them.

Agency Response: See response to Comment 53.1 SCPPA. Also note that the regulation has been modified so the interstate pipeline is no longer a point of regulation for the fee.

27.2 Comment: The construct of Kern River's contracts do not ensure Kern River any reasonable opportunity to recover the fee from AB 32-defined end-users.

All of Kern River's contracts are *regulated* transportation-only service contracts governed exclusively by the rules and regulations of the FERC. Kern River provides a "transport service," meaning that Kern River does not own or sell the natural gas that flows through the pipeline. "Shippers" on Kern River's system (not Kern River) generally hold contracts with end-users for the commodity. Kern River has no contracts for natural gas supply service: Kern River's shippers may or may not be an end-user of natural gas. Often Kern River's shippers are more likely to be a marketer or supplier. Accordingly, Kern River's regulated transportation contracts generally do not even reach to the end-user upon whom CARB's AB 32 fee must be placed. With no contract to link Kern River to the end-user, there is no contract upon which to place the fee once assessed. As the next section discusses, because the contracts are heavily regulated and Kern River's rates may only recover for costs associated with *transportation service*, it is likely that recovery of AB 32 program fees would be significantly challenged by shippers if Kern River sought to recover the same in rates.

Agency Response: The regulation has been modified so the interstate pipeline is no longer a point of regulation for the fee.

27.3 Comment: Federal regulatory mechanisms currently do not permit Kern River to recover the fee from shippers and/or end-users, and it is questionable whether recover would ever be allowed.
As a federally-regulated pipeline, Kern River may collect CARB-related fees only following special tariff and rate approval from FERC. No such mechanism (for a current or retroactive exaction of fees) exists in Kern River's federal tariff. Kern River transports natural gas in interstate commerce for its customers; it does not own it. Kern River is a transportation service provider. Therefore, the policy concept that CARB staff pursued (e.g. that the fee would be "passed through" by increasing the price for either natural gas or interstate transportation service) is not necessarily advanced even in the best of circumstances. Kern River's pipeline transportation rates are subject to the exclusive jurisdiction of federal rate regulation, requiring the consent of FERC to recover any new regulatory cost. Kern River's regulated contracts with its shippers require the consent of FERC for any term or condition that differs from tariff requirements or deviates from its *pro forma* service agreement. While the Initial Staff Report concept of upstream regulation contemplates that AB 32 program fees will reach end-users immediately and on a constant basis, interstate pipeline rate proceedings at FERC occur only on a periodic basis. Thus, even if a rate tracking mechanism were proposed to and approved by FERC,[3] there would likely be long periods during which Kern River would be forced to bear and pay all or a substantial portion of the AB 32 program fees: those costs would not be borne by emitters of greenhouse gases, reflected in the price of natural gas or recovered in the price of interstate natural gas transportation.

Because of these inherent difficulties and intense federal regulation, imposing AB 32 program fees on federally-regulated interstate pipelines is unlikely to ensure either the emitter-level responsibility or the stability or ease of revenue collection that CARB seeks.[4] Federally regulated interstate pipelines subject to collecting the fee cannot collect the fee from customers (who are not necessarily end-users) without federal approval. Kern River's ability to obtain such approval would be unlikely and untimely at best.

<u>Footnotes:</u>
[3] (1) There is no known FERC-approved tracking mechanism in use for state-level emissions program fees and (2) no tracking mechanism approved for Kern River is automatic but rather requires regulatory filings to institute a change in the cost recovery level, permitting comment, hearing and investigation.

[4] In addition, as in any regulatory environment, Kern River may not be authorized to recover the full fee. Pipeline rate proceedings typically are heavily contested. Kern River's rate structure may not readily permit the inclusion of additional fees and costs at this time.

Agency Response: After staff communicated with the Federal Energy Regulatory Commission (FERC), it became apparent that it may not be possible for Kern River or other interstate pipelines that have similar rate structures to pass the fee to customers. Even if it is possible, a multi-year, administratively and economically burdensome process would be necessary to change the entities rate structure. Therefore, the regulation no longer includes interstate pipelines as a fee payer.

27.4 Comment: Attaching the fee to Kern River is an impermissible intrusion into and burden upon interstate commerce.

Kern River appreciates the difficulty placed upon the CARB and its staff with the challenges of AB 32's enormous and ambitious public health initiative. During this process, Kern River has worked hard to understand both the complexity and the administrative burden placed upon CARB in promulgating the fee implementation regulations. However, the identification of interstate natural gas pipelines as a fee collection entity, as Kern River explained to CARB staff, creates many more problems than it solves. In May, Kern River approached its review of the Initial Report with the general premise that California and CARB may have a legitimate basis, given the enabling legislation, for the fee regulation. Where California's public health laws, rules and regulations – a function of its police powers – do not unduly interfere with interstate commerce,[5] such may be valid so long as state laws, rules and regulations do not also conflict with federal regulations on the subject.[6] Where Congress has demonstrated its intent to regulate an entire field – action known as federal preemption–, then California's laws, rules and regulations that purport to regulate that field (in whole or in part) are in jeopardy.

Footnotes:

[5] Commerce begins with the physical transport of the good and ends when the good reaches its destination. The continuum of passage from one state to another state is a transaction of and in interstate commerce.

[6] By asserting that such laws must not unduly interfere, we mean such laws may interfere, *but no more than is necessary in the proper exercise of California's police power.* The original draft of staff's proposed regulations unduly interfered with the federal regulatory, as set forth herein.

Agency Response: The regulation has been modified so the interstate pipeline is no longer the point of regulation.

27.5 Comment: Kern River Supports CARB Staff's Proposed Revisions to the Initial Staff Report and Proposed Regulations

Kern River worked diligently with CARB staff to address the problems posed by interstate pipelines as a collection point for the fee, and worked out a resolution whereby Kern River would continue to assist (as requested initially and thereafter periodically by CARB staff) to verify end-users (as defined by AB 32 and CARB's regulations) within the state of California, to the extent it has such information. The changes to the proposed regulations, as agreed to in principle and substance by CARB staff, are set forth in Exhibit A.

Agency Response: No response needed.

Comment 30: MWD, June 24, 2009

Note: The Metropolitan Water District incorporated into its comment by reference the comments made by SCPPA on April 24, 2009, in response to a staff workshop. These comments of SCPPA were made before staff had published the original proposed regulation and ISOR, and were not submitted by SCPPA as comments in the 45-day comment period for the published regulation. Thus the SCPPA April 24 comments refer to early staff concepts for the regulations.

30.1 Comment: Applicability of the Proposed Fee Regulation to Imported Electricity from Hydroelectric Facilities

"In its April 24th Comments, Metropolitan expressed its concern over treatment of imported electricity from large hydroelectric facilities. Specifically, Metropolitan commented that Section 95201(a)(5) and 95203(g) (the latter of which is now renumbered and hereafter referenced as 95203(i)) did not acknowledge that fees would be calculated only on imported electricity that emitted greenhouse gases (GHG). While the Report acknowledges this concern in the ISOR portion of the Report (see at 51) and provides some additional detail in an expanded section 95203 (see specifically Report at 80-84), it appears to have omitted this clarification in section 95201(a) (see Report at 66) and thus, Metropolitan requests the following amendment to this section:

(5) Retail Providers and Marketers of Imported Electricity.
Any retail provider or marketer that is the purchasing/selling entity at the first point of delivery in California of imported electricity. Fees shall be paid for each megawatt-hour of imported greenhouse gas-emitting electricity, as detailed in section 95203(j) herein.

(Report at 66 (proposed amendments double underlined)). As noted in the April 24th Comments, in my conversation with Mr. Jon Costantino on April 24, he confirmed that imported electricity from hydroelectric facilities has a zero Emission Factor and therefore would not be assigned a portion of the administration fees.

For these reasons, Metropolitan requests the ARB review the areas of its proposed regulation regarding imported electricity and insert clarifications where necessary, but at least in section 95201(a)(5), that imported electricity from non-emitting facilities are excluded from the costs assigned by California governmental agencies to implement AB 32.

Agency Response: This comment was made before staff had proposed modifications to the regulation that were approved by the Board. See response to Comment 48.1 CBEA. As modified, section 95201(a)(4) details applicability of the fee to electricity generated from fossil fuel combustion, replacing previous section 95201(a)(5). The modification results in the exclusion of hydropower from the fee.

30.2 Comment: Potential Duplicative and/or Conflicting Regulations.

"Furthermore, as set forth in the April 24th Comments, while Metropolitan is aware of prior legal analysis on the issue of the deliverer point of regulation, Metropolitan remains concerned that imposition of an administrative fee on out-of-state imports may adversely interfere with interstate commerce, conflict with federal law, and result in unfair and unreasonable duplicative charges. Although ARB admits it lacks authority to regulate out-of-state, upstream generation (see, e.g., Report at 20 ("California cannot apply the Fee to upstream suppliers of fuel to out of state generation facilities (as ARB proposes to do with in-state facilities)"), it appear to proceed with imposing a fee on out-of-state imports that appears to constrain interstate trade. For example, an out-of-state generator would be constrained by ARB's fees to import to California versus another neighboring state without similar fees. The Report does not appear to address the issue of potential impacts on interstate commerce, as set forth in Metropolitan April 24th Comments as well as those of other commenters, including the comments from the Southern California Public Power Authority, dated April 24, 2009, incorporated herein by reference. For these reasons, Metropolitan requests that ARB address this issue in its final rulemaking."

Agency Response: This comment was made before staff had proposed the modifications which were approved by the Board. The switch to a first deliverer approach is explained in our response to Comment 5.1 SCPPA. The legal issues pertaining to imported electricity raised by MWD, SCPPA and others are the subjects of our responses to Comments 5.1, 5.5, 5.13 to 5.19, 60.4, 60.5, and 60.6 SCPPA.

There is no evidence that "an out-of-state generator would be constrained by ARB's fees to import to California versus another neighboring state without similar fees." An out-of-state generator is only charged the fee if it is the first deliverer of electricity to California. In that case, the generator has no disadvantage compared with other imported electricity generated from fossil fuel combustion. We expect that any entity that delivers electricity to California will be able to pass through the fee to purchasers of the imported electricity. Our response to Comment 38.5 NCPA explains that the fee is so small compared to the price of electricity that it is unlikely to affect electricity markets.

All importers will face the same fee based on the CO2 emissions associated with the imported electricity.

30.3 Comment: As previously proposed by staff, the ARB administrative fee would apply to four fuels-- gasoline, diesel, coal, and natural gas--that are consumed in California, and the fee would apply to process emissions from refineries and cement manufacturers in California, but the fee would not apply either to electricity that is generated in California or to imported electricity. Under the April 17, 2009 draft, however, the fee would be extended to cover imported electricity, but the fee would still not apply to electricity generated in California. On its face, the administrative fee as now proposed appears to be discriminatory against imported electricity in favor of in-state electricity.

The extension of the fee to cover imported electricity but not electricity generated in California may violate the Commerce Clause of the United States Constitution. The Commerce Clause provides for federal regulation of interstate commerce. (U.S. Const., art I § 8, cl. 3.) The courts have recognized that "this affirmative grant of authority to Congress also encompasses an implicit of 'dormant' limitation on the authority of the States to enact legislation affecting interstate commerce." *Healy v. The Beer Institute* (1989) U.S. 324, 326, fn 1. If a state regulation discriminates on its face against out-of-state businesses, then it is *per se* unlawful under the Commerce Clause: "When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry." *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth*. (1986) 476 U.S. 573, 579.

The facial discrimination against imported electricity in favor electricity that is generated in California exposes imported electricity to bearing a double burden. Among the states, California is the recognized leader in adopting and implementing GHG emissions reduction legislation and regulation, and California is the leader of the Western Climate Initiative ("WCI"), which includes states and provinces that are likely to be the source of electricity that is destined for importation into California. If California were to adopt an administrative fee as designed in the April 17 draft regulation, California's WCI Partners would be likely to follow California's lead. That would result in WCI Partners imposing administrative fees on facilities that burn coal. Thus, electricity that is generated at coal-fired generation stations in, for example, Utah or New Mexico, would bear the burden of the host state's administrative fee plus the burden of the administrative fee imposed by California. Adherence to the dormant Commerce Clause ban on facial discrimination against out-of-state businesses, in this case, electricity generation, would avoid the potential for this double burden.

In order to avoid the legal complications that could arise from adopting a fee that may violate the Commerce Clause and to avoid the practical inequities that could result from adopting such a fee, SCPPA recommends that the ARB staff revise the April 17 draft to revert to the February version and eliminate the application of the administrative fee to imported electricity. If, contrary to SCPPA's recommendation, the staff elects to include imported electricity in the ultimately proposed regulation, SCPPA recommends that the staff include in the ISOR a comprehensive discussion of the legal bases for proposing an application of the administrative fee that appears on its face to violate the Commerce Clause." (

Agency Response: This comment was made before staff had released the originally proposed regulation and ISOR, and before the beginning of the 45-day comment period. Our responses to Comments 5.1, 5.5 and 5.13 to 5.15 SCPPA explain how we have modified the regulation, and why the regulation as modified does not discriminate or violate the Commerce Clause. Our responses to Comments 5.22 SCPPA and 53.8 SCPPA explain why there is no double burden.

30.4 Comment: In the section of the April 17 draft regulation that would apply the administrative fee to imported electricity, there is a provision that would apply the fee to "values reported under the Mandatory Reporting Regulations." Proposed Regulation, p. 18, §95203(e). This could lead to the fee being applied to electricity that is generated outside of California and consumed outside of California without having any contact with California whatsoever. Under §95111(b)(3)(Q) of the Mandatory Reporting Regulations, a retail provider such as the SCPPA members is required to provide the "facility name, ARB designated facility ID, generating unit ID as applicable, percentage ownership share at the facility level, ownership share of the generating unit level as applicable, and net powered generated in the report year (MWH)…."

As a result, a SCPPA member that participates in a generation facility such as the Intermountain Power Project ("IPP") in Utah is required to report its share of the power generated at IPP. If a portion of the retail provider's share of electricity that is generated at, for example, IPP during the year is sold at IPP to an out-of-state wholesale buyer, the retail provider is permitted to report the sale and have the sold megawatt hours deducted from the retail provider's share of the power generated at IPP only if the out-of-state sales to the out-of-state entities were power that could not be delivered to the retail provider due to congestion on the transmission system, or the retail provider did not need the power for reasons unrelated to reducing the retail provider's responsibility for GHG emissions. Section 95111(b)(3)(R) of the Mandatory Reporting Regulation contains the provision that limits the retail provider's reporting of wholesale sales at out-of-state facilities to out-of-state entities:

1. Wholesale sales (MWh) made by the retail provider or on behalf of the retail provider from the facility or unit to counterparties located outside California where:

i. The power could not be delivered to the reporting entity during the hours in which it was sold due to congestion in the transmission and distribution system or similar issues or;

ii. The retail provider did not need the power during the hours in which it was sold for reasons not related to reducing the retail provider's greenhouse gas emissions responsibility. Reasons may include, but are not limited to, the retail provider's own load was met by resources that were less expensive than the specified facility (excluding any value associated with greenhouse gas mitigation).

The provision restricts the reporting of out-of-state sales to out-of-state entities so that electricity that is generated at a unit like IPP would be attributed to a retail provider even though the electricity had no nexus with California whatsoever. The provision should be eliminated from the Mandatory Reporting Regulations if the administrative fee is to be applied to imported electricity on the basis of "values reported under the Mandatory Reporting Regulations." The provision unduly restricts the reporting of wholesale sales that are made outside of California to out-of-state entities so that the sales cannot be fully subtracted from a retail provider's share of electricity that is generated at an out-of-state facility such as IPP. Such and undue restriction could lead to the administrative fee being imposed on electricity that is generated and consumed entirely outside of California.

Agency Response: This comment was made before staff had released the originally proposed regulation and ISOR, and before the beginning of the 45-day comment period. Our responses to Comments 5, 53, and 60 SCPPA in their entirety explain how the regulation was modified, and that the regulation as adopted does not impose fees on electricity generated and consumed outside of California.

30.5 Comment: If the administrative fee is to be imposed on imported electricity, the draft proposed regulation should be revised so that the fee will not apply to imported electricity that is included in the mix of electricity that is sold for consumption out-of-state when a retail provider such as a SCPPA member makes a system sale of electricity to an out-of-state entity such as, for example, Portland General Electric. The Mandatory Reporting Regulations permit an importer of electricity to exclude power that is "wheeled through" California. Section 95111(b)(1)(C) provides:

"Power Wheeled Through California. When reporting power transactions involving imports into California or exports out of California, the retail provider or marketer shall exclude the amount of power imported into California that terminates in a location outside of California, as measured at the first California point of delivery.

However, electricity that is imported and then included in system supply for subsequent sale through a wholesale sale of system supply to an out-of-state entity is not power that is "wheeled through" California. Thus, it is not exempted from reporting under the Mandatory Reporting Regulations by applying Section 95111(b)(1)(C). The Mandatory Reporting Regulations should be revised to assure that administrative fees would not be assessed on imported electricity that is mixed with system supply for sale to out-of-state entities.

Agency Response: This comment was made before staff had released the originally proposed regulation and ISOR, and before the beginning of the 45-day comment period. See response to Comments 5.22 for our explanation of how the fee applies to imports and exports of electricity in general, and see our responses to Comments 5.21 and 53.2 SCPPA for discussion of wheeled power.

Comment 1: MBla, June 8, 2009

Comment: This proposal is ridiculous. It is costly to working people and tax payers alike-with negligible enviromental benifits (sic). I oppose this, and urge your agency to do the same.

Agency Response: ARB understands the concern about this regulation, especially in the current economic climate. Staff considered the Fee's economic impacts to businesses, particularly small businesses, and understands that when a fee is passed through, the end user pays. See responses to Comment 17.1 WSPA and Comment 44.4 MID.

ARB disagrees with the commenter that the environmental benefits that are being realized through the AB 32 program are negligible. Implementation of AB 32 is expected to reduce 164 million metric tons of greenhouse gas emissions each year compared to the business-as-usual scenario. In addition, substantial environmental co-benefits will be realized as well (see ARB Scoping Plan, Dec. 2008). In order to achieve the greenhouse gas reductions and numerous co-benefits included in AB 32, ARB must establish a funding mechanism to implement AB 32.

Scientists estimate the costs associated with taking no action to reduce the risks associated with climate change from loss of property (from catastrophic wildfires, floods, etc.), air quality impacts that affect the public health, loss of the state's agricultural resources, etc., would be far more costly than the collective efforts to mitigate greenhouse gas emissions at their source.

Comment 3: GSte, June 17, 2009

Note: This is one of 1200 form letters.

Comment: As a Californian concerned about global warming, I urge you to approve the proposal to make big polluters pay for the costs of implementing AB 32, the Global Warming Solutions Act. The State of California is already facing serious budgetary constraints; we cannot afford to simply add this cost, one that polluters should pay, to the state's credit card.

We know that when it comes to climate change, the most expensive thing we can do is nothing. Warming temperatures would cost the state billions annually. AB 32 is an investment in stabilizing state's future. It will put California's environment and economy on a more secure path, insulating us from the price shocks and volatility associated with fossil fuels as well as the hidden costs of climate change

Agency Response: No response needed.

<u>Comment 4: TMea, June 18, 2009</u>

Comment: The legislation needs full attention of the Assembly - at that cannot be given with the budget - and even reasonable costs of a well-balanced measure can't be expected to be carried in this economy. California is a place that deserves the steady attention to her betterment - but efforts like AB 32 can not always be implemented regardless of economic realities. It is not time for this bill.)

Agency Response: ARB and other state agencies required by California state law to implement AB 32. This regulation provides funding for implementation of AB 32.

<u>Comment 6: MTsu, June 22, 2009</u>

One of 91 form letters.

Comment: I am writing to thank you for your leadership as the California Air Resources Board (CARB) moves forward in the fight against global warming and to support the Administrative Fee regulation coming up for a vote on June 25, 2009.

A stable funding source is needed in order to continue the important work of CARB and other state agencies to implement California's global warming strategies. The proposed AB 32 administrative fee provides that funding in an equitable manner by imposing a fee on major sources of greenhouse gases in California, rather than continuing to rely on state funds.

In light of the state's already dire budget situation, adopting the fee regulation is a responsible action to provide the resources necessary to administer key strategies and regulations to curb greenhouse gas emissions from all sectors of the economy.

I strongly support adoption of the fee to ensure that CARB maintains momentum toward meeting the state's greenhouse gas reduction goals. Thank you again for your leadership and I again urge you to adopt the AB 32 administrative fee.

Agency Response: No response needed.

Comment 7: MReb, June 22, 2009

Comment: The big corporate polluters should pay for the cost of implementing AB 32!

Agency Response: No response needed.

Comment 8: RBer, June 22, 2009

Comment: I am very in favor of supporting your proposed fees. I would prefer to breath cleaner air that dirty air.

Agency Response: No response needed.

Comment 9: RBra, June 22, 2009

Comment: Nothing is more precious and completely necessary than the air we breathe. We must support all efforts to improve air quality. I urge you to support the adoption of AB 32.

Agency Response: No response needed.

Comment 10: JCor, June 22, 2009

Comment: I support clean air and strategies to reduce global warming. AB32 implementation is very important to reduce greenhouse gas emissions. I support the payment structure of charging fees from polluters to pay for implementation of AB32.

Agency Response: No response needed.

Comment 12: LFra, June 22, 2009

Comment: Because of the 2/3 requirement, California's legislature can't do much to gain sorely needed revenue. Fining polluters is one acceptable way to help solve the problem. It seems more than reasonable to me to fine polluting industries who until now have profited very well from their activities while getting off scot free as they threaten all living things, who are of course at the mercy of their pollutants. At the very least we should charge them for slowly killing us--with two excellent outcomes: The state will start to fill its coffers, and the industries will begin to think about controlling and even ending their discharge of pollutants.

Agency Response: No response needed.

Comment 13: TDgu, June 22, 2009

Comment: Yes, I support the legislation. Let the major polluters fund the peoject [sic].

Agency Response: No response needed.

<u>Comment 14: WKus, June 22, 2009</u>

Comment: Please support the Administrative Fee regulation coming up for a vote on June 25, 2009. I strongly support adoption of the fee to ensure that CARB maintains momentum toward meeting the state's greenhouse gas reduction goals.

Thank you again for your leadership and I again urge you to adopt the AB 32 administrative fee.

Agency Response: No response needed.

<u>Comment 15: MDen, June 22, 2009</u>

One of 2 form letters.

Comment: I am writing to thank you for your leadership as the California Air Resources Board (CARB) moves forward in the fight against global warming and to support the Administrative Fee regulation coming up for a vote on June 25, 2009.

A stable funding source is needed in order to continue the important work of CARB and other state agencies to implement California's global warming strategies. The proposed AB 32 administrative fee provides that funding in an equitable manner by imposing a fee on major sources of greenhouse gases in California, rather than continuing to rely on state funds.

In light of the state's already dire budget situation, adopting the fee regulation is a responsible action to provide the resources necessary to administer key strategies and regulations to curb greenhouse gas emissions from all sectors of the economy.

I strongly support adoption of the fee to ensure that CARB maintains momentum toward meeting the state's greenhouse gas reduction goals. Thank you again for your leadership and I again urge you to adopt the AB 32 administrative fee.

Agency Response: No response needed.

<u>Comment 16: SGol, June 22, 2009</u>

Comment: It is clear that during this fiscally shaky time, we cannot count on California state to fund global warming strategies. Instead we would like to see fees levied on all major sources of greenhouse gases. Homeowners should pay license fees in order to use their fireplaces, wood stoves, charcoal bar-b-ques, and fire pits. We pay for licenses to fish and hunt. Why not licenses to burn biomass? Just as industry has to operate under strict guidelines and pays for permits to burn, wood burners should do the same – operate under strict guidelines and pay to burn.

Agency Response: As part of the development of this regulation, ARB did consider alternative approaches (see pages 36-39 of the Staff Report and section I. D above). Staff believes, like several other alternatives evaluated, applying the suggestion in this comment would increase the administrative burden substantially and would therefore be less viable.

Comment 18: JLoc, June 22, 2009

Comment: If someone has to pay, why not those who gained? If not at the source, then where?

Agency Response: No response needed.

Comment 19: WWei, June 22, 2009

Comment: Polluters should pay. We need government that focuses us on responsible behavior. We need to be responsible for what we are doing to our earth habitat. Polluters and Emitters should pay for their errant ways. This will encourage us to change. The fees should be enough to encourage better behavior.

Agency Response: No response needed.

Comment 20: SHan, June 22, 2009

Comment: Please adopt--time is precious

Agency Response: No response needed.

Comment 21: KPer, June 22, 2009

Comment: Please adopt the AB 32 administrative fee! Curbing green house gasses is vital to the health of every Californian and is an important step to stopping global warming. Giving polluters a fee is the fairest option to quell green house emissions! Thanks.

Agency Response: No response needed.

Comment 23: LUng, June 23, 2009

Comment: Please support the current bill that will regulate polluters!

Agency Response: No response needed.

Comment 25: JSch, June 23, 2009

Comment: make the polluters pay

Agency Response: No response needed.

<u>Comment 26: RVin, June 23, 2009</u>

Comment: As a pediatrician and director of the pediatric asthma program for a 6-office community clinic organization caring for over 7000 children, I urge you and the California Air Resources Board to support AB 32, the Administrative Fee regulation.

This Administrative Fee regulation will have a great and positive impact on both individual health (children with asthma, for example) and on the health of our planet's ecosystem. The stable funding source it provides is vital, literally health protecting and life-saving. Opponents, I believe, are looking at this fee through a lens focused on a too-narrow view of the public and private good. We must pay, sooner or later...either now for prevention...or later and much more for trying to correct the damage to our health and environment.

I thank you for your consideration and attention to this issue and urge you to adopt the AB 32 administrative fee.

Agency Response: No response needed.

<u>Comment 28: JBian, June 23, 2009</u>

Comment: There is no argument that methane is 10 times more active as a greenhouse gas than is CO_2. What are you doing to regulate agricultural factories we call feedlots? Cows, pigs, sheep, goats, etc. when considered together, and when the methane multiplier is considered, put 100s of tons of greenhouse gas emissions into the atmosphere every day. Time for you to get to work on the farm/ranch lobbies and get them to pay for their pollution; better yet, compel them to enclose feedlots, and capture and burn methane, then capture the resulting CO_2 for use as oil field purging gas, or other uses.

License and issue permits to own horses, dogs, cats, and other mammals that emit methane and CO_2. License and issue permits to permit humans to exercise, since we burn more calories and therefore emit more CO_2 when exercising than when not. Since the more we exercise, the more we burn, charge extra fees and issue licenses to all sporting events such as soccer games, football games, track meets, baseball games, and so on, since they invite the burning of calories and emission of CO_2 purely for the sake of entertainment. Tax the admission tickets with a CARB emissions tax.

Agency Response: This comment does not directly relate to the regulation. However at this time ARB is not pursuing expanding the application of the fee directly to include livestock or to each human. The proposed fee applies to large natural gas distributors and some large users of natural gas, electricity generating facilities, refineries and other producers or importers of gasoline and diesel fuel, cement manufacturers, facilities that combust coal, and fossil fuels.

<u>Comment 33: GBro, June 23, 2009</u> (One of 65 form letters)

Comment: Thank you for all your efforts to ensure we reach the global warming reduction goals outlined in AB 32, the California Global Warming Solutions Act of 2006. I urge you to take another step forward in our fight to stop climate change by approving the proposal to make polluters pay when they emit large amounts of greenhouse gases. With California in a budget crisis we cannot depend on the state to come up with the needed cash to ensure our global warming reduction targets.

Agency Response: No response needed.

<u>Comment 29: GDel, June 24, 2009</u>

Comment: I strongly urge CARB to definitely ADOPT the Proposed AB 32 Cost of Implementation Fee Regulation and Proposed Amendment to the Regulation for the Mandatory Reporting of Greenhouse Gas Emissions.

CA has made wonderful progress retarding the growth of pollution. We need to continue this drive SO THAT WE CAN CONTINUE TO BREATH CLEAN AIR THAT DOES NOT DAMAGE OUR LUNGS AND THOSE OF OUR CHILDREN.

PLEASE ADOPT AB 32!!

Agency Response: No response needed.

<u>Comment 32: Assorted Health Orgs, June 24, 2009</u>

Comment 32: On behalf of the undersigned public health and environmental organizations, we are writing to voice our strong support for the adoption of the AB 32 Administrative Fee regulation at the June 25, 2009 meeting of the California Air Resources Board (CARB). Our organizations believe that the adoption of the Administrative Fee regulation is urgently needed to provide a stable and continuous source of funding for the range of work being conducted at CARB and other state agencies in support of AB 32 implementation. The Administrative Fee regulation is required to support the state's efforts to protect California's air quality, public health and environment from the worst effects of global warming. We applaud CARB for moving forward in a responsible manner to generate funding outside of the severely strained state budget to support AB 32 activities and support adoption of the AB 32 Administrative Fee regulation for the following reasons:

• *California's current financial crisis is threatening many state programs and AB 32 implementation is too important to delay.* This regulation avoids adding to the already overburdened budget by collecting fees from the largest sources of global warming emissions in California. By adopting the fee regulation, California can maintain momentum toward its greenhouse gas reduction goals without additional strain on California's finances.

• *Current law requires CARB to impose a fee on sources of greenhouse gas emissions to carry out the scoping plan.* AB 32 specifically authorized the implementation of a fee to generate funds for carrying out AB 32 programs.[1] This regulation will prevent CARB from continuing to borrow from existing state funding sources and repay funds borrowed to support this program over the last two fiscal years. Further, the Governor and the Legislature required implementation of the fee in the 2008 budget to end borrowing from other programs.

• *The regulation imposes fees in an equitable manner, ensuring that a broad range of major greenhouse gas emission sources are responsible for the cost.* The proposal covers 85 percent of all greenhouse gas emission sources in California and would not be applied to small businesses. Even with the potential for businesses passing costs to consumers, the costs to California households are expected to be less than five dollars per year.[2]

• *The overall cost of this program is minor compared to the costs of global warming to California.* California's vast real estate, agriculture and tourism industries face significant threats from global warming, with trillions of dollars of assets at risk. California's infrastructure for energy, water and transportation face hundreds of billions in potential costs due to increased warming. The state's public health system is also facing billions in added costs due to global warming.[3] California's leadership on climate action can help curb global warming worldwide, leading to benefits that far outweigh the annual estimated $30 million cost of administering AB 32 scoping plan measures.

Our organizations strongly support the proposed AB 32 Administrative Fee to remain on course to protect California's economy, environment, air quality and public health while the state continues the fight against global warming. Thank you for your continued leadership, and for the opportunity to comment on this vital regulation.

Footnotes:
[1] California Health and Safety Code Section (HSC) 38597 states: "The state board may adopt by regulation, after a public workshop, a schedule of fees to be paid by the sources of greenhouse gas emissions regulated pursuant to this division, consistent with Section 57001. The revenues collected pursuant to this section, shall be deposited into the Air Pollution Control Fund and are available upon appropriation, by the Legislature, for purposes of carrying out this division."
[2] California Air Resources Board. May 8, 2009. Staff Report: Initial Statement of Reasons for Rulemaking. Proposed AB 32 Cost of Implementation Fee Regulation…: "ARB has determined that representative private persons would be affected by the cost impacts from the proposed regulatory action at an estimated cumulative cost of $ 4.00 per household per year when the marginally increased utility and fuel costs are passed through to the consumer."

[3] Kahrl, Fredrich and Roland-Holst, David, UC Berkeley Dept. of Agricultural and Resource Economics. Nov. 2008. California Climate Risk and Response: “Our estimates indicate that climate risk – damages if no action is taken – would include tens of billions per year in direct costs, even higher indirect costs, and expose trillions of dollars of assets to collateral risk.”

Agency Response: No response needed.

Comment 39: EnvE, June 24, 2009

Comment: We write this letter asking you to support the adoption of a new regulation to impose fees on sources of GHG emissions to cover the costs of implementing Assembly Bill 32 (AB 32), the California Global Warming Solutions Act of 2006.

E2 comprises more than 850 business leaders from across the nation who support good environmental laws that make sound economic sense. Over600 of our members live in California, and they work in technology, consulting, venture capital, financial services, legal, professional, and a number of other sectors. Our members have been involved in financing, creating or working in the early development of over 1,200 companies, which have created more than 400,000 jobs. They currently represent more than 20 billion dollars in private equity capital.

Assembly Bill 32 mandates that the California Air Resources Board (CARB) issue regulations to reduce California's greenhouse gas emissions. We believe that CARB is moving forward in a fiscally responsible manner to generate the funds needed to implement AB32. It would be fiscally irresponsible to move the
Process forward without identifying how California agencies will cover the costs to implement AB32. The proposed administrative fee is a very minor cost (about*$1/Californian/year)* to pay for running a world-class program to reduce GHG emissions and save the state's economy from the catastrophic impacts of climate change. Moreover, this fee is authorized by AB 32 and required by the 2008 budget.

The proposed Cost of Implementation Fee Regulation is fair and equitable. It will not be applied to small business. Instead, it will be applied to the largest emitters, like utilities, pipeline owners and operators, transportation fuel producers and importers, refineries, cement manufacturers, and other top polluters. We ask you to. Support adoption of the proposed AB32 Cost of Implementation Fee Regulation. It is necessary for the continued implementation of AB32.AB32 is an investment in stabilizing state's future. It will put California's environment end economy on a more secure path, insulating us from the price shocks and volatility associated with fossil fuels as well as the hidden costs of climate change. We support the proposed fee.

Agency Response: ARB thanks the commenter for its support.

Comment 35: BCed, June 29, 2009

Comment: I am writing to support you on regulating Industrial polluters that lead to increasing national global warming and local health issues. Thank you for looking out for the little guys and population affected by their offsite impacts.

I found that under a California loop hole intended to allow property owners to sand blast the exterior of their buildings from 1978, this Pre-cast company could actually sand blast 6 tons of abrasive per day at cement walls outside with no protection to keep their toxic cement dust from blowing on our food supply and adjacent properties. This dust contains a tiny particle that can be carried in the wind miles away and can lead to silicosis and other health related problems. Our County Supervisors did not put any measures in place to protect the neighboring properties from this outdoor sand blasting activity. Their high dollar attorneys told the county it was to costly to sand blast inside.

My interest is a personal issue and describes how these Industrial giant polluters avoided regulation. We moved to Yolo County and located in an agricultural area. The Industrial users found this area as cheap ground and could strip it of its groundwater, pollute and are not under a watchful eye. The county changed our agricultural zoned area in the Draft EIR for the General Plan to a 120 acre Industrial park, in the middle of the best Class 1 soils in California. The beautiful productive agricultural land was bought last year by Danny Ramos of Ramos Oil, Clark Pacific – Precast Concrete and other Industrial type interests.

Industrial by definition has off site impacts. The cement companies are the worst polluters. Specifically the large Industrial cement company that is relocating from West Sacramento next door to us with batch plants, outdoor sandblasting and such. They build complete sky scrapers, buildings and parking structures for other cities, this means all of the impacts these cities would have are now being placed on the backs of the properties that surround this plant. Their trucks drive down the road with the structures and one can watch the cement dust blowing off the structures in the wind and out into the ag fields. This cement pre cast company is in the middle of an agricultural area and negatively impacts adjacent organic farms producing our nations [sic] food supply on the West and South sides, homes for developmentally disabled to the West and our ranch to the East and the Nelson Ranch Foundation which helps adults with disabilties [sic]. We have tall trees with nesting Swainson Hawks and I am worried this cement dust will affect their young. If these Industrial companies had moved to the City they would be on water and sewer and more scrutiny; but it was cheaper to buy off the politicians and locate and pollute on county land.

The people that lived and worked next to their plant in West Sac., sought me out when they learned I was fighting the comapny [sic]. Hispanic men that worked at this factory in West Sac. who did the sand blasting spoke to me and they mentioned breathing/lung issues and said they mainly did it dry to see and get the finish on the walls etc... The neighbors around their plant in West Sac. described issues of dust that blew over from the cement factory and scratched their windows, paint on cars and would end up in their homes. These people said they tried to do something about it, and went to the city but no one listened and they were up against big money Industrial groups and unions. After dealing with Yolo County, I am begining [sic] to share their sentiments.

This company gets a lot of government work and funding, and should be required to protect the environment from harm. However, they also have deep pockets to politically fight regulation. I hope you can implement measures to correct this loop hole that allows outdoor sand blasting and to regulate these polluters.

Nancy, thank you for taking these guys on and please forward this to the appropriate departments.

Agency Response: This comment does not relate to this regulation.

<u>Comment 36: ABat, June 30, 2009</u>

Comment: I have cabover truck and trailers combos cattle trucks the length for a combination of this sort is 65 feet the trucks have a 28'box and they pull a 28' trailer thes [sic] combinations where the standard truck to haul livestock because of the nather [sic] of roads And terane [sic] they had to navagate [sic] there are still a lot of cattle ranches & Sheep ranches that require this type of truck to get there [sic] livestock to market and seasonal grassing allotments [sic]

We transport our cattle from mountain pastures spring to the organ [sic] borderFall [sic] pastures 450 moma [sic] cows & calves that equates to someware [sic] around 30,000 per year .now the problem the truck companeys [sic] that are left dont [sic] have many of thes [sic] units left so there is already a shortage of them every spring and fall. with the new law on diesel trucks thes [sic] will not be leagal [sic] soon.The [sic] truck manufactures no longer make cabover trucks and if they did no one could aford [sic] to have them setting around 75% of the time.

so how are we supost [sic] to ship our cattle from pasture to pasture or to market the other option is i understand the older trucks are ok to run 15,000 miles a year so shood [sic] I buy 4 more and put cowboys driving them to move our catte [sic]! I realy [sic] think that would put people at risk of injury the roads thes [sic] trucks drive are narrow windy mountain roads with grades 20%

Agency Response: This comment does not relate to this regulation.

<u>Comment 37: PAnd, July 4, 2009</u>

Comment: Additional cost to supply data to goverment [sic] agencies drivers [sic] the cost of business in Ca to a point with [sic] business leave Ca.

We (business) want and will be in compliance with rules we understand and rules that fit our industry. Rules then [sic] are writting [sic] without imput [sic] from private section usual means "square pegs in a round hole".

Compliance is less than attainable and no one wins.

Agency Response: ARB held three public workshops and two Board hearings to ensure a transparent process and to seek comments from affected parties.

Comment 40: JHan, July 8, 2009

Comment: I recently read that the California Air Resources Board will be voting this month on the nations's (sic) first statewide "carbon fee" on utilities, oil refineries and other polluting industries. I urge you to please NOT vote in a carbon fee. The California economy is perhaps the worst it has ever been. Unemployment is over 11% and climbing, the state is broke, and many businesses are either going bankrupt or on the verge of doing so. Your "carbon fee" will devastate the California economy. According to news reports, you want to impose a "fee" on cement plants of about $200,000 per year. That will kill the construction trade, already in trouble. Any fees you impose on oil refineries will result in yet higher gasoline costs for all Californians at a time when this state needs any help it can to climb out of this recession. Higher gasoline costs will raise the cost of virtually everything in California. This is the most reckless idea I have heard in years. Please, for the sake of California's economy, vote NO on any "carbon fee". If you pass this you will be responsible for ruining any hope of California recovering from this recession.

Agency Response: See responses to Comment 17.1 WSPA and Comment 44.4 MID.

Comment 41: ASte, August 7, 2009

Comment: My business manufacturers aluminum ingot and billet for sale in California and around the world. Today it is very difficult to compete in the world market. Recently a new competitor from India started importing my products to California. I am loosing market share to companies outside California and now from foreign imports. More costs will guaranty that the 200 California residents that I employ will have a less secure future.

Agency Response: See responses to Comment 17.1 WSPA and Comment 44.4 MID.

Comment 42: BFell, August 19, 2009

Comment: As employment at our facility has been reduced from 220 to >90 and manufacturing running away from California at record pace I must voice my thoughts as to what AB 32 will do to our business. We did most of our business in California 25 years ago with a 100 or so man shop. 80% out of state and 20% instate Now we are 80 % out of state and 10% out of country and 10% instate. To add fees and expense to our products that we make for other manufacturers, that are free to purchase from other states and other countries, will put us out of business. 57 years of employees that pay taxes is our history. Please don't mess this up.

Agency Response: See responses to Comment 17.1 WSPA and Comment 44.4 MID.

Comment 55: BFox, August 17, 2009

Comment: Just a note before I leave California. You may have heard from other small business owners that the published article of August 8, 09 (enclosed) scared the hell out of me! Doing business here is just not rewarding to me after almost 40 years! This article is causing me to move to Arizona or Texas, as I have family in both states. It's much cheaper living elsewhere as I will get to keep more money in my pocket. Your AB 32 would be devastating to me and other mall businesses. The article estimated $49,691 to each small business, and now in addition, I've heard they are again raising workman's compensation. There just not enough taxes to suit this left wing Sacramento Legislator(s)! I'll be moving probably end of November or December. It's too bad about my employees. We sell life insurance. They will have to get another job and some said they may move. Maybe you can figure a way to collect more taxes from all the illegal aliens to help out California.

Agency Response: This comment refers to an article authored by Sanjay Varshney, Dean of the College of Business Administration at Cal State Sacramento, and Dennis Tootelian, director of the Center for Small Business and a professor of marketing in the College of Business at Cal. State University Sacramento. This study is not about the cost of this fee, but rather what the authors believe are the costs for businesses to *implement* regulations and measures developed to meet AB 32. ARB and others believe that the report contains significant flaws. For example, in his review of the report, James L. Sweeney stated:

> "Examination of the Varshney/Tootelian analysis leads to the conclusions that their estimates are highly biased, are based on poor logic and unsound economic analysis, and are likely to be too large by a factor of at least 10."[10]

Regarding the Fee regulation's estimated costs to small businesses, see responses to Comment 17.1 WSPA and Comment 44.4 MID.

Comment 56: KBig, September 22, 2009

Comment: It is time to disband CARB. They brought os [sic] MTBE High priced California Reformated [sic] Gasoline and other poor thought out ideas. We do not need to pay for people who do not have the needed expertize [sic] to do the job they are doing poorly at excessive pay. Now they want to add more fees. California needs to cut expenses they would do this by getting rid of an unnecessary agency CARB.

Agency Response: No response needed.

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[10] Sweeney, Professor of Management Science and Engineering and Director of the Precourt Efficiency Center, Stanford University. "Review of Varshney/Tootelian Report "Cost of AB 32 on California Small Businesses – Summary Report of Findings;" Draft, February 16, 2010.

Comment 59: Assorted Health Orgs, September 23, 2009

Comment: On behalf of the undersigned public health and environmental organizations, we are writing to voice our strong support for the adoption of the AB 32 Cost of Implementation Fee Regulation at the September 25, 2009 meeting of the California Air Resources Board (CARB).

Our organizations believe that the adoption of the Administrative Fee regulation is urgently needed to provide a stable and continuous source of funding for the range of work being conducted at CARB and other state agencies in support of AB 32 implementation. The Administrative Fee regulation is required to support the state's efforts to protect California's air quality, public health and environment from the worst effects of global warming. We applaud CARB for moving forward in a responsible manner to generate funding outside of the severely strained state budget to support AB 32 activities and support adoption of the AB 32 Administrative Fee regulation for the following reasons:

• AB 32 implementation is too important to delay. This regulation avoids adding to the already overburdened budget by collecting fees from the largest sources of global warming emissions in California. By adopting the fee regulation, California can maintain momentum toward its greenhouse gas reduction goals without additional strain on California's finances.

• Current law requires CARB to impose a fee on sources of greenhouse gas emissions to carry out the scoping plan. AB 32 specifically authorized the implementation of a fee to generate funds for carrying out AB 32 programs.[1] This regulation will prevent CARB from continuing to borrow from existing state funding sources and repay funds borrowed to support this program over the last two fiscal years.

• The proposal equitably covers 85 percent of all greenhouse gas emission sources in California and would not be applied to small businesses. Even with the potential cost pass through to consumers, costs to California households are expected to be only about $0.33/month.[2]

• Slowing AB 32 implementation threatens swift action of global warming.
The cost of this program is minor compared to the costs of global warming to California. California's vast real estate, agriculture and tourism industries face significant threats from global warming, with trillions of dollars of assets and revenues at risk. California's infrastructure for energy, water and transportation face hundreds of billions in potential costs due to increased warming. The state's public health system is also facing billions in added costs due to global warming.[3] California's leadership on climate action can help curb global warming worldwide, leading to benefits that far outweigh the annual estimated $30 million cost of administering AB 32 implementation.

<u>Footnotes:</u>

[1] California Health and Safety Code Section (HSC) 38597 states: “The state board may adopt by regulation, after a public workshop, a schedule of fees to be paid by the sources of greenhouse gas emissions regulated pursuant to this division, consistent with Section 57001. The revenues collected pursuant to this section, shall be deposited into the Air Pollution Control Fund and are available upon appropriation, by the Legislature, for purposes of carrying out this division.”
[2] California Air Resources Board. May 8, 2009. Staff Report: Initial Statement of Reasons for Rulemaking. Proposed AB 32 Cost of Implementation Fee Regulation…: “ARB has determined that representative private persons would be affected by the cost impacts from the proposed regulatory action at an estimated cumulative cost of $ 4.00 per household per year when the marginally increased utility and fuel costs are passed through to the consumer.”
[3] Kahrl, Fredrich and Roland-Holst, David, UC Berkeley Dept. of Agricultural and Resource Economics. Nov. 2008. California Climate Risk and Response: “Our estimates indicate that climate risk – damages if no action is taken – would include tens of billions per year in direct costs, even higher indirect costs, and expose trillions of dollars of assets to collateral risk.” Our organizations strongly support the proposed AB 32 Administrative Fee to remain on course to protect California’s economy, environment, air quality and public health while the state continues the fight against global warming. Thank you for your continued leadership, and for the opportunity to comment on this vital regulation.

Agency Response: No response needed.

B. June 25, 2009 Board Hearing Written Comments

Comment BHJ-W1: SCPPA

Agency Response: This is the same as Comment 5 SCPPA and Comment 34 LADWP. See responses to those comments.

Comment BHJ-W2: SCAQMD

Agency Response: This is the same as Comment 57 CAPCOA. See the response to that comment.

Comment BHJ-W3: CIPA

BHJ-W3.1 **Comment:** Moreover, with respect to the application of the Fee to natural gas in general, we note that in the Scoping Plan, CARB lists recommended greenhouse gas reduction measures for both capped and uncapped sectors[3]. The cap and trade measure adopted by the Board is essentially a "hybrid" design, where electric generating facilities and large industrial sources are covered at the *"point of emission".*

With respect to natural gas, small industrial combustion and the residential commercial sectors are covered "where the fuel enters into commerce". This is widely considered to be at the Local Distribution Company (LDC) level as noted in the Western Climate Initiative's (WCI) design recommendations released on September 23, 2008…

CIPA respectfully submits that if a fee is to be established, notwithstanding our objections noted above, CARB should redesign its fee proposal to ensure that any fees designed to recover the costs of administering, implementing and enforcing AB 32 be levied in a manner consistent with CARB's Scoping Plan, the CPUC's Interim Decision, the WCI's design recommendations, and the statute itself.

Footnote:
[3] *See* "Climate Change Propose Scoping Plan", Table 2: Recommended Greenhouse Gas Reduction Measures, issued October 2008.

Agency Response: Where possible, for purposes of the fee regulation we have considered the point of emission for large industry to also be the LDC.

In developing the fee regulation, minimizing the administrative burden was a key concept. The focus of ARB's Scoping Plan, CPUC's Interim Decision, and the WCI's design recommendation was the design of a cap and trade program, the purpose of which is to reduce emissions of greenhouse gases through a cost associated with those emissions and is not necessarily to minimize the administrative burden. Therefore, the point of regulation for the purposes of the fee regulation and a cap and trade market are not necessarily consistent.

BHJ-W3.2 **Comment:** But one area in particular in which change is being contemplated that would have significant impact on this Fee rulemaking is very concerning. When we complained to staff about early changes to the draft Fee Regulation that swept up the emissions from natural gas burned on site at production facilities for the reasons articulated above, we were told that it would only impact those who are mandatory reporters under Title 17, California Code of Regulations. In other words, the fee would only be paid by those who emit >25,000 tons and must already report those emissions, so that there would not be additional record keeping and reporting, just the addition of the fee. However, at a June 5, 2009, workshop on Cap and Trade Reporting, the staff presentation discussed the movement from >25,000 tons emissions as the threshold for mandatory reporting and participation in the cap to > 10,000 tons, ostensibly to conform to the latest Western Climate Initiative design.

Agency Response: If the emissions threshold at which a source is considered large enough that it must report under ARB's Mandatory Reporting regulation changes, it is appropriate that the new reporting sources would be considered large enough to be points of regulation for purpose of the fee.

Comment BHJ-W4: CMUA

BHJ-W4.1 **Comment:** The California Municipal Utilities Association ("CMUA") files these Comments on the Proposed AB 32 Cost of Implementation Fee Regulation. CMUA's comments are based upon the standards for necessity,[1] clarity,[2] consistency,[3] and authority[4] as mandated for regulations by the Administrative Procedure Act ("APA"). AB 32 authorizes ARB to adopt regulations for "a schedule of fees to be paid by the sources of greenhouse gas emissions, regulated pursuant [to AB 32]."[5] ARB has no authority or necessity to adopt a schedule of fees for entities or activities that are not sources of statewide greenhouse gas emissions as that term is defined in AB 32.

Footnotes:
[1] "Necessity" means that "the record of the rulemaking proceeding demonstrates by substantial evidence the *need for a regulation to effectuate the purpose of the statute…"* (GOV'T Code § 11349(a) (emphasis added)).
[2] "Clarity" means that the regulation is "written" or displayed so that the meanings of regulations will be easily understood by those persons directly affected by them." (GOV'T CODE § 11349(c)).

[3] "Consistency" means that the regulation is "in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law." (GOV'T CODE § 11349(d)).
[4] "Authority" shall be presumed to exist only if ARB cites a California constitutional or statutory provision which: (1) expressly permits or obliges the agency to adopt the regulation; or (2) grants a power to the agency which impliedly permits or obligates the agency to adopt the regulation in order to achieve the purpose for which the power was granted. (GOV'T CODE § 11349(b); CAL. CODE REGS § 14).
[5] HEALTH & SAFETY CODE § 38597

Agency Response: This regulation applies to sources of greenhouse gas emissions. See responses to Comments 5.10, 5.11, and 53.1 SCPPA. Without more specificity about the commenter's concerns about APA standards, it is impossible to respond.

BHJ-W4.2 **Comment:** In the CMUA-ARB meeting on June 22, 2009, CMUA's members described their concern regarding "substitute energy." It is common practice in the electric utility industry for contracted renewable energy to be "unbundled" from the Renewable Energy Credits (RECs) due to lack ***I*** uncertainty of transmission, an intermittent generation profile, economic considerations or operational constraints. The utility retains the RECs and then "substitute energy" is procured from another source. The contracted renewable energy facility output (MWh) is balanced with the substitute energy periodically.

The following example illustrates a typical transaction: A Seller sells renewable energy such as wind along with the environmental attributes (i.e., the RECs) as a bundled product. A Buyer unbundles the products by retaining the environmental attributes but sells or assigns the energy to the Seller or a third party. The Seller or third party delivers firm substitute energy as a 7 by 24, on/off peak or seasonal exchange at an acceptable delivery point and balances or trues to the original renewable energy production on a periodic, daily, weekly, monthly, or seasonal basis (not exceeding yearly). The Buyer then rebundles the substitute energy and environmental attributes. This may involve a delivery point within or outside California to serve load in California.

Pursuant to the CMUA-ARB meeting and consistent with the principle that eligible renewable resources have zero GHG emissions, CMUA understands that the administration fee does not apply to rebundled substitute energy because it is attributed zero GHG emissions. This is true regardless of which type of generating resource is used to supply the substitute energy.

Agency Response: When ARB staff met with CMUA on June 22, 2009, staff expressed their intent that the fee should not apply to electricity that was imported as RPS-eligible electricity that a utility can use to meet its RPS requirements. Under current law and regulation (Public Utilities Code sections 399.11 et. seq. to 399.20, and Public Resources Code section 25,740 to 25,751, investor-owned utilities (IOUs) must meet a 20 percent renewable portfolio standard (RPS) by 2010. IOUs must meet deliverability requirements, but, under a recent PUC decision, may use RECs to meet a portion of their RPS requirements. Under current law publicly-owned utilities, which are the members of CMUA, do not have the same deliverability requirements, and may, under their own RPS program rules, purchase RECs that are later rebundled with substitute energy. We affirm that the fee will not apply to "substitute energy" meaning electricity imports that are rebundled with RECs. Staff of the mandatory reporting program have instructed reporting entities that they may report substitute energy that is imported along with RECs as being electricity from the source responsible for the RECs. These reporting entities will need to be able to prove that RECs were rebundled with the electricity imported that is claimed as renewable.

Although ARB has made this determination for this fee regulation, the treatment of substitute energy and RECs under this regulation in no way determines how these matters will be treated in the renewable electricity standard regulation or the cap and trade regulation, both currently under development, or any other regulation ARB may adopt in the future.

BHJ-W4.3 **Comment: Null power is not subject to the AB 32 administration fee.** In the CMUA-ARB meeting on June 22, 2009, CMUA's members described their concern regarding "null power."

Pursuant to the CMUA-ARB meeting and consistent with the principle that eligible renewable resources have zero GHG emissions, CMUA understands that the AB 32 administration fee does not apply to null power.

Agency Response: We agree that the fee does not apply to null power. Null power is electricity from a renewable electricity generating facility that has been stripped of its renewable attributes, typically by sale of renewable energy credits.

BHJ-W4.4 **Comment:** Power that is "wheeled" through California is not subject to the AB 32 administration fee.

In the CMUA-ARB meeting on June 22,2009, CMUA described its concern regarding the "wheeling" of power through California. The California Energy Commission Energy Glossary defines wheeling as the "transmission of electricity by an entity that does not own or directly use the power it is transmitting." However, the description of "wheeling" in ARB's Mandatory GHG Reporting regulations lacks sufficient clarity for the purpose of being used to collect the administration fee. The mandatory reporting regulations collect data for power wheeled through California (on single or chain of NERC e-tags) as two separate transactions: (I) import;

and (2) export if the title of the energy is held by the entity that is wheeling power notwithstanding the evidence that the power is not consumed in California. If that interpretation were true, then the ARB methodology would impose GHG emissions and fees for energy wheeled into California but not provide equivalent relief when the same power is wheeled out of California in the same transaction.

At the CMUA-ARB meeting, CMUA provided a copy of an actual NERC e-tag for power owned by a California utility in a simultaneous energy exchange transaction. The electricity was wheeled from Utah to Oregon, via the California transmission system. Pursuant to the meeting and consistent with the principle that AB 32 does not regulate electricity that is not delivered to and consumed in California, CMUA understands that the administration fee does not apply to power wheeled through California. Pursuant to telephone conversations with ARB staff on June 24, 2009, CMUA understands that ARB staff will describe this issue to the Air Resources Board at the Regular Meeting on June 25,2009. Furthermore, staff will propose new regulatory language to clearly define "wheeling" and identify that "wheeled" power is not subject to the administrative fee.

Agency Response: We agree that "wheeled" power is not subject to the fee. See responses to Comments 5.21 and 53.2 SCPPA.

BHJ-W4.5 **Comment: "Biogas is an eligible renewable fuel and is not subject to the AB 32 administration fee.**

In the CMUA-ARB meeting on June 22, 2009, CMUA described its concern regarding the applicability of the AS 32 administration fee to landfill or biogas that was treated to pipeline grade natural gas quality and injected into the natural gas distribution/transmission system. Pursuant to telephone conversations with ARB staff on June 24, 2009, CMUA understands that the proposed regulations apply to "natural gas" as defined in proposed regulation § 95202(a)(59). Landfill and biogas are not included within that definition, therefore, ARB staff stated that the administration fee does not apply to landfill or biogas.

Agency Response: Renewable fuels, including landfill gas and biogas, are not subject to the fee.

BHJ-W4.6 **Comment:** Energy exchange transactions promote many AB 32 policy goals and should, at most, only be subject to the AB 32 administration fee for the net amount of imported power.

In the CMUA-ARB meeting on June 22, 2009, CMUA described its concern regarding energy exchange transactions. An energy exchange agreement typically means a commitment between electricity market participants to swap energy for energy. Exchange transactions do not involve transfers of payment or receipts of money for the full market value of the energy being exchanged, but may include payment for net differences due to market price differences between the two parts of the transaction or to settle minor imbalances. Overall, energy exchange agreements are utilized to optimize the use of existing generation and transmission resources.

It has long been a common practice in the electric utility industry for entities to engage in intertemporal exchanges, i.e., the contracted energy is received in one season or during an on peak period and returned in a different season or during off-peak periods. The energy exchange is generally performed due to generating resource limitations, economic considerations, or operational considerations. The received and returned energy amounts may vary for any particular exchange but the amounts are balanced periodically as per the energy exchange contract.

Pursuant to the CMUA-ARB meeting and a telephone conversation with ARB staff on June 24, 2009, CMUA understands that for intertemporal energy exchanges, the proposed regulations will apply the AB 32 administration fee to the full amounts of energy that are imported and exported. The proposed regulations will use the data collected by the Mandatory GHG Reporting Regulation to calculate the import/export quantities, and in many cases, using a default emission rate for imported power of 0.499 MT C02 per MWh. Yet, ARB has openly acknowledged in its June 5, 2009, workshops that the Mandatory GHG Reporting Regulations are not sufficient to identify the obligated entities in a cap-and-trade program because they were not designed to do so. It follows that if the Mandatory GHG Reporting Regulations are insufficient for use in a cap-and-trade program, then they are also insufficient for identifying the obligated sources and emissions for imposing the AS 32 administration fee.

Special requirements [for mandatory reporting] apply to the electric power sector and utilities and power marketers. They are required to report certain electricity transactions, including purchases, sales, imports, exports, and exchanges. The data collected is designed to be comprehensive and overlapping in the sense that it collects information on the same transactions (i.e., emissions) from multiple entities. In this manner, ARB may more thoroughly understand the source and flow of direct (actual emissions inside California) and indirect (electricity consumption inside California) statewide GHG emissions. On the flip side, the overlapping nature of the reporting regulations make them inadequate for use in a cap-and-trade program in which covered entities will have compliance requirements because they will result in duplicative and/or incorrect GHG emission obligations."

Agency Response: It is true, as stated by the commenter, that the fee will be applied to the full amounts of electricity imported and exported, except for simultaneous exchanges. See our responses to Comments 5.22 and 53.6 to 53.8 SCPPA for our rationale for applying the fee both to electricity generated in California and exported, and to electricity imported into California for consumption in California.

The commenter's reference to the use of the Mandatory Reporting Regulation to identify the obligated entities in a cap-and-trade program is not relevant to the fee regulation and the use of the data collected under Mandatory Reporting Regulation that is used for application of the fee. In fact, the regulation clearly identifies electricity that is subject to the fee in Section 95201(a)(4). For electricity generated in California, the fee only applies to electricity "reported pursuant to section 95111(a)(1)(A) or 95111(a)(2)(A) of the Mandatory Reporting Regulation." For imported electricity, fees are applicable to electricity "reported pursuant to section 95111(b)(2)(B and C) and 95111(b)(3)(N) of the Mandatory Reporting Regulation." The regulatory language in this regulation and the reporting referred to under the Mandatory Reporting Regulation is sufficient to identify sources and emissions for imposing the fee.

It is true that there is overlapping information reported pursuant to the Mandatory Reporting Regulation. However, this regulation identifies clearly which portions of data reported under the Mandatory Reporting Regulation identify electricity subject to the fee.

BHJ-W4.7 **Comment:** The Mandatory GHG Reporting Regulations cannot be used to accurately calculate the covered emissions or identify the obligated entities for many energy exchange transactions because the regulations do not collect the necessary information to identify the electricity that is actually delivered to and consumed in California (i.e., the statewide greenhouse gas emissions). The broad application of the proposed AB 32 administration fee regulations will, in some cases, impose a fee on energy exchanges that include purely financial transactions in which no generation or emissions actually occur. This is inconsistent[6] with AB 32 which only authorizes ARB to collect fees from sources of *actual* statewide GHG emissions. [7]

Footnotes:

[6] The APA requirement for "consistency" means that the regulation is "in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law." (GOV'T CODE § 11349(d)). Under the proper legal standard of review, a court will determine whether the agency reasonably interpreted its legislative mandate when deciding that the challenged regulation was necessary to accomplish the purpose of the statute. In other words, "the court will determine whether the regulation is reasonably designed to aid a statutory objective." (Benton v. Board a/Supervisors, 226 Cal.App.3d 1467, 1479 (1991)).

[7] HEALTH & SAFETY CODE § 38597.

Agency Response: This comment is incorrect. The fee will apply to electricity delivered to the California transmission and distribution system. For electricity from in-state electricity generating facilities, the fees apply to electricity delivered to the system at the busbar, where the generating facility connects to the California grid. For imported electricity, the fee applies to electricity that is ultimately consumed in California, and delivered by a first deliverer (a marketer or retail provider) that first delivers the electricity to the California grid. This imported electricity is reported as such under the Mandatory Reporting Regulation. The fee does not apply to electricity generated outside California that is part of an exchange but that is not consumed in California.

BHJ-W4.8 **Comment:** The broad application of the AB 32 administration fee regulations will, in some cases, apply the incorrect default emission factor to imports from "zero" emission resources. This is inconsistent with AB 32 since it contradicts the express AB 32 requirements for accuracy. ARB may not supplant actual, known emissions with a default, especially when the facility is a zero-emission source. AB 32 requires ARB to develop regulations that "[e]nsure rigorous and consistent accounting of emissions ...."[8] The proposed administration fee regulation sections should be deleted to the extent they knowingly and expressly assign an incorrect emission rate to verifiably clean resources.

Footnote:
[8] HEALTH & SAFETY CODE § 38530(b)(4).

Agency Response: This comment is incorrect. The fee only applies to electricity from a specified source that generates electricity from fossil fuels, and to electricity from unspecified sources. If imported electricity is from a known, or specified, source, and the source is an electricity generating facility that does not combust fossil fuels, then it should be reported as such, and will not be subject to the fee. A first deliverer may choose to import electricity only from specified sources. If there is electricity that has been reported as being from unspecified sources, but the deliverer can show a portion of that electricity is, in fact, from a specified, non-emitting source, then the deliverer can report that electricity separately as originating from a non-emitting, specified source, and it would not be subject to the fee.

BHJ-W4.9 **Comment:** Finally, the broad application of the AB 32 administration fee regulations will, in some cases, impose fees on energy exchanges in which the electricity is being delivered to and consumed outside California. This is also inconsistent with the definition of statewide GHG emissions in AB 32. Accordingly, the proposed regulations applying the fee to imported electricity fail to meet the requirements of necessity, clarity, consistency, and authority as mandated for regulations by the APA.

Agency Response: As explained in our response to 5.1 SCPPA, the Fee was modified to apply to electricity generated in-state as well as imported electricity. However, as explained in response to Comment 5.22 SCPPA, the Fee does apply to electricity generated in California and delivered to and consumed outside of California.

BHJ-W4.10 **Comment:** The most effective alternative for ARB at this point, is to delete the application of the administration fee to imported electricity. This issue should then be properly evaluated during the cap-and-trade rulemaking. At the very least, the regulations should be amended so that the AB 32 administration fee is calculated based upon the net difference in electricity for the import and export transactions that are conducted pursuant to an intertemporal energy exchange.

Agency Response: In our responses to Comments 5.1 and 5.5 SCPPA, we have explained why we have applied the fee to imported electricity, and that we have modified the regulation so that it applies to both in-state and imported electricity equally. Our responses to Comments 5.22, and 53.3 to 53.11 SCPPA explain why we have applied the fee to both the import and export portion of a non-simultaneous electricity (energy) exchange. How electricity will be treated under the cap and trade program is not a subject of this rulemaking.

BHJ-W4.11 **Comment:** CMUA's Recommendation for a more effective and less burdensome alternative. Preferred alternative, delete all sections related to calculating a fee on imported electricity: §§ 95201(a)(5), 95203(g), and 95204(f)

Agency Response: In our responses to Comments 5.1 and 5.5 SCPPA, we have explained why we have applied the fee to imported electricity, and that we have modified the regulation so that it applies to both in-state and imported electricity equally.

BHJ-W4.12 **Comment:** Second alternative, amend these sections whereby the exported electricity of intertemporal energy exchanges is netted with the imported energy. The administration fee shall only be charged on the net import of electricity that is delivered to and consumed within California.

Reference and authority: Health & Safety Code §§ 38505(m), 38562(b), 38597.

AB 32 requires that ARB adopt GHG emission limits and emission reduction measures by regulation to achieve the maximum technologically feasible and cost-effective reductions in GHG emissions in furtherance of achieving the statewide GHG emissions limit and the AB 32 Scoping Plan states that certain policy objectives will be incorporated into which measures are selected. (H&S Code § 38562(a)). For instance, in adopting the regulations, to the extent feasible and in furtherance of achieving the statewide GHG emissions limit of 427 MMT, AB 32 requires ARB to design the regulations in a manner that seeks to minimize costs and maximize the total benefits to California, consider the overall societal benefits, and other benefits to the economy, environment, and public health. (H&S Code § 38562(b)). Also, ARB shall evaluate the total potential costs and total potential economic and non-economic benefits of the plan for reducing greenhouse gases to California's economy, environment, and public health, using the best available economic models, emission estimation techniques, and other scientific methods. (H&S Code § 3856l(d)). ARB is required to consider myriad other issues including: (1) equity; (2) no disproportionate impact on low-income communities; (3) fuel diversity; and (4) no interference with efforts to achieve and maintain federal and state ambient air quality standards and to reduce toxic air contaminant emissions. (H&S Code § 38562(b)(l), (2), (4)-(6), (9)).

Energy exchanges promote many of these AB 32 policy goals as listed below in the bullet points.

- Most of the energy exchanges involving imports/exports of electricity are with entities in the pacific northwest. Primarily, these include the Bonneville Power Administration ("BPA"), Portland General Electric, and Seattle City Light. The BPA is a federal administration that markets, transmits, purchases, exchanges, and sells electric energy in the wholesale market. Federal dams in the Pacific Northwest generate the hydroelectric energy that BPA sells. Federal statutes govern the BPA including the Bonneville Project Act of 1937 (16 U.S.C 832), the Pacific Northwest Consumer Power Preference Act of 1964 (16 U.S.C. 837), the Pacific Northwest Federal Transmission System Act of 1974 (16 U.S.C. 838), and the Pacific Northwest Electric Power Planning and Conservation Act of 1980,16 U.S.C. 839-839h. Many of the contractual terms for energy exchanges must follow federal law.
- Congress created the BPA primarily to serve the Pacific Northwest, however, whenever the BPA generates sufficient electric energy to satisfy the demand of its primary service area, any electric energy above this amount is defined as surplus. "Surplus energy" is electric energy that would otherwise be wasted due to lack of a market in the Pacific Northwest. BPA may sell such surplus electric energy outside of the Pacific Northwest.
- An energy exchange is a contract that BPA has with a utility that establishes an exchange of energy rather than a direct sale of energy. Exchanges have economic benefits and also have environmental advantages such as allowing for seasonal fish passage needs and lessening the use of air polluting thermal plants.
- The Pacific Northwest-Pacific Southwest Intertie transmission system was constructed for the purpose of enabling energy exchanges between the Pacific Northwest and other states (particularly, California). Presently, the system has AC and DC lines that carry up to 4,800 MW and 3,100 MW, respectively. The AC line runs from Oregon to Lugo,

California, near Los Angeles. The DC lines run from the Oregon, to Sylmar, California (also near Los Angeles).

- By integrating federal, publicly owned non-federal, and privately owned electric utility systems, the intertie permits the exchange of loads and a better utilization of existing generating capacity. The system directly and indirectly benefits the customers of many utilities. Benefits derived by the Northwest-Southwest Intertie include: (1) exchange of summer-winter surplus peaking capacity between the northwest and the southwest to reduce capital expenditures for new generating capacity; (2) sale of northwest secondary energy to the southwest; and (3) sale of southwest energy to the northwest to firm peaking hydroelectric sources during critical water years. The intertie also provides a means for conservation of significant amounts of power plant fuels by use of the northwest's surplus hydroelectric energy in California, and increased efficiency in the operation of hydro and thermal resources.
- The energy exchanges enable the northwest and California to benefit from the complementary characteristics of their respective electricity systems. California's system is principally comprised of base-loaded thermal generation and is less accommodating to large load swings than BPA's principally hydro-based system, which can accommodate rapid load swings.
- Energy exchanges make full use of existing resources on both systems. Energy exchanges have the potential for avoiding substantial generation resource development by California utilities with the attendant risks, adverse rate effects on California's consumers, and adverse environmental impacts on Californians including any discriminatory impacts on disadvantaged groups. The sale of surplus capacity to California allows California utilities to defer construction of new thermal resources that they may otherwise need in the absence of exchange agreements. BPA's receipt of energy from California and California's deferral of construction/operation of additional thermal resources preclude potential impacts to air quality, water quality, and other environmental components that could otherwise occur.
- Energy exchanges eliminate or reduce the need for peaking resource development by California utilities. Substantial impacts on air quality, global warming, and resource consumption (particularly natural gas) would occur from the [otherwise unnecessary] construction of combustion turbine projects to meet peaking capacity needs.

Agency Response: We explain why we have not allowed the netting of imports and exports in our responses to Comments 5.22 and 53.3 SCPPA. In our response to Comments 53.4 and 53.5 SCPPA, we explain that we agree that energy exchanges are beneficial, but that this fee is unlikely to discourage exchanges. See those responses, and the responses to Comments 53.6 to 53.11 SCPPA for our full rationale for charging the fee both on imports and exports, except for imports that are part of simultaneous exchanges.

Furthermore, imported electricity from hydroelectric facilities such as those controlled by BPA are not subject to the fee when the source is specified.

In addition, under the Mandatory Reporting Regulation, asset-owning or asset-controlling entities that supply electricity to California may apply for and be assigned supplier-specific identification numbers based on their fleet of generating facilities, so that the electricity they supply can have a specific emissions factor appropriate to the supplier's fleet. For example, if an asset-owning supplier has for sale electricity that is a mix of hydroelectricity, nuclear power and a small amount of fossil fuel generation, its emission factor and fee associated with imports will be small. This is an additional reason, beyond those stated in our responses to SCPPA 12.A. and 12.B., which make it unlikely that energy exchanges with the Pacific Northwest will be discouraged.

Comment BHJ-W5: KernRiv

Note: This comment is the same as Comment 7 KernRiv. See response to that comment.

Comment BHJ-W6: WSPA

Comment: Section 95204(e) ("Producers and Importers of Gasoline and Diesel Fuels") requires that producers and importers of California gasoline, CARBOB or California diesel fuel report the total amount of each variety of fuel sold or supplied for use in California, with the fee effectively paid at the point of manufacture or import. It has been recommended as an alternative that the fee structure for transportation fuels instead parallel the current federal and state collection points for motor fuel excise taxes. Specifically, under this alternative the inventory position holders at distribution terminals and refineries would be responsible for the AB 32 fees when the product is removed for distribution within the state (i.e., "tax at the rack"). In the event gasoline or diesel fuel is distributed within the state in a non-bulk manner directly from a refinery that would be subject to the AB 32 fees, the fees would be separately identified and invoiced to instate purchasers of gasoline and diesel fuel.

This alternative builds upon an existing and efficient tax administrative regime developed and used both by the federal government and California, relying upon existing business records and actual inventory data.

Agency Response: See response to Comment BHJ-O9.2 WSPA.

Comment BHJ-W7: SCAQMD

Comment: "§95204. Reporting and Recordkeeping Requirements.
(a) Reporting Format All reports required by this article must be submitted to ARB by using the California Air Resources Board's Greenhouse Gas Reporting Tool, as specified in Title 17, California Code of Regulations section 951 04(e), and is available

on ARB's internet website at www.arb.ca.gov <u>or an equivalent tool approved by the Executive Officer</u>.

Proposed Amendment to the Regulation for the Mandatory Reporting of Greenhouse Gas Emissions §95104. Greenhouse Gas Emissions Data Report. (e) The operator shall submit emissions data reports, and any revisions to the reports, through the California Air Resources Board's Greenhouse Gas Reporting Tool <u>or an equivalent tool approved by the Executive Officer</u>."

Agency Response: Sections 95204 of the Fee Regulation and 95104(e) of the Mandatory Reporting Regulation were modified and address the commenter's concern.

C. September 25, 2009 Board Hearing Oral Comments

<u>Comment BHS-O1: LACSD</u>

BHS-O1.1 **Comment:** The industry had brought a concern to staff regarding renewable sources or biogas facilities which produce renewable energy. Staff, I think, assured us that these facilities -- these biogenic sources would not be included in the fee structure. We appreciate the clarification on that. However, two things have slipped through the crack. Number one, it's not recognized here that in delivering our renewable energy -- our biogas to energy facilities, specifically landfill gas energy, many times we need natural gas for stabilization of the BTU values of that gas. It enables to burn landfill gas. Without that natural gas in many cases we'd have to shut down and just flare our gas. The way I read this rule right now is that that could potentially be subject to a fee. So we not only have to pay for the natural gas to deliver our renewable sources, but we have to pay a fee on top of that.

Agency Response: It is our intent that the fee is applied to all fossil natural gas. All consumers of natural gas in the state must not only pay for the natural gas they consume, but pay the additional amount due to the fee. We believe that the minimal additional cost of natural gas due to the fee will not cause the commenter to cease using landfill gas as a fuel only to replace it with natural gas for which they would pay full cost.

BHS-O1.2 **Comment:** The second issue, which I think has slipped through the crack, we also operate MSW incineration facilities. There's three in the state of California. While those facilities largely produce biogenic emissions, there's a portion of solid waste plastics, textiles, for example -- while there is an effort to take those out of the waste stream, they're still there. And they produce anthropogenic emissions, and they would be considered I believe under this a fossil fuel. And that would cause us to once again have to pay a fee on that, which would be an extreme burden in terms of reporting and all that. And once again, this is a renewable stream of MSW and really should not be caught up in this rule. I recommend that language simply be put in there that facilities that primarily burn biogas be excluded and facilities that burn MSW be excluded from the fee rule. And just with my 50 seconds left, I'm always complimentary of the staff here. They always do a wonderful job and they continue to do that. In the fervor of getting AB 32 implemented -- and this unfortunately is an example of that, I think staff has really -- the dialogue of staff has broken down with the central public services of waste treatment plants, waste disposable plants, and deliveries of wastewater treatment. As we move into cap and trade and very significant issues there that we're trying to resolve with staff, dialogue has completely broken down. Once again, I respect staff. I hate to have to come here and say that. But this is another example where staff does not understand our business or how we operate. And as we get into

AB 32, which is a brand-new world of greenhouse gases, it's very important that we have a dialogue and continue an ongoing dialogue with staff.

Agency Response: As stated by staff at the Board meeting at which the regulation was adopted, the fee does not apply to municipal solid waste. Such waste is not a fossil fuel as defined in section 95202(a)(48). An MSW incineration facility would not be subject to the fee unless it combusts fossil fuels in the generation of electricity. We note that as requested by the commenter, staff followed up to address these issues.

Comment BHS-O2: WSPA

BHS-O2.1 **Comment:** I want to focus my comments on the collection mechanism for the transportation fuels side of the equation. I've invested a lot of my personal time with Mr. Goldstene and staff on this, and there is a fundamental difference on assessing fees on stationary sources and transportation fuels. You obviously catch us as a stationary source in the proposal that staff talked about. But on transportation fuels, CARB wants to impose fees on an outbound refinery gate and all imports. This approach will have considerable problems, which our tax experts have articulated on numerous occasions to the staff.

There will be potential federal court challenges on issues because you're assessing fees on fuels going to other states, Nevada, Arizona -- Nevada gets 100 percent of its fuels from California; Arizona gets a large majority; of course, some from Texas. It won't substantially address a lot of the import requirements on fuels. Forty percent of all the fees for this program are going to be levied on transportation fuels. We have got to get this right. We encourage much more conversation with the staff on this issue.

Measuring the quantity of fuel removed from the terminal rack with California delivery destinations is the fairest, least complicated method. You collect it on a prospective basis, on a rate per gallon. You know how much fuel. You know where it's going. You set it. You collect it. You remit it.

Agency Response: Most fees are designed to be collected on an “open-ended” basis. A rate is set and the total amount collected depends on the product sales that occur thereafter. By contrast, the AB 32 fee is designed to collect a specific amount of funding for each year. In order to collect the AB 32 fee on a prospective basis as requested by the commenter, ARB would need to ensure that its funding needs are met each year by setting the projected fee artificially high in case sales were lower than expected, or by creating a mid-year adjustment procedure. Since the revenue requirements must be fully justifiable and supportable, it would not be reasonable to set an artificially high fee. Mid-year adjustments would add complexity for all parties, would create additional administrative expense, and would create uncertainty for regulated parties regarding the amount that would ultimately be collected for each year.

In addition, the AB 32 fee is not applied only to gasoline and diesel fuel. Most of the emissions covered by the fee are based on other fuels, such as natural gas and coal, or specific facility emissions. To ensure that all regulated parties are treated fairly and that the fees are assessed for the same time period, ARB would need to move to "prospective billing" for all sectors, not just transportation fuels. This approach would require ARB staff to undertake the impossible task of attempting to accurately predict electricity sales, cement production and other sources of greenhouse gas emissions for each year in order to accurately determine the fee.

The commenter also states that "There will be potential federal court challenges on issues because you're assessing fees on fuels going to other states, Nevada, Arizona -- Nevada gets 100 percent of its fuels from California; Arizona gets a large majority; of course, some from Texas. It won't substantially address a lot of the import requirements on fuels." The commenter does not further elaborate on this claim regarding federal lawsuits, and staff is unclear about which aspect of the regulation the commenter believes will be challenged. However, the commenter appears to be basing this claim on the assumption that gasoline and diesel fuel destined for out-of-state use can be successfully tracked from the rack but that refineries do not have the ability to ascertain this same information. This is unlikely to be true given that refineries have sophisticated inventory and marketing information as well as contractual relationships with their downstream customers. Furthermore, since the fee will be based on sales data that is over one year old, the entities covered in the fee regulation have ample time to acquire and provide accurate data that has been corrected for sales of gasoline and diesel fuel to out-of-state customers.

There are substantial issues with collecting fees at the terminal rack. It would increase the number of fee payers, which would increase the complexity of the regulation and increase the amount of administrative costs.

Additionally, applying the fee at the terminal rack would apply the fee to gasoline and fuel distributors, which include more small businesses. These businesses often experience significant year-to-year variations in sales, and could have difficulty passing the fee through to their customers, raising equitability and competitiveness concerns (see comment 45.1 WSPA for further detail).

Finally, ARB would not be able to use the tax collection system in place at BOE as previously suggested by this and other commenters as a means of simplifying the collection of the fee for transportation fuels. This would require that ARB modify the tax collection methodology, further increasing the administrative complexity of collecting the fee which would also increase the overall fee. See also response to Comment 17.13 WSPA.

It is also worth noting that there are two types of gasoline supplied by California's refineries: California gasoline for in-state use and gasoline intended for use outside of California. To be used in California, gasoline must be certified for use in the State. While there are instances where California certified gasoline is exported out of the state, gasoline manufactured for use outside of the state does not need to meet the same requirements as California gasoline and does not require certification as such. The fee will only be applied to certified California gasoline intended for use in the state. Refiners will report quantities of California certified gasoline that was not exported out of state.

See also the response to Comment BHS-O11 CIOMA.

BHS-O2.2 **Comment:** We have submitted a very easy proposal to the staff and steps identified on how to do this. In the context of efficient government, what you have is an existing system in place with the Board of Equalization who collects fees for transportation fuels for a long time, diesel and gasoline, excise fees.

Agency Response: See responses to Comment 17.1 WSPA, Comment 17.3 WSPA, Comment 17.8 WSPA, and Comment BHS-O2.1 WSPA.

BHS-O2.3 **Comment:** Cal/EPA collects fees on underground storage tanks in this same manner. Childhood lead fees, oil spill fees, they're all collected in using this system. It is a long established body of law to administer the fee. It is the way to do it. It would avoid duplication for you, for us. It is the highest level of transparency. And it ensures a price signal to the regulated community and the consumer. We are very frustrated and disappointed with the outcome. We urge this Board the (to) adopt an at-the-rack point of measurement on the fees for transportation fuels. I cannot believe that we are fighting about how to most efficiently provide you 40 percent of the finances that you claim to need to administer this program. And I urge you to revisit this recommendation, to keep the dialogue open with us on this, much like you did on the last item. We'd love the staff to continue to try to get an understanding how this system works.

Agency Response: See responses to Comment 45 WSPA in its entirety and Comment 17.13 WSPA.

Comment BHS-O3: CIPL

Comment: And I'm the Southern California Outreach Director of California Interfaith Power and Light. And I'd like to take a big view picture today of this issue. We work with 500 congregations in California representing some 200,000 people of all faiths. And we work on energy reduction, energy efficiency, and sustainable energy measures. We're one state affiliate with National Interfaith and Light Movement, now working in 30 states on climate change and energy issues. To the faith community, the need to reduce energy use is not merely a financial or environmental question; it is a morale mandate dictated to us by our beliefs. In regards to the proposed administrative fee, which we support, I wanted to briefly bring up the issue of equality and fairness. In terms of energy reduction, many sectors of California's society have taken action. One, the legislators of California have passed strong energy efficiency standards, which over the last 30 years have resulted in the stable use of energy, despite our rise in population. Two, many businesses, small and large, have taken practical steps to become more energy efficient. Three, the faith community has taken and continues to take strong action and energy reduction measures through education of their Congregants and facility retrofitting. And, fourth, the good people of California are recognizing the need for energy reduction and are taking practical steps toward that end.

It is now past time to make the biggest polluters who are the largest causes of pollution in global warming pay the small fee that ARB is proposing. To those who say that this fee would be unfair to large polluters, let us recognize the cost that has already been paid in health and health care, lives and livelihoods of California citizens, many of whom are in economically disadvantaged areas, have been paying for decades because of pollution and in the name of large profits. California Interfaith Power and Light is advocating for an eventual price on carbon, one that would reflect the true price as business as usual in terms of cost to the environment and human health. This fee, which ARB has the authorization to instate, would be a small step in the right direction, a step toward carbon reduction and toward a needed rapid shift to clean energy. It would save money in the long run and is very fair.

Agency Response: ARB appreciates the commenter’s support.

<u>Comment BHS-O4: Pills</u>

Comment: I’m here to request the Board to provide additional supporting information on the direct costs involved in the proposed fee. We ask that the public comment period remain open until this has occurred and the Board takes a vote. There are, as is addressed in the written record and other speakers will comment on, very substantial data gaps that remain in the record on substantiation of direct costs. In that litigation, on September 18th, the judge ruled, and I quote, "Respondent Board is already under a legal obligation to make public through the rulemaking proceeding itself all of the facts that support its action."

The court did not order further review, but did state again "viewing this matter in its proper context in regulation to a pending rulemaking proceeding in which respondent Board is already under the legal obligation to reveal the factual support proposed action" -- go on and continue.

The court even commented, "in this case, given the legal standards applicable to fees, any failure by the Board to provide facts in the rulemaking record to support its action presumably would make the regulation vulnerable to a legal challenge."

I want to add that CARB's attorney made the following statements on the record, "Any questions the associations have, they can ask the staff of ARB during this pending rulemaking proceeding as a matter of law under the government code."

The staff have to respond. If they don't, they do so at their own peril. Without the substantive responses to public comment, the regulation's going to be back in court. And went on to say ARB staff has to respond substantively and help our clients understand what's going on.

I would like to mention part of the APA, Government Code 11347.A and B talks about the obligation on CARB in this process that it shall maintain a file available to the public, which shall include all data and other factual information, empirical studies, reports, if any, on which the agency is relying.

So, accordingly, for policy reasons as well as the legal obligations that are referenced, we are requesting that the Board make publicly available all of the factual materials and documentation that validate the cost of this fee.

Agency Response: ARB has made available to stakeholders and the public all materials relied upon related to the formulation of the Fee Regulation. In addition, ARB has provided all appropriate materials available in response to the Public Records Act (PRA) requests.

Comment BHS-O5: SBA

Comment: ARB expenditure data for fiscal years 2007-08 and 2008-09 in tables 3A and 4A of the staff report is not well supported by documents produced by ARB. The documents produced by ARB supported only 17 and 11 percent of expenditures respectively for the two fiscal years. Our analysis of the ARB's estimation exercise suggests that ARB may have double counted overhead costs by removing administrative services PY contribution without removing their salaries from total personnel expenditures.

There are also significant expenditures for operating costs, equipment, and administrative overhead, totaling $17 1/2 million for which no supporting data are provided.

The ARB uses the CalSTAR system for all its accounting and reporting. The only way the data in tables 3A and 4A and supporting spreadsheets can be determined to be accurate is through the examination of complete accounting records from ARB's CalSTARs accounting system.

Agency Response: It is not clear to staff what the *"17 and 11 percent of expenditures"* refers to. In addition to tables 3a and 4a in the Staff Report (pages 109-111), ARB provided updates (corrected) to these tables and also made public two spreadsheets on its web site to provide supplementary details on all of its employees working on AB 32. (This is found at: http://www.arb.ca.gov/cc/adminfee/spreadsheets.htm). This supplemental employee information provides significant detail, including: employment classification, employee's division, employee's monthly salary, percent of time spent during each fiscal year, annual allocated cost (salary) during fiscal year, start and end dates, first, second and third program areas the employee worked within the AB 32 program, as applicable. Although not required to disclose this information, it was done as an effort to provide useful data and transparency to all interested stakeholders. Those documents were subsequently added to the record during the first 15-day notice of changes, pursuant to Government Code section 11347.1(b).

ARB has included both new and revised data into the administrative record including CalSTARS reports, summaries of contracts, copies of contracts, purchase orders and invoices, and Department of Finance Final Budget Summary reports that document contract and other expenditures.

Comment BHS-O6: NCPA

Comment: "… we believe that the regs should be revised to exclude imposition of the fee on the electricity imports.

Staff correctly notes that AB 32 does talk about all statewide greenhouse gas emissions, and NCPA and its members acknowledge both the compliance and reporting obligations associated with that obligation. But that obligation is distinguished from imposition of the fee and they should not be read together.

NCPA supports the netting provisions for several reasons. First, seasonal exchange agreements and multi-power purchase agreements with entities from out of state are very useful and they maximize the efficient use of the entire regional electricity system. They can control costs. They reduce emissions associated with excess generation at various times of the year. They maximize overall efficiencies and ensure reliability. Second, the fact that the amount at issue is only five percent is irrelevant, nor does it address the impact of the fee on an individual compliance entity or recognize the fact that there is no cap on the fee amount. Accordingly, the actual obligation can be and likely will increase from year to year and will be higher than the current obligation.

Finally, the estimated impact on individuals is irrelevant, because it does not address the impact of the fee on the entity that needs to pay the fee. So we urge the Board to reconsider of the netting of electricity imports.

We believe the administrative burden can be easily addressed and urge you to review the comments filed by the Southern California Public Power Authority earlier this week that address ways in which that can be handled through the reporting regulation. And also if there is going to be at look at the fee, we would ask that something specific be placed in there regarding enforcement to allow for a review of the fee obligation before penalties are assessed if there is a discrepancy."

Agency Response: Our rationale for application of the fee to imported electricity in general is explained in the responses to Comments 5.1, 5.5, and 5.9 to 5.12 SCPPA. Our reasons for applying the fee to both the import and export legs of non-simultaneous power exchanges are explained in our responses to Comments 5.22 and 53.2 to 53.11 SCPPA. We agree that seasonal exchange agreements and multi-power purchase agreements are useful and efficient. However, as explained in our response to Comment 38.5 NCPA, the fee is so small compared to the price of electricity that it is unlikely that it would serve as a disincentive to such agreements. Regarding setting a cap on the fee, see response to Comment 60.3 SCPPA.

See response to Comment 44.3 MID regarding disputes.

Comment BHS-O7: SJAQMD

Comment: It will cost businesses a great deal of unnecessary expense and having to deal with a duplicate redundant system, it essentially will codify inefficiency and bad government in my view. As you know, for decades the local air districts have been collecting emissions data both for criteria pollutant and toxic pollutants from businesses, and that information has been relied upon and acted upon by your agency, by EPA, and all of us and all the difficult work that we have to do.

Unfortunately, this recommendation now will require businesses to do two different systems: Report emissions to the local districts in a different format and to the ARB really for no good reason. My colleagues from CAPCOA had provided additional information on that. But I'd like to point to two other -- bring up two other thoughts that you may want to consider in your deliberations today. One is EPA will soon require their own mandatory reporting beginning next year. And will we have three different systems now that the businesses will have to use and report the same information to the three agencies? Will ARB be able to fight against that if you adopt the staff recommendation which says there is only one way to do the reporting and do it redundantly. The other thing I ask you to consider is to stay true to the resolution that you adopted when you implemented or the adopted the AB 32 Scoping Plan. In that resolution, you said you will -- when appropriate, you will rely on the existing infrastructure that is in place at the local air district and will put that in place and will use that to minimize the cost. All we're asking here is that in Section 95204 and Section 95104 where it says "ARB's tool is the only system to use," add a sentence at the end that will say "or an equivalent system adopted by local air districts and approved by your executive director," if it's appropriate.

Agency Response: Section 95104(e) of the Regulation for the Mandatory Reporting of Greenhouse Gas Emissions addresses the comment by requiring the use of the California Air Resources Board’s Greenhouse Gas Reporting Tool or any other reporting tool approved by the ARB’s Executive Officer that guarantees transmittal and receipt of data required by the Mandatory Reporting Regulation and the AB 32 Cost of Implementation Regulation.

<u>Comment BHS-O8: Pills</u>

BHS-O8.1 **Comment:** As stated in John Rosa's report, and Mr. Rozsa addressed you a moment ago, which he submitted on behalf of the association CARB has refused to release to the associations or otherwise make available any -- and I underscore the word "any" -- materials that validate past cost of AB 32 cost implementation to be covered through the proposed fee.

Indeed, in response to the Public Records Act request from the associations, CARB staff withheld on the asserted basis a privilege over 84 percent of their file on the proposed regulation. By CARB's own admission, the withheld records contain facts, financial information, numbers, and estimates relating to the amount of the proposed AB 32 fee and to the nexus with the regulatory programs of AB 32. For fiscal year 2007-2008, CARB claims staff person years, or PYs, of 125.44 direct staff cost approximately $10.6 million and staff overhead of approximately $3.7 million. For fiscal year 2008-2009, the staff PYs are 182.23. Direct staff cost are approximately 16.1 million, and staff overhead is approximately 5.6 million. We estimate that approximately 27.8 million is claimed by CARB for staff hours and staff overhead for fiscal year 2007-08 and 2008-09 of the approximately $54.6 being retroactively claimed for those years.

Agency Response: ARB has made available to stakeholders and the public all materials relied upon related to the formulation of the Fee Regulation. In addition, ARB has provided all appropriate materials available in response to the Public Records Act (PRA) requests.

BHS-O8.2 **Comment:** The fact is that CARB staff has admitted through the declaration of Daniel J. Whitney that CARB staff did not keep records. Mr. Whitney stated, and I quote, "ARB did not keep hourly records of AB 32 implementation administration work for fiscal years 2007-2008 or 2008-2009. The time spent on such work by CARB employees was estimated." The bottom line is that CARB staff has taken the position that the public is not entitled to see the supporting documentation for the calculation of past year costs and that the public is only entitled to see CARB staff's final totals determined through its secretive process. This position is contrary to the Legislative intent of AB 32, the statutory requirements of AB 32 ---- and requirements of the Administrative Procedures Act.

Agency Response: ARB did not keep hourly (staff time) records for work on AB 32. This is not required. However, staff strongly disagrees with the statement that they have "…*taken the position that the public is not entitled to see the supporting documentation for the calculation of past year costs and that the public is only entitled to see CARB staff's final totals determined through its secretive process.*"

On the contrary, the supplemental employee spreadsheets (found at: http://www.arb.ca.gov/cc/adminfee/spreadsheets.htm) was not required to be made available pursuant to the APA, but rather was provided specifically to show a greater level of detail than the summations of staff hours and costs (Tables 3a and 4a of the Staff Report found on pages 109-111) made available. ARB provided additional documentation into the public record for this regulation. This includes: copies of all related contracts and invoices, copies of purchase orders for equipment, CALSTARS summaries and other related documents.

Comment BHS-O9: CBPA

Comment: There's been a concern that a great deal of money has been spent by CARB in moving forward with AB 32, and we recognize that. AB 32 is changing the landscape of how we do business here in California. But understanding that, there will be a financial obligation paid by most businesses for implementation. And with that obligation comes the ability for those costs to then be borne upon our rate payers, which would be businesses and residences. So we would request that as you move forward that you require that there be an audit system included into this rulemaking and that you set up an advisory committee of those who are actually paying the rates, are paying those fees to make sure that they can be substantiated, since it is an administrative fee, that there's a nexus study that's done, and to make sure there's direct accountability for all those fees that are addressed.

Agency Response: ARB, like all state agencies, is subject to audit by the Department of Finance. ARB is also implementing other fees, like the Nonvehicular Source, Consumer Products, and Architectural Coatings Fee (AB 10X), without an advisory panel and has chosen not to convene an advisory panel for this fee.

Comment BHS-O10: SierraC

Comment: I'm here in support of AB 32 the administrative fee as proposed. This action is fiscally responsible, as funds are needed for implementation of AB 32. It would be fiscally irresponsible to move the process forward without identifying how California agencies will cover AB 32 implementation costs. California taxpayers have already borne the burden of this economy and future repayment of bonds with interest. It's time for the polluter to pay for their pollution. They created it. They profited from it. And they should pay for it.

There is a clear split in California's business community. There are many highly vocal and organized individuals, many here today, that represent old dirty business interests in California, who every step of the way have been hard at work trying to delay or detail AB 32. It's the same old, same old. These companies sue over every environmental regulation and then run ads during the nightly news claiming how green they are.

Let's make no mistake. AB 32 enjoys strong support from innovative business leaders across the state. Six months ago, hundreds of business leaders, including top executives from Google, Ebay, Gap, Warner Brothers, many other highly respected companies, they signed a full page ad in the Sacramento Bee expressing their strong support of AB 32 and also claiming, rightfully so, siting the economic opportunities it would spark.

Finally, AB 32 is an investment in stabilizing California's future. I'm a native California. Born and bred here. Lived my whole life here. It will put California's environment and economy on a more secure path, insulating us from the price shocks that they want to continue to give us and supply disruptions for our energy. Regardless of how they're caused, these trends of our growing oil demand in a business as usual mode will continue to make these price shocks more frequent, deeply felt, and longer lasting. The costs of driving a mile in the U.S. has nearly doubled between 2002 and 2007. And, finally, I have two little kids at home.

I'm more than willing to pay my fair share, as deemed by this Board, of $0.77 a year to see AB 32 implemented.

Agency Response: ARB thanks the commenter for its support.

Comment BHS-O11: CIOMA

BHS-O11.1 **Comment:** First of all, we believe it is an inappropriate delegation of taxing authority by the Legislature. The way this regulation has unfolded shows that it is a guessing game, that somehow ARB is going to guess on what's going to happen and how much it's going to cost, and they apparently have no obligation to tell us how they got those guesses. So we believe that that's inappropriate delegation of taxing authority to you.

Agency Response: This comment does not address the regulation. The appropriate venue to challenge this would be with the State Legislature.

BHS-O11.2 **Comment:** Secondly, we adamantly oppose any retroactive assessment at the rack. I have contacted our members that will be included in such a proposal, that every one of them has said that they will not be able to pay the invoice -- they'll be able to pay. They will not be able to pass along the money or the price of the invoices to their customers. That is just the way the pricing mechanism works in this industry. We're in competition. One company decides not to pass it on, nobody gets to pass it on. That's the way it works. This is not just a simple assessment of cost and pass it on to the customer. That's not the way it works. And it's obvious your staff doesn't understand that.

Agency Response: The commenter stated that the point of regulation for the fee should not be at the rack. ARB has not placed the point of regulation at the rack. See also BHJ-O9.2 WSPA.

BHS-O11.3 Comment: Finally, we would oppose any retroactive establishment, refinery gate, or at the rack. It's just not the way to do business. When a price -- when a fee gets laid into a gallon at the rack, that's apparent to everybody. It gets laid into the gallon. It goes along with the gallon. People pay that price laid in going forward.

Retroactive fees don't work that way. It's a mystery on whether those fees get paid for not. So this regulation has just got a major amount of problems with us, and we don't think that it is appropriate regulation.

Agency Response: Most fees are designed to collect an open-ended amount of money, while State law requires ARB to collect a set amount. To apply a fee per gallon, ARB would be required to forecast fuel sales, and for regulatory consistency, to forecast fuel use and facility emissions from for other regulated sectors. As ARB is unable to forecast the required data, staff must base the fee on known data from previous years. See also response to Comment BHS-O2.1 WSPA.

<u>Comment BHS-O12: SDAPCD</u>

Comment: We were up here concerned with the greenhouse gas reporting tool being the only option. And I appreciate the fact that you said you're going to expand those into federal as well as perhaps our needs. I think the data quality will be better with the APC districts involved.

Agency Response: See response to Comment BHS-O7 SJAQMD.

<u>Comment BHS-O13: SCAQMD</u>

Comment: South Coast staff supports the recommendations from CAPCOA. They recently submitted a letter which Mr. Kard and Mr. Seyed had discussed. And basically wanted to show you the specific language that we think should be added to the rule. This specific language is a little bit different from what South Coast staff proposed previously. But this would enable tools developed by local air control districts or local APCD's to provide an optional reporting tool that, should the Air Resources Board staff approve it, would be a good opportunity to stream line and consolidate reporting.

The South Coast is willing to provide funding to pay the CARB consultant that developed your tool to help in the evaluation and to make sure that our tool would meet all of your needs. So we strongly support the CAPCOA recommended language.

Agency Response: See response to Comment BHS-O7 SJAQMD.

<u>Comment BHS-O14: SierraC</u>

Comment: I'm also a volunteer speaking on behalf of the 200,000 volunteer members of the Sierra Club in California. And I want to say that this is a great day. This is the day when we finally get the financial structure in place to move AB 32 forward. We are totally thrilled with the amazingly brilliant staff that Mary Nichols and the whole -- Mr. Goldstene and everybody has put together, that this is a great staff. And obviously we need to pay them. And so this is great that we're now moving forward to get that pay structure in place. And we know that this is obviously essential in terms of getting this whole effort of the AB 32 on its way. And this fee is pretty small, right? What was that, 1.4-tenths of a cent? In other words, less than two-tenths of a cent of a gallon. How in the heck could you ever know that that fee was added to your three or $4 a gallon gas price?

This is truly a nominal fee to get us on the track to do what we need to get done. And I think that it is pretty embarrassing by all these emitters, polluters, whatever trying to delay this thing with some ridiculous Public Records Act that this is legal, mumbo-jumbo. And what we need to do is move forward. And you are all well aware that the cost of delaying of global warming is getting worse and worse. As I said yesterday, we're this deep trouble on this thing, because the methane klath rates in Siberia are starting to leave. They're starting to be emitted as the global warming. We're getting very, very close to global warming runaway tipping point.

So your action today is totally critical. And we are going to look forward to supporting you in all the rest of this wonderful implementation of AB 32.

Agency Response: ARB thanks the commenter for its support.

Comment BHS-O15: WJames

Comment: I'm here on behalf of several public interest groups, environmental public health, and other public interests. They submitted a letter you should have received. The groups are the Natural Resources Defense Council, American Lung Association of California, Center for Resource Solutions, Planning and Conservation League, Environment California, Union of Concerned Scientists, California League of Conservation Voters, California Tax Reform Association, Coalition for Clean Air, California Interfaith Power and Light, Sierra Club, Environmental Defense Fund, Climate Protection Campaign, and a late addition that wasn't on the letter you received, Breathe California. I want to provide just some highlights of the written copy you received. And those are the following: That this regulation, the fee you're adopting today, avoids adding to the already over-burdened state budget by collecting fees from the largest sources of global warming emissions in California.

Current law requires ARB to impose a fee on sources of greenhouse gas emissions to carry out the Scoping Plan you have adopted. AB 32 specifically authorized the implementation of a fee to generate funds for carrying out the AB 32 programs. And this regulation will prevent ARB from continuing to borrow from existing funding sources that the State has and repay these borrowed funds to support the program over the last two fiscal years, clearly not the intent.

This proposal equitably covers 85 percent of all greenhouse gas emission sources in California. It would not be applied to small businesses. As was stated earlier, it's a very minimal fee, even if passed along to consumers. And while it's not in the letter, I will say it's a fraction of the cost associated, I'm sure, with the legions of lawyers being employed by those who are trying to delay it. The cost of this program is minor compared to the cost of global warming to California. California's vast real estate, agriculture, and tourism industries face significant threats from global warming with trillions of dollars of assets and revenues at risk. California's benefits far outweigh the annual estimated 30 million of administrative cost of implementation. We strongly support the proposed AB 32 administrative fee. We've had enough delay. We've had an extensive public process.

Agency Response: ARB thanks the commenter for its support.

<u>Comment BHS-O16: AmLung</u>

Comment: On behalf of the American Lung Association in California, I'm pleased to reiterate our strong support for adoption of the AB 32 administrative fee. As we've stated in letters, workshops, and other Board meetings, we feel that this fee is necessary to maintain the important work of CARB and other State agencies to implement AB 32. Like others, we applaud CARB for moving forward in a responsible manner to protect our air quality, public health, and environment from the worst effects of global warming by maintaining California's role as a global leader in climate policy.

Among the many reasons to proceed with adaptation are:

One, we have seen the effects of California's budget crisis on our many State programs. And AB 32 implementation is too important to delay. Secondly, this regulation would provide a stable and continuous source of funding in an equitable manner ensuring that a broad range of major greenhouse gas emission sources are responsible to pay for their pollution. And, third, as others have stated -- and I'll just quickly reiterate, the overall cost of this program is minor compared to the cost of global warming to California, especially in terms of air quality and public health that are already in crisis and will be further threatened by rising temperatures, increased energy demand, emissions, and other factors.

Climate change impacts could cost the public health sector 3.8 billion to 24 billion in additional annual costs. And this is on top of the $170 billion attributed to ozone and PM pollution every year.

So just conclude by again thanking you for the opportunity to reiterate our strong support for adoption without delay of the administrative fee.

Agency Response: ARB thanks the commenter for its support.

<u>Comment BHS-O17: BAAQMD</u>

Comment: And like the other CAPCOA members that you've heard from this morning, my comments are directed at the proposed amendment to the mandatory reporting regulation. We've had for many years a system in place for facilities in the bay area to establish and update emission inventories for criteria and toxic air pollutants. A few years ago, that system was expanded to cover greenhouse gases. We've also been working on a major upgrade to our inventory system, which we expect will be completed at the end of next year. The upgraded system will be in the form of intuitive online tool where facilities can enter their data, check it for errors, and then submit it to us electronically.

We've had discussions with ARB staff about the possibility of extending our system so that it can be used for Bay Area facilities to submit their greenhouse gas inventory data directly to CARB rather than having to duplicate their effort by using a separate tool. The staff has been open to that idea and has indicated a willingness to continue the discussions with us toward that end. And so we're looking forward and toward the time when we can have a more efficient integrated approach that can provide all of the required data directly from the facilities to both of our agencies in the required format. Realistically, in the Bay Area, we're probably still a couple years away from that point. But we do support the language that was proposed by South Coast staff a moment ago.

I'd like to conclude by thanking the ARB staff for their time and cooperation in this matter. They obviously have a great deal going on, and they have shown a sincere interest in what we're doing. And we look forward to continuing to work with them on this.

Agency Response: See response to Comment BHS-O7 SJAQMD.

Comment BHS-O18: UCS

Comment: I want to echo the support you've heard from others. We believe this fee is both fair and equitable. It's reasonable. And it's fiscally responsible. So we encourage you and support you in adopting this without delay.

Agency Response: ARB thanks the commenter for its support.

Comment BHS-O19: RZamb

Comment: I'm here to represent the city of Commerce residents that were not able to be here today. I'm here to say no to pollution. I know the residents living in our city of Commerce have 140 percent increase risk of cancer. And to show you care, I know it's awareness week this week. And yesterday in the L.A. Times there was a great article in the front page. It describes our city as cancer alley. It is. You'll hear residents later on in Spanish, and these residents that care. Some of them have lost their husband to lung cancer. Some of them they didn't even smoke. I know I don't live in that alley, but I live in that city and I care. So therefore we're asking you to make our community a better place in the enforcement that you have to make. You have the power to have environmental justice in our city and the cities around us.

And I believe it's been a difficult time to gather signatures, because everybody that works, they don't have time to actually come here. But I have collected some signatures, and I would like to give them to you. They are in opposition of so much pollution in our city.

Agency Response: This comment is not directed at this regulation.

<u>Comment BHS-O20: SCPPA</u>

BHS-O20.1 **Comment:** Like the July version, today's proposed regulations still applies a fee to both the import leg and the export leg of an electric utilities exchange arrangement with an out-of-state counterparty.

For example, for Riverside's agreement with BPA in Oregon, the fee would be applied to the electricity that Riverside imports from BPA in the summertime. The fee would be applied again when Riverside generates in the winter to return electricity to BPA.

If Riverside simply generated in the summer instead of seasonally exchanging with BPA and realizing the resulting economies, Riverside would pay only one fee. By applying the fee twice instead of once on exchanges, the fee discourages socially beneficial economy exchange arrangements.

Agency Response: We have provided our rationale for applying the fee to both legs of an import/export non-simultaneous electricity exchange in our responses to Comments 5.22 and 53.3 to 53.11 SCPPA.

BHS-O20.2 **Comment:** The fee also discriminates against interstate commerce. If a southern California utility enters into an exchange agreement with a northern California utility, the southern California utility pays no fee on the electricity that would be received from the northern California utility. It would pay a fee only once upon generating electricity to return to the northern California utility. However, if the southern California utility enters into an exchange arrangement with an Oregon utility, a fee would be paid both on the electricity received from the Oregon utility and on electricity returned to the Oregon utility. Placing the double burden on exchanges with out-of-state counterparties while placing a single burden on exchange with interstate counterparties unconstitutionally discriminates against interstate commerce in favor of intrastate commerce. Thus, for both public policy and legal reasons, we urge the Board to relook at the treatment of imports and exports under electricity utility economy exchange agreements. SCAPA has filed written comments proposing some fixes.

Agency Response: We have explained that the fee does not discriminate against interstate commerce with regard to exchange agreements in our response to Comment 60.5 SCPPA.

Comment BHS-O21: VICA

Comment: VICA is a business advocacy association that for nearly 60 years has advocates on behalf of the businesses for the San Fernando Valley, which has reached 21,000 businesses and that provide over 387,000 jobs. I'm here to respectfully ask that you oppose approving the $57 million in additional fees as we believe this action will have a detrimental impact to our business community and the consumers that we serve. Ensuring a vibrant business community is of paramount importance to us and our organization. And we believe we support the principles behind AB 32, yet we are deeply concerned about the associated costs with complying with the government regulations. For example, our local public utility districts of Los Angeles, Pasadena, Glendale, and Burbank have estimated that AB 32 implementation will increase the cost of electricity anywhere from 30 to 60 percent. These increases will inevitably be passed on to our businesses and consumers in the form of higher energy rates, higher costs of products and services, or worse, layoffs. Given the strain placed on our current economic climate, we believe it is extremely unwise to ask business to pay more fees to comply with government imposed regulation.

We appreciate greatly the opportunity to be able to come to you today and voice my concern on behalf of the VICA membership, but we ask you to give great consideration to the economic backlash this would have to our communities.

Agency Response: See response to Comment 44.4 MID and 17.1 WSPA.

Comment BHS-O22: CCA

Comment: I'm here to support this fee, because I support as do so many of my environmental colleagues the strong implementation of AB 32 to reduce global warming pollution. We know this pollution is on top of and related to the pollution that so many communities are already burdened with. And while I hear concerns about whether the time that your staff is going to spend exactly matches this fee, let me just say if there is any over-estimate there, I have plenty of work for the staff to do. So we are going to make sure you got plenty of work to fill any gaps in that administrative fee. But I know that's a lighthearted way of saying there's more work to do and this fee is necessary, essentially believe that your numbers are going to be accurate and appropriate and publicly acceptable.

This fee is just along the way to an appropriate pricing of carbon in the global warming pollution that is causing such damage that and has the prospect for such greater damage that is requiring the leadership of California and this fee which at the consumer level is so small and which the Board here and the staff here is appropriately considering putting up for upstream, this will help mitigate some of the financial damage that comes with global warming and climate change and the burden that has on already over-burdened communities. So I urge you to expeditiously adopt this fee so that we can continue on the path of implementing AB 32 to reduce global warming pollution.

Agency Response: ARB thanks the commenter for its support.

Comment BHS-O23: CSE

BHS-O23.1 **Comment:** I'm happy to state that we are here to support the AB 32 Cost Implementation Fee. We believe that CARB needs sufficient funds for the administration and enforcement of AB 32. We believe that major greenhouse gas emitters should pay for their violation of AB 32. We believe that polluters should pay for the assessment of their illegal greenhouse gas emissions. We believe that a fee should not be passed on to the public, as has been mentioned, if the emissions are due to the negligence, failure to incorporate the maximum achievable control technologies, or the failure to replace parts, equipment, and systems on a regular basis, which has been causing regular breakdowns and malfunctions.

Agency Response: ARB thanks the commenter for its support. However, this fee is not intended to be an enforcement mechanism, or to specifically encourage reductions in GHG emissions. It is the intention of the regulation that the cost associated with greenhouse gas emissions associated with the covered fuels be passed on to the final point of combustion. For fuels such as coal, petroleum coke, catalyst coke, and refinery gas the most administratively efficient point of regulation is directly at the point of consumption. It is not our intention that those industrial facilities specifically included as the point of regulation pass through the fee. However, we understand that increased operating costs may be passed through. In other instances, the most administratively efficient point of regulation was the upstream supplier of the fuel, and the intent of the regulation is to that the fee will be passed through to the consumer of that fuel.

BHS-O23.2 **Comment:** We do wish to have some modifications of what you're proposing. In section -- where it says applicability A, three refineries, we believe that you should add a D category, which means -- states something to the effect of planned and unplanned flare events. Today, our refinery in Wilmington had a major breakdown fire. There are hundreds and hundreds and hundreds of tons of PM, NOx, SOX, and greenhouse gases that are being emitted right now as we speak. The television has reported there are over 100 fire engines there putting it out. We cannot just include just the regular day-to-day operations. When you have major incidents like this, one day can equal one or two months. So we ask that you add that as another section.

We ask there be another section added that is B that there is no exemption for emissions caused by planned and unplanned flare events. So we don't want that to be left out of the loop. So we want that to basically include both process emissions and non-process emissions. And that's what we're asking that be included in the language.

Agency Response: We do not believe that an exemption for emissions from refinery flares exists, and that as sources of emissions from refinery gas combustion, the emissions from flares will be included in the fee. It should also be noted that this regulation is not intended to modify behavior nor reduce/control emissions (e.g., bring about a reduction in flaring).

D. June 25, 2009 Board Hearing Oral Comments

Comment BHJ-O1: SCAQMD

Comment: What I want to talk about is the aspect of the regulation that you heard about that would restrict greenhouse gas reporting only through the online ARB tool. At South Coast we have developed a voluntary optional component to our web-based emissions reporting system that can take the data that's needed for ARB reports and send it directly, without any ARB intervention, to your agency. It's actually a very important issue, not just to the staff but also to our governing board, that we can use such consolidated and streamlined approaches. And I hope to be able to convince you in the next minute or two that this represents good government, streamlining significant cost savings and better customer service.

Simply stated, what we're asking today is not for you to approve the tool. What we're asking for is some language changes that would enable us to continue the evaluation of this tool. And if it passes all of the requirements and meets all the needs, and we can overcome some of the concerns your staff has raised, then we may ultimately be able to use this tool. And why this makes sense is that we have hundreds of facilities in the South Coast that will be doing mandatory greenhouse gas reporting. The combustion-related equipment, there's a very large overlap in the amount of data that is needed. So we estimate that there's 75 or 80 percent of the data that a facility would enter for our annual emission reports for criteria and toxic pollutants that could then easily be transferred over and be used for the greenhouse gases.

It would save a facility tremendous time if they did not have to then reenter this same data into the online tool for ARB. And that translates into money. And in this economic time, we really should be careful about adding layers or additional costs where there may be ways to get around that. The analogy also is, in the proposed federal greenhouse gas regulations they're actually requiring use of -- or recommending use of just one online tool for EPA. We've made similar comments to them. Our model -- or our analogy is the federal income tax. We're all required to file taxes. They have to go to the IRS. There is online eFiling directly to IRS. But there's also a long list of preapproved software. And that software gets the right data, puts it in the right places. And there are solutions to the technology and security issues that have been raised. So our request, which we believe would be consistent with your Board policy and direction to staff to utilize existing infrastructure and try and streamline, is simply that you add some language to Section 95204(a) 2 in the fee reg and 95104(e) in the Greenhouse Gas Rule…

Agency Response: Section 95104(e) acknowledges that reporters shall use the ARB's reporting tool or any other reporting tool approved by the ARB's Executive Officer that guarantees that the data transmitted to and received by the ARB complies with the requirements of ARB's Mandatory Reporting Regulation and the Cost of Implementation Fee Regulation

Comment BHJ-O2: SCAQMD

Comment: …the proposed language is basically precluding the use of any alternative tool, and that we have spent significant resources developing a consolidated tool for reporting criteria emissions and greenhouse gas emissions that we think satisfies the requirements of AB 32. The Mandatory Reporting Rule as developed allowed for the possibility of using an ARB-approved district-developed tool. But the current proposed language basically precludes it. And that's our problem, is that we are seeking the opportunity to continue developing this tool to ARB's satisfaction.

We think the technology for doing this is good. We think it is legal, as Jill has mentioned the analogy with the federal income tax. There is off-the-shelf technology to handle all the legal issues. These issues that have been brought up to us, for instance, the data being unaltered, and the data security issues associated with people begin to intercept and change the data after it's been submitted. We think these issues have been addressed for over a decade. The technologies have been specified in California's digital signature regulations that were adopted in 1998. And they also included – the technologies are also talked about in EPA's cross-media reporting regulation that was adopted in 2005. So we don't see the issues associated with – any of the data concerns associated with doing this.

The one in particular is called public encryption or infrastructure, which relies on public key cryptography. And it's been around for 10 or 15 years and is very mature, and can be used for data transfer between our agencies very securely. And we don't see why it can't be used. So, in essence, we are proposing the language that Jill has recommended, to leave open the option of pursuing these. We're not asking for ARB to adopt our program as is. We're asking for just the opportunity to continue developing this with the hopes of in the end having a tool that ARB can rely upon.

Agency Response: The proposed regulatory language for Section 95104(e) does not preclude reporters using any reporting tool approved by the ARB's Executive Officer that guarantees that the data transmitted to and received by the ARB complies with the requirements of ARB's Mandatory Reporting Regulation and the Cost of Implementation Fee Regulation.

Comment BHJ-O3: NRDC

Comment: When California passed AB 32, we took a leadership role on confronting global warming. And one of the reasons that we did that was to position our economy to become a leader in a carbon-constrained world. Right now CARB and other agencies are in the middle of implementing a world-class greenhouse gas emissions reduction program. And the agencies need a sure source of funding to make sure that the staff can continue implementing those programs. AB 32 recognized the need to have funding for staff, and so it authorized a fee. And the California Legislature in their 2008 budget required CARB to move forward with this fee.

The proposed fee before you today is fair and equitable, covering 85 percent of sources in California. And it is necessary to ensure that we can continue developing our greenhouse gas emissions reductions programs, which will position California for success in a carbon-constrained world by maintaining our role of leadership in energy efficiency and technological innovation. At approximately $1 per Californian per year, this fee is a small price to pay for confronting global warming and transforming our energy economy. We urge you to approve it.

Agency Response: ARB thanks the commenter for its support.

<u>Comment BHJ-O4: MidAm</u>

Comment: When confronted with the issue of the potential fee imposition on interstate natural gas pipelines, we engaged in a very constructive dialogue with staff. I'm pleased to report that, based on the proposed amendments, our issues of concern have been satisfactorily resolved vis-a-vis potential interstate commerce concerns and the ability to pass on the fee. And our FERC jurisdiction, currently there is no mechanism to be able to pass along such a fee. So in that regard, we would hope that you will be favorably disposed toward the staff amendments. And we support the rule.

Agency Response: No response needed

<u>Comment BHJ-O5: CalC</u>

Comment: To that end, yesterday the associations submitted a joint letter to the Board requesting that it defer action and to hold the comment period open until at least the next scheduled hearing of July 23rd. Our request is based in part on a number of items, one of which is: Since February, through your Public Records Request, the associations have sought to obtain documentation substantiating the proposed AB 32 fee regulation, with little avail, leaving the associations with no choice but to seek assistance from the court in May. In addition, details to staff expenditures were not posted until June 1. And last Friday, 5,500 pages of documents were released. And they were released pursuant to the Public Records Request that we made back in February. And the information in these documents and records is important in the formulation of comments on the proposed regulation. And while we've done our best to try and go through all the documents, our review is hardly complete. Moreover, pending court action related to the public records request may indeed make additional information available that will be important to the formulation of our comments. Again, transparency on the manner in which regulations are proposed and adopted is what this is all about. And it is for this reason that these associations sought to obtain, and will continue to pursue, documentation to enable them to accurately comment on the proposed rule. Unfortunately, we have not had a fair amount of time to review, analyze, and fully and effectively comment on the proposed fee. And just to address the additional 15-day notice of comment period that's been proposed, due to the very limited discretion that's typically available to the Executive Officer in that setting, this would not be an appropriate way of ensuring that the associations have a full and fair opportunity to comment and inform the Board of its decision making.

Agency Response: The comment period was held open because the Board did not act on this regulation until its September 25, 2010.

<u>Comment BHJ-O6: NCPA/MSR</u>

BHJ-O6.1 **Comment:** We support many of the changes that have been made, but here's still a few issues that we think are -- need to be addressed further. One of them includes the lack of a cap on the total amount of the fee and the treatment of imported electricity that's not actually consumed in California.

Agency Response: See response to comment 60.3 SCPPA.

BHJ-O6.2 **Comment:** The electricity sector, which accounts for about 25 percent of emissions, is going to be called upon to make about 40 percent of the reductions. And the additional burden associated with the imposition of the administrative fee is not a trivial amount.

Agency Response: The comment concerning the percent of reductions does not pertain to the regulation, but to policy decisions regarding the Scoping Plan.

The total amount of fees expected to be collected from the electricity sector is approximately $13.2 million (from September 25, 2009 Board Hearing staff presentation). “Triviality” is relative. This regulation is authorized by section 38597 of the Health and Safety Code to fund administration of AB 32. The fee is apportioned based on each source’s contribution to greenhouse gas emissions.

BHJ-O6.3 **Comment:** There are no cost-containment measures in the proposed regulation or the statute. And accordingly there is no limit on the total costs associated with implementation of AB 32 or subject to collection through the fee. Because the fee amount is uncapped and the proposed regulation has no termination provisions, the total obligation to affected entities can and likely will continue to increase from year to year.

Agency Response: See response to Comment 60.3 SCPPA.

BHJ-O6.4 **Comment:** NCPA's concerned that the fee structure is being justified based on the current revenue requirement and that it is deemed to be a de minimis impact on individuals, as NRDC said, "One dollar per individual doesn't seem like much." However, because the fee is based on uncapped amounts and because the proposed regulation does not impose the fee on each individual but on entities that are responsible for paying the entire amount, using a snapshot of the disaggregated impacts cannot be used to justify the structure.

Agency Response: See response to Comment 60.3 SCPPA.

BHJ-O6.5 **Comment:** The economic review must look at the potential cumulative impacts of the fee in the long term and on the actual entities responsible for paying the fee, notwithstanding the hope that those costs can be passed through.

Agency Response: ARB analyzed the economic impacts of the fee in the ISOR. Also see responses to Comment 47.3 KernOil, Comment 38.5 NCPA.

BHJ-O6.6 **Comment:** NCPA is also concerned with the proposed regulation's imposition of the fee on electricity that is imported but never consumed in California. Failure to recognize and exclude imposition of the fee on what are basically financial transactions adversely impacts the electricity sector and jeopardizes the efficient operation of the entire western electricity grid. Retail providers must be able to procure and schedule electricity using the most effective and efficient transmission routes, and not be constrained by concerns that excess fees may be imposed on these transactions.

The MSR Public Power Agency is comprised of the cities of Modesto, Santa Clara, and Redding, and have ownership interest in renewable and coal-fire generation out of state. MSR's concerned that there's been insufficient review of the impacts on the fee in imported electricity, which limits the cost effectiveness of entity's ability to use out-of-state resources, risks efficiencies in terms of scheduling electricity, and increase compliance costs.

Agency Response: See responses to Comments 5.21 SCPPA, 5.22 SCPPA, and 53.1 to 53.11 SCPPA concerning electricity exchanges and the effects of the fee on imported electricity. The fee does not apply to electricity that is imported but not consumed in California.

<u>Comment BHJ-O7: SCPPA</u>

BHJ-O7.1 **Comment:** We are concerned, however, about the legality of the extension of the fee to imported electricity. We suggest that you reconsider the extension to imported electricity. If you elect to approve the extension of the fee, we urge you to consider seeking an Attorney General's opinion about the extension and that in FSOR the Board fully explain the legal support for the extension of the fee to imported electricity.

Agency Response: This comment was made while staff were still considering modifications to the proposed regulation, before the Board approved staff's recommended modifications. The regulation now applies the fee equally to in-state and imported electricity. See our responses to Comments 5.1, 5.2, and 5.9 to 5.20 SCPPA regarding the legality of applying the fee to imported electricity.

BHJ-O7.2 **Comment:** If the extension of the fee to imported electricity is retained, we urge two modifications to the ISOR. First we urge that the regulation be clarified to assure that the fee will not be applied to electricity that is wheeled through California without being consumed in California, regardless of the way in which the wheeling service is performed. Secondly, when power is imported as the first leg of an economic exchange arrangement, we urge that the fee apply only to one leg of the exchange, not both. In an economic exchange with an import and an export, only one kilowatt-hour is consumed in California, not two. Thus the fee should be charged once, not twice.

Agency Response: We have responded to these comments in our responses to Comments 5.21, 5.22, and 53.3 to 53.11 SCPPA.

BHJ-O7.3 **Comment:** And just the last point. SCAPPA joins with others in urging the Board to consider capping or in some way containing the revenue requirement that would be recovered through the fee.

Agency Response: See response to comment 60.3 SCPPA.

<u>Comment BHJ-O8: PacC</u>

Comment: We raised to staff some concerns about the definition of "imported power." As Ms. Blakeslee pointed out, there have been clarifications. Based on a review of that language this morning, it appears our concern has been addressed. We're going to have some of our technical people look at it some more to make sure there aren't any issues and possibly make some comments during the 15-day period. But other than that, we do appreciate the staff's attention to our specific multi-jurisdictional concerns.

Agency Response: ARB thanks the commenter for its support.

<u>Comment BHJ-O9: WSPA</u>

BHJ-O9.1 **Comment:** … I do want to draw your attention to one of the flaws in the proposed regulation. Section 39600 and Section 39601 of the Health and Safety Code authorizes ARB to adopt a fee regulation to be paid by sources of greenhouse gas emissions. In order to do this, the fee regulation must be levied as directly as possible on those responsible for the greenhouse gas emissions. Fuels in and of themselves are not sources of greenhouse gas emissions. The source of greenhouse gas emissions related to the use of these fuels is the facility or equipment in which the fuel is combusted. Combustion clearly does not occur at the producer-importer level as used by CARB in the proposed rule -- regulation. So fuel producers and importers cannot be considered sources of greenhouse gas emissions.

Agency Response: AB 32 does allow ARB to adopt a fee regulation to be paid by sources of greenhouse gas emissions. In order to minimize the administrative burden of implement the regulation, we determined that it was necessary to collect the fee at the fewest points of regulation as possible. However, as the fee can be passed through ultimately to consumer by the entities to which the regulation applies, it will be levied on those responsible for the greenhouse gas emissions. See also responses to Comment 53.1 SCPPA and Comment 47.3 KernOil.

BHJ-O9.2 **Comment:** If CARB reasonably determines that it would be administratively difficult to levy a fee directly on emitters who combust transportation fuels, such as at the pump, CARB must consider other collection methods. WSPA proposes that CARB adopt a fee structure that parallels current federal and State collection points for motor fuel excise taxes. This proposed structure would reduce compliance costs and avoid the need for expansive and successive new regulations to address the novel point of collection at the refinery gate. WSPA has been working with staff on this option and respectfully requests the Board consider this. We would like to suggest the Board consider having WSPA continue to work with the CARB staff and Board of Equalization to find the most acceptable solution for all involved. I have a modification to Section 95204 for the Attachment B to the regulation for your perusal should you decide to have the Board consider this and to have the Executive Officer in his 15-day package address that.

Agency Response: The commenter appears to acknowledge that it may be reasonable to determine that it would be administratively difficult to levy a fee directly on emitters who combust transportation fuels, such as at the pump. ARB has determined that it is a greater administrative burden to apply the fee to millions of transactions at the pump than to the approximately 40 refineries and importers in the state.

The commenter suggests that the fee structure parallels current federal and State collection points for motor fuel excise taxes. Once again, we have placed the point of regulation on the fewest entities possible. Applying the fee within the structure noted by the commenter (commonly known as “at the rack”), would increase the number of affected entities responsible for paying the fee on transportation fuels from approximately 40, to approximately 125.

Additionally, the quantity of fuel sold by smaller entities that would be included under the approach suggested by the commenter can vary significantly from year to year. Since the fee is based on data from previous years, if the fee is recouped on fewer gallons than those upon which it was based, the suppliers per gallon rate could be higher than competitors (and vice-versa) creating a competitive disparity. For example: a small fuel distributer sold 300,000 gallons of fuel in 2008, and is assessed a fee based on the emissions from those 300,000 gallons in 2010. To pass along the fee, the distributer projects sales for 2010, and attaches a fraction of the fee to every gallon sold. However, for various reasons, this distributers market share/fuel sales have declined in 2010 and will only amount to 100,000 gallons of fuel sold. To pass along the fee from 2008 sales on fewer gallons sold in 2010, this distributor would need to increase the additional per gallon cost three times as much as a competitor whose fuel sales/market share have remained relatively constant. The variability in market share is minimal with large distributors. For the seven major refinery operators in the State, the market share for the years 2005 through 2008 varied by less than one percent of the total market.[11]

See response to Comment 45.1 WSPA for a discussion of why ARB does not believe the terminal rack is the appropriate location for fee collection. In addition, see response to Comment 17.13 WSPA regarding why ARB does not believe that BOE's current tax collection system is appropriate for collection of the AB 32 Fee.

<u>Comment BHJ-O10: PLC</u>

Comment: With the State budget in crisis, AB 32 needs all the funding and support it can get to keep up momentum through these tough economic times. The administrative fee is an equitable option to fund AB 32 implementation and would pass on a small cost to California residents in return for climate change solutions. I urge you to support the fee.

Agency Response: No response needed

<u>Comment BHJ-O11: CIPA</u>

BHJ-O11.1 **Comment:** In the comments we try and explain the concern about the data release. There's the common carbon cost equation. And it has a numerator and a denominator. The denominator is the emission factors times the quantity of the natural gas plus the quantity, et cetera, which is below the numerator, which is the TRR, the total revenue requirement. We got lots of data on the denominator, not so much data on the numerator. So that's where we're looking for a little help from you.

Agency Response: The amount of the TRR is ultimately based upon the approved the state budget for the next fiscal year, as well as debt repayment. This amount will include what is approved for ARB and other state agencies working on the implementation of AB 32, adjusted for over or under collection. While we can provide estimates based upon loan repayment costs (debt and accrued interest) and the current program costs based on our latest information, we will not know what the exact TRR will be until the state budget is approved each year. Based upon past state budgets, approval should be in the July-September time frame. ARB will make this information available as soon as possible.

[11] Ibid.

BHJ-O11.2 **Comment:** The problem for us is that we can't pass the cost to this fee on. When we're burning associated gas on-site in production facilities, it's to generate distributed generation electricity to run our processes. The unintended consequence that we fear here is that, to escape paying the fee, we may flare the gas and then just put increased demands on conventional electricity. With that said, the other thing that's out there looming very large for us is the fact that -- we were given some comfort that this would only apply to those who are mandatory reporters and emit at 25,000 tons, and would then therefore spare many of our smaller members. But then we're participating in other proceedings wherein we're talking about conforming to the Western Climate Initiative and reducing 25,000 tons to 10,000 tons. So we just want to put that on your radar screen, to consider holding that at the 25,000 ton mark so that if there is movement to conform with WCI, it doesn't sweep up a whole lot more of our members and therefore require the flaring of more of this gas. At any rate, we'd like to be able to continue to use it in our production.

Agency Response: The intent of the fee regulation is that the cost of the fee is passed along to the end user. For natural gas that is produced and subsequently used at the production site as fuel for the production process, the producer is the end user.

Additionally, the commenter states that applying the fee to this sector will cause the industry to no longer use their produced natural gas as fuel, but to simply combust it in a flare. This process is reported as combustion emissions under mandatory reporting and is still subject to the requirements of the fee regulation. Therefore, there is no economic incentive to flare the natural gas rather than use it as fuel.

Additionally, see response to Comment BHJ-W3 CIPA.

Comment BHJ-O12: CMTA

Comment: The California Manufacturers care about the fee regulation because every additional cost burden adds to our already very high cost of doing business in the State. The Milken Institute's just released a new report about manufacturing in the State. I urge you all to take a look at that. They describe how important it is and how manufacturing employment has declined since the year 2000. They say, quote, "California's been progressively losing more of its manufacturing employment, particularly high value-added manufacturing, to other states, such as Oregon, Texas, Minnesota, and Washington." Milken cites high taxes and regulatory burdens for an unfavorable manufacturing climate. So we need to make sure that we're not paying more than it's justified under the law. And given importance of the fee reg, we're disappointed that we've not been able to understand and verify the underlying data for the fee calculation. We've earnestly attempted to obtain the information we need, both informally and through the public records request. Based on what we have so far, there are still discrepancies to be resolved. These go to how much should be raised by the fee, who should be paying the fee, and how much should be paid by each payer. And there are more documents being withheld that we're not sure are justifiably confidential. There's a matter of dispute I believe with whether or not the original request in February has been accurately replied to. And there are 11,981 pages of records from the -- that were requested that have been withheld by CARB. And we're not sure at this point whether that's justifiable that those have been withheld. So the letter goes into much more detail on these points. But the bottom line is we request a 45-day extension of the comment period so that we can get the materials we need and do some good comments on the rule.

Agency Response: The comment period was held open because the Board did not act on this regulation until the September 25, 2010 hearing.

Comment BHJ-O13: CMUA

Comment: I want to bring up the issue of energy exchanges. This is a strong policy in California to promote energy exchanges. And the Health and Safety Code 38562 would promote these also because AB 32 is supposed to minimize costs and maximize total benefits to California, also benefit the economy, public health and the environment and achieve overall societal benefits. Energy exchanges do this by utilizing hydro resources up in the northwest. When they have low load and we have peak loads, we transmit them down here. And vice versa. When we have high energy capability and low load - that's in the winter - and they need our load, we ship it back to them. And so these are energy exchanges. And because of this, we don't have to build certain power plants. We can defer or offset construction of power plants. So that obviously improves the public health and also lowers costs. So there's a strong, strong policy argument to encourage energy exchanges. Right now we believe that the mandatory reporting regs are not discrete enough to identify the proper energy exchange allocations. And entities like Mr. Pedersen mentioned, they're getting double charged for some transactions. We're also working with staff up until the last minute here to get a good definition of wheeling in the 15-day language. It's not quite out yet, but I think we're getting something good. When we have a definition of wheeling, that might help some of the transactions not have a double charge. But we would like you to direct staff to continue to work with us during this ensuing period before the new language comes out to possibly figure out ways to identify proper energy exchanges and allocate the single charge, or the zero charge if they're zero emissions.

Agency Response: We explain why we have not allowed the netting of imports and exports in our responses to Comments 5.22 and 53.3 SCPPA. In our response to Comments 53.4 and 53.5 SCPPA., we explain that we agree that energy exchanges our beneficial, but that this fee is unlikely to discourage exchanges. See those responses, and the responses to Comments 53.6 to 53.11 SCPPA for our full rationale for charging the fee both on imports and exports, except for imports that are part of simultaneous exchanges.

We modified the definition of “imported electricity” to exclude wheeling and other simultaneous import/export transactions, as discussed in our responses to Comments 5.21 and 53.2 SCPPA.

Comment BHJ-O14: AmLung

Comment: And we are pleased to be here in strong support of your Board moving forward tonight to adopt this fee regulation. And we do believe this action is long overdue. We believe that it's not only fiscally responsible, but this is necessary, as has been stated by my colleague from NRDC, to support the Board's groundbreaking work on AB 32 and, frankly, to address significant public health challenges that we're facing in the State. We believe that this regulation is fair and equitable. It's broad based. And we think the staff has done a great job in crafting the regulation. And we completely agree with the importance of placing the cost of AB 32 implementation on these major sources of greenhouse gas emissions.

That is certainly the way to go. And the key message we want to send is that we feel this fee is really tiny compared to the monumental public health impacts of climate change from poor air quality, heat waves, forest fires, and all the other impacts. And the cost that the public health sector will be bearing are huge, in the billions of dollars, to face these impacts, to build out the public health infrastructure that's needed to respond to address the illnesses, hospitalizations, premature deaths and all of those impacts that are going to occur from climate change. So we urge you to move forward. We're not surprised to hear the protests from industry. I'm sure you're not surprised also. And we urge you to adopt the fee today.

Agency Response: ARB thanks the commenter for its support.

Comment BHJ-O15: SierraC

Comment: …Sierra Club California, in strong support of this rule because we do support the principle that the polluters should pay for the costs of reducing pollution. And in this case the Legislature actually already made that decision and told you to enact a fee on the polluters. And this is a good proposal to do that. And it's not surprising that your major opposition is coming from those who would have to pay the fee, because they are responsible for most of the emissions. Some of the major points in favor of this fee: It covers 85 percent of the greenhouse gas emissions in the State - that's really very impressive - and does it very efficiently by assessing the fee upstream. It pays back the loans, which is only fair, because those were loans and some of them came from programs that also have important environmental goals like recycling. And also very important, I think, that it includes imported electricity. AB 32 specifically addresses accounting for electricity imports. And of course since most of our coal-fired electricity, virtually all of it, is imported - and that's the most carbon-intensive form of electricity production - it's very important that we include that.

Agency Response: ARB thanks the commenter for its support.

E. First 15-Day Changes Comments

<u>Comment FF1: KWal, March 2, 2010</u>

Comment: Please note that your attempt to enact the following bill and its fee provisions will further bankrupt this State and cause greater economic turmoil than already exists in California. This attempt by the State government to access fees on producers of carbon emission, and thus "greenhouse gasses" will do no more to protect the health and welfare of this State than it will to create jobs...and that it (sic) to say that it will do nothing but drive industry and those that bring jobs and properity (sic) to this State away. This is like punching holes in a sinking ship and I would hope you would scrap this bill and its fee arangements (sic) and bring some sanity back to how laws are created and enforced on the public. The fact that your reviewers can somehow measure that the consumer will only receive a $4.00 a year surge in utility and fuel costs is nothing more than laughable in that the ripple of affects of this legislation will end up causing the people of California so much more in jobs lost and welfare/unemployment benefits as industry is driven away. Please take in to consideration those that love and take care of this State on a practical day-to-day level because it is those of us that do that realize more and more that our representative do not have this States best interesets (sic) in mind in crafting this type of legislation. Please reconsider the implementation of AB 32 and its corresponding amendments and work instead on spending within our means and bringing private industry back to California.

Agency Response: See responses to Comment 44.4 MID and Comment 17.1 WSPA.

<u>Comment FF2: CMar, March 2, 2010</u>

Comment: The whole premise of your Agency, global warming is caused by man, is based on emotions rather than science. Your legislation will further cripple our economy, which is already burdened by taxes and regulations.

Cease and desist, you will make a great contribution. What we need is to promote and help develop nuclear power and off shore drilling. This will reduce our dependency on foreign oil, improve the balance of trade and clean the air which should be your goal.

The ARB should be abolished along with many other government agencies involved in this effort, That will reduce our deficit, stimulate businesses and move us toward financial solvency.

Agency Response: This comment does not pertain to the regulation.

<u>Comment FF3: LPfe, March 3, 2010</u>

Comment: I am adamantly opposed to this proposed legislation. AB32. At a time that California is "underwater", some of the highest taxes in the country, high unemployment and businesses leaving the state this is the one of the DUMBEST proposals that can be made.

Gestapo tactics of mandatory reporting of "greenhouse gases" smacks of a fascist state mentality/approach to governing.

I believe that the CARB should be disbanded. There is increasing evidence based upon recent discoveries is the scientific community as well as admissions by the scientists themselves who are in the field that the data does NOT support the conclusions and that the data was "cooked". The agency (CARB) with its' plethora of environmentalist (sic) should do the people of California a service and RESIGN.

The people of California are FED-UP with high taxes and OVERREGULATION. Please just go away. Stop being so self-righteous.

Agency Response: This comment does not pertain to the regulation.

<u>Comment FF4: CSte, March 4, 2010</u>

Comment: To the people who gave us deadly MTBE, please kill AB 32.

Agency Response: This comment does not pertain to the regulation.

<u>Comment FF5: PacC, March 5, 2010</u>

Comment: Pacificorp's comments are intended to clarify any outstanding questions regarding the impact on multi-jurisdictional retail providers ("MJRP"), like PacifiCorp, and the specific applicability of the Fee Regulation.

PacifiCorp representatives and CARB Staff have worked cooperatively over the last several months in an effort to understand the unique circumstances applicable to PacifiCorp as an MJRP and the impact of the Fee Regulation. In particular, PacifiCorp and CARB Staff discussed the concerns about a potential disconnect between the allocation-based manner in which PacifiCorp reports California's share of system power related emissions and the proposed implementation of the Fee Regulation as applicable to retail and wholesale imports of electricity. Based on the mandatory reporting rules developed by CARB, PacifiCorp reports GHG emissions consistent with California's two percent (2%) share of system emissions, although, as discussed above, the actual power flows physically serving the California electric demand primarily come from a different subset of system resources located in the PacifiCorp West control area. This proportionate share approach to emissions reporting is an administratively efficient mechanism based upon PacifiCorp's long-standing cost allocation mechanism that has been agreed to by the various states' regulatory bodies and which is routinely reflected in California regulatory filings and cost structures.

The Fee Regulation relies on the types and quantities of GHG emissions reported pursuant to the CARB's GHG Mandatory Reporting Regulation as the basis for imposing a fee on individual entities, including electricity importers.[4] Pursuant to proposed § 95201(a)(4), the Fee Regulation is applicable to an MJRP on a limited basis, specifically stating that "[f]ees shall also be paid for each megawatt-hour of imported electricity reported pursuant to sections 95111 (b)(2)(B and C) and 95111 (b)(3)(N) of the Mandatory Reporting Regulation if the electricity is from either unspecified sources or specified sources that combust natural gas, coal, petroleum coke, catalyst coke, refinery gas or other fossil fuels (except California diesel)."[5] In sum, the Fee Regulation applies only to each megawatt-hour of imported electricity from the MJRP's wholesale power sales.

A. Section 95111(b)(2)(B and C)

When section 95111(b)(2)(B and C) is applied, which addresses wholesale power imports into California, MJRPs are explicitly exempted within section 95111(b)(2) from this specific reporting requirement. Since wholesale power imports are not reported by MJRPs as part of the GHG Mandatory Reporting Regulations, no AB 32 fees can be assessed on an MJRP's wholesale power imports into California under this provision.

B. Section 95111(b)(3)(N)

When section 95111(b)(3)(N) is applied, AB 32 fees may be assessed on MJRP's wholesale power imports into California. Specifically, section 95111(b)(3)(N) states that "[m]ulti-jurisdictional retail providers shall indicate those wholesale sales included in section 95111(b)(3)(K)-(M) for which they are the deliverer to the first point of delivery in California (not located within their own service territory)". As discussed above, these wholesale power sales are transactions where power delivery is scheduled and each transaction explicitly identifies a final point of delivery. Moreover, these wholesale power sales are reported by PacifiCorp pursuant to the GHG Mandatory Reporting Regulations as part of the CARB's "Power Transaction Reporting" excel workbook (specifically within the spreadsheet titled "WSP Sold to CA (MJRP&DWR)".

<u>Footnotes:</u>
[4] See § § 95204(g) and 95205(a).
[5] See § 95201(a)(4).

Agency Response: Pacificorp correctly characterizes the fee and we concur with the commenter's analysis of how the fee applies to Pacificorp and other MJRPs.

<u>Comment FF6: JHan, March 9, 2010</u>

Comment: To hold California hostage in order to decrease global warming is simply irresponsible. This state can't do it alone and certainly cannot afford it. No matter how many penalties you put on Californians, there will be NO measurable decrease in global temperatures. Simply none. But you want Califonians (sic) to pay for it. On March 4th, the independent Legislative Analyst's Office said, "California is likely to see modest job losses in the near term from its aggressive climate change policy due to higher energy costs and other factors". Further it said, "We believe that the aggregate net jobs impact in the near term is likely to be negative. Reasons for this include the various economic dislocations, behavioral adjustments, investment requirements, and certain other factors."

California cannot afford further job losses and enforcement of AB32 will be a disaster for California. Fortunately the citizens of California will be able to vote on this in November and finally put this entire disaster to bed, once and for all.

Agency Response: See responses to Comment 44.4 MID and Comment 17.1 WSPA.

Comment FF7: WPTF, March 10, 2010

FF7.1 **Comment:** First, the definition of imported power in section 95201, paragraph 56 now excludes "transactions for which imported power is simultaneously exchanged for exported power." While ARB has not yet finalized the rules for the cap and trade program, discussions to date within the Western Climate Initiative suggest that the First Jurisdictional Deliverer approach will exclude 'wheel-through' of power, but not power exchanges. The reason for this distinction is that in a wheel-through, the import and export of power are captured as a single transaction, whereas a power exchange involves two separate transactions. Because power exchanges involve separate transactions, it will be extremely difficult for ARB staff to track and verify claims of power exchanges. WPTF therefore requests that the exemption for power exchanges be removed from the definition of imported power.

Agency Response: We do not agree that it will be difficult to track and verify claims of power exchanges. The key is to verify that the same quantity of electricity is imported and exported at the same time. Documentation can be done using North American Electric Reliability Corporation (NERC) e-tags which can be verified as part of the verification for the Mandatory Reporting Regulation.

FF7.2 **Comment:** Our second concern regards the definition of 'specified source' in section 95201, paragraph 94, of the modified regulation. As currently drafted, this definition presumes that power imports can be specified only through ownership or power contracts. However, ongoing discussions within the WCI are considering other possible mechanisms for identifying and attributing emissions to specified sources, including the use of the Western Renewable Energy Generation Information System. To ensure consistency with whatever rules are ultimately adopted for the FJD approach, this regulation should not define the means for identifying 'specified sources', but simply refer to rules to be adopted under the cap and trade regulation.

Agency Response: In the definition of “specified source” there was no change in the language referring to partial ownership or identification in a power contract. Nevertheless, the Western Renewable Energy Generation Information System (WREGIS) only tracks renewable energy, whereas the fee applies to electricity generated from fossil fuels. In the future, if there are other ways of identifying specified sources, the Board may choose to amend the regulation to allow for such methods.

FF7.3 **Comment:** Finally, in our previous comments on the Administrative Fee Regulation, WPTF raised a concern that entities that are subject to a cap and trade program could be subject to dual assessment of fees – once for the purchase of allowances under the cap and trade program and again under the Administrative Fee Program. Given that ARB has not yet determined how allowance value will be distributed and used, we recognize that this issue can not be resolved now. Therefore, we strongly urge ARB to review the Administrative Fee regulation once the cap and trade regulation has been finalized to ensure that capped entities do not pay twice for the same emissions.

Agency Response: We do not speculate at this point on how allowance value under a potential cap and trade program will be used, as this issue has not yet been addressed by the Board. However, depending on the outcome of the cap and trade regulatory process, the Board may choose to revisit this fee regulation.

Comment FF8: KernRiv, March 12, 2010

Comment: Kern River supports the regulation in the form posted for 15-day comment that reflects the discussions, modifications and agreements that underlie the reporting requirement for interstate natural gas transmission pipelines.

Agency Response: No response needed.

Comment FF9: MID, March 15, 2010

FF9.1 **Comment:** To the extent the modified Proposed Regulation allows for Fees to be charged on electricity values in excess of the amount used to serve California load, the Regulation would exceed the bounds of A 32.

Modesto ID appreciates that the revised regulations recognize that Fees should only be charged on electricity "consumed" in California. However, while including only imported electricity that is "delivered for consumption in California" in the Fee calculation, the Proposed Regulation requires that Fees be paid for "each megawatt-hour of imported electricity reported" excluding imported power that is "simultaneously exchanged" for exported power. These revisions leave open the question of what it means to be "delivered for consumption" or "simultaneously exchanged", leaving open the possibility that fees may be charged on more electricity than is actually consumed in California. Such an outcome would unduly burden the electricity sector and California electric ratepayers by resulting in a payment of the Fee on electricity not consumed in California. This outcome is not mandated by the provisions of AB 32 and is inconsistent with the stated purpose of the Fee in the Initial Statement of Reasons (lSOR).

The simplest resolution to this problem would provide for the netting of electricity imports and exports. This will ensure that no generation is double-counted in the Fee calculations and that the Fee is only applied to electricity consumed in California. This will in turn assure that California's ratepayers are not overly burdened and charged for emissions unrelated to their load.

Agency Response: We do not agree that charging the fee on electricity in excess of the amount used to serve California load, when that electricity is generated in California, would “exceed the bounds of AB 32”. AB 32 authorizes a fee on the sources of California’s greenhouse emissions, which includes all greenhouse gases emitted in California, as well as the emissions associated with imported electricity. Exported electricity is subject to the fee when it is delivered at the busbar of a California electricity generating facility, because of direct California emissions due to its generation. We do not agree that there is an open question about what electricity is subject to the fee, and we have explained how the fee affects various kinds of import-export transactions in our responses to Comments 38.5 to 38.9, 50.1 to 50.5, BHJ-06.6 and BHS-06 NCPA, and also in our responses to Comments 5.21, 5.22, and 53.1 to 53.11 SCPPA, which are referenced in the responses to NCPA’s comments. Electricity that is imported is subject to the fee only if it is consumed in California.

FF9.2 **Comment:** The modified Proposed Regulation includes an emission factor for all unspecified power of .499 metric tons per megawatt hour. The regulation contains no explanation of how this number was determined and contain s no provision for reviewing its accuracy and allowing periodic updates. Furthermore, because the power sources for each region are likely to be very different, it may be more appropriate to use a different emission factor for unspecified power from each region: California, the northwest and the southwest. In order to ensure that the Fees fairly capture the emission value of unspecified power resources Modesto ID believes that it is important that this value be consistent with approaches taken in other venues, including the Western Climate Initiative.

Agency Response: The emission factor for unspecified electricity has not been changed since the original proposed regulation. Nonetheless, we have explained our reasons for our choice of emission factor in our responses to Comment 38.10 NCPA and 5.16 SCPPA.

<u>Comment FF10: PGE, March 15, 2010</u>

FF10.1 Comment: Modification to Section 95207. Severability

Section 95207 (b) of the proposed regulation states that if any fee payer is determined to be ineligible, then remaining entities shall be assessed the entire fee. AB 32, however, requires that the greenhouse gas regulations be designed "in a manner that is equitable" and will "consider the significance of the contribution of each source or category of sources to statewide emissions of greenhouse gases" (Health and Safety Code § 38562(b)(1), (9)). Since the reasons that any entity may be determined to be ineligible cannot be predicted, it is premature to specify how the fees to the other entities would be reassessed. Instead, PG&E suggests a rulemaking process to determine the fees, if ineligibility is granted to some entities. Accordingly, we recommend the following revisions to section 95207 (b):

(b) If any fee payer or group of fee payers subject to this subarticle is determined to be ineligible, by a court of law or statute, to pay the fees pursuant to this subarticle<u>, the formula contained in section 95203 shall be revised by rule-making</u>. ~~the remaining entities shall be assessed the entire fee based on the formula contained in section 95203, without including the emissions associated with the ineligible fee payer or group of fee payers in the calculation. If a refund is ordered by any court or other authority the remaining fee payers shall be responsible to pay the subsequent deficit.~~

Agency Response: The suggested language does not comply with the APA which requires regulations to be clear. The proposed change would not provide certainty to the regulated entities.

FF10.2 Comment: Modifications to Section 95201. Applicability

PG&E recognizes that the regulation was modified to calculate the fee for in-state and imported electricity in the same manner using the "first deliverer" approach. PG&E has requested that ARB limit the possibility for "double charging" these particular entities by developing a list of those electricity generating facilities who will be required to pay the fee directly to ARB as a "first deliverer" (see Section 95201(a)(4)(A)). This list is needed to clearly identifying those entities that need to be excluded from the natural gas utility fee payment responsibility as described in Sections 95201(a)(1)(A) and 95204 (a)(d)(1). It is also important that the list is generated in a timely manner and updated on an annual basis so that it provides sufficient time to reconcile our data for reporting. We appreciate ARB staff's willingness to help with this matter.

Agency Response: We are currently developing a list of all of the facilities that reported their 2008 data under the mandatory reporting regulation that are subject to the fee as electricity generating facilities, and should be excluded from the natural gas fee payment liability. We expect to make this initial list available to entities that deliver natural gas before this regulation takes effect. We expect that there will be few, if any, changes to the list from year to year. ARB may become aware of additional electricity generating facilities (or of such facilities that no longer are subject to the fee) only when those facilities report under the mandatory reporting regulation. We expect that it is possible that natural gas deliverers may know of new electricity generating facilities before such information comes to ARB. ARB staff will work with natural gas deliverers to ensure that any changes in the list of facilities excluded from natural gas fee liability are made as soon as possible, and will share new information with the natural gas deliverers in a timely manner.

Comment FF11: SCE, March 15, 2010

Comment: The Modified Regulation Order proposes new language to be added to AB 32 Cost of Implementation Fee Regulation, including modifications to the methods by which CARB will calculate the administrative fee for regulated entities. Currently, however, the Modified Regulation Order does not explain whether regulated parties may have access to the data and specific calculations used in assessing each invoiced fee. SCE is concerned that an invoice may only contain a limited amount of data, such as a simple per unit fee ($/ton, $/MWh), applied to a simple quantity (ton, MWh), without adequate detail. SCE recommends that each invoice include a description of the data and calculations for each entity on a sufficiently granular level such that a regulated entity can verify or confirm the various components to the assessed fee. Alternatively, CARB should make this data available upon request of each invoiced entity.

In addition, SCE recommends that CARB develop and establish a dispute resolution process for entities assessed the AB 32 administrative fee. A clear and transparent dispute resolution process will provide regulatory certainty for regulated entities and an efficient solution for all parties should questions or disagreements arise regarding the invoiced fee.

Agency Response: ARB is currently developing invoices for the fee and will consider the amount of data and level of detail as this regulation is implemented. Regarding dispute resolution, see response to Comment 44.3 MID

Comment FF12: MWDSC, March 15, 2010

FF12.1 **Comment:** MWD's March 15, 2010 comment repeats comments made in MWD's submissions of June 24 and April 24, 2009. MWD also states that "the regulation would benefit from a definitive statement specifically exempting renewable resources and including associated zero emission factors within the mandatory reporting portion of the regulation in order to enable future regulatory modification and reference that adequately recognizes this regulation's treatment of non-emitting sources."

Agency Response: We addressed MWD's comments that were also included in earlier submissions in our responses to Comment 38.10 NCPA and 5.16 SCPPA. There is no need for the regulation to have a definitive statement specifically exempting renewable resources (we believe that MWD is referring to resources used for electricity generation) because the applicability language clearly states that the regulation applies to electricity generation from fossil fuels. We are not sure what MWD means by "including associated zero emission factors within the mandatory reporting portion of the regulation." In fact, some renewable resources do have greenhouse gas emissions. Nonetheless, this fee is only applicable to electricity generation from fossil fuels.

FF12.2 **Comment:** Metropolitan continues to have concerns with the proposed regulatory scheme's interference with interstate commerce and conflict with federal law, now in the form of fee applicability to the "first deliverer of electricity", which includes electricity importers. Our concerns were set forth in our comment letters dated April 24, 2009 and June 24, 2009, attached and incorporated by reference, as well as those of other commenters, including the most recent comments from SCPPA, dated March 15, 2010.

Agency Response: See responses to Comments 60.5, and 5.13 to 5.15 SCPPA.

FF12.3 **Comment:** In addition to the changes proposed to section 95205 of the Fee Regulation, Metropolitan requests that CARB add an additional 30 day lead time for the initial payment under the regulation. The resulting 90 day payment deadline, from receipt of the fee determination notice, would allow regulated entities the needed time to assess and process the first of the payments under this regulation. Given current budgetary and staffing constraints, and different budget cycles, this change would help with the transition into annual payment cycles.

Agency Response: This is outside the scope of the noticed 15-Day changes. However, see response to Comment 50.6 SCPPA.

Comment FF13: Sempra, March 15, 2010

FF13.1 **Comment:**

We respectfully request the following changes (noted in BOLD) to the February 26 draft:

Recommendation #1

95202. Definitions.

11) "Biogas" (also called biomethane) means **~~natural~~** gas that meets the **~~meets the~~** requirements of 13 CCR §2292.5 and is produced from the breakdown of organic material in the absence of oxygen. Biogas is produced in processes including, but not limited to, anaerobic digestion, anaerobic decomposition, and thermochemical decomposition. These processes are applied to biodegradable biomass materials, such as manure, sewage, municipal solid waste, green waste, and waste from

energy crops, to produce landfill gas, digester gas, and other forms of biogas, agricultural waste, animal waste, or other biomass.

Sempra recommends that “natural” be deleted from the definition of biogas to remain consistent with the language in the definition of natural gas:

> (68) “Natural gas” means a naturally occurring mixture of hydrocarbons beneath the Earth’s surface that maintains a gaseous state at standard atmospheric temperature and pressure under ordinary conditions. **“Natural gas” does not include “biogas”.”**

Agency Response: We agree that the word “natural” should be dropped from the first line of definition of “Biogas” and, as part of the second 15 Day Modifications, have changed the final regulation accordingly. We have also corrected the typographical error in which the words “meets the” were repeated. Finally, in the final text we made additional modifications to improve consistency and clarity of the definition in subsection 95202 (11). We note that the regulation had already been modified to incorporate the second change (in 95202(68)) recommended by Sempra.

FF13.2 Comment: 95207. Severability.

(a) Each part of this subarticle is deemed severable, and, in the event that any part of this subarticle is held to be invalid, the remainder of this subarticle shall continue in full force and effect.

(b) If any fee payer or group of fee payers subject to this subarticle is determined to be ineligible, by a court of law or statute, to pay the fees pursuant to this subarticle**, the formula contained in section 95203 shall be revised by rule-making**~~**. the remaining entities shall be assessed the entire fee based on the formula contained in section 95203, without including the emissions associated with the ineligible fee payer or group of fee payers in the calculation. If a refund is ordered by any court or other authority the remaining fee payers shall be responsible to pay the subsequent deficit.**~~

A revision in the regulation is likely to be necessary in the event a particular ratepayer or group no longer is subject to the fee. Section 95207 (b) as proposed says that the calculation in section 95203 (common carbon cost) shall be made "without including the emissions associated with the ineligible fee payer or group of fee payers in the calculation." However when one refers back to the common carbon calculation in section 95203 it seems doubtful that the missing "fee payer or group of the players" will always neatly out of the calculation equation. Such a revision also will give remaining stakeholders to participate in determining the most equitable way to split the program costs to account for a missing fee payer group.

Agency Response: See response to Comment FF10.1 PGE

FF13.3 **Comment:** Additionally, Sempra supports PG&E's request for staff to provide a list of electric generators required to pay the AB 32 Administrative Fee. Similar to PG&E, providing this information will assist with Sempra's reporting requirement to provide aggregate therms of natural gas delivered at the meter to end use customers, and exclude natural gas delivered to electricity generating facilities.

Agency Response: See response to Comment FF10.2 PGE.

Comment FF14: NCPA, March 15, 2010

FF14.1 **Comment:** "...NCPA continues to be concerned with the fact that the Proposed Regulation and Initial Statement of Reasons (ISOR)[2] have not been revised to address the concerns raised by stakeholders regarding (i) improper application of the Fee as assessed on some imported electricity that is not consumed in California (ii) the lack of a total cap on the annual amount of the Fee, (iii) certainty regarding the total fee obligation of affected entities, and (iv) lack of clarity regarding the Fee calculation and enforcement procedures.[3]"

Footnotes:
[2] The *Staff Report: Initial Statement of Reasons for Rulemaking (ISOR) for the Proposed AB 32 Cost of Implementation FEE Regulation,* dated May 8, 2009.
[3] NCPA does not reiterate the positions set forth in the *Comments on the Northern California Power Agency on Proposed AB 32 Cost of Implementation Fee Regulation,* submitted June 24, 2009 (NCPA June 24, 2009 Comments) and the *Comments of the Northern California Power Agency on Staff Proposed changes to the AB 32 Cost of Implementation Fee Regulation,* submitted on September 2, 2009 (NCPA September 2, 2009 Comments), but incorporates those comments herein.

Agency Response: NCPA brought up these issues in earlier comments, and provide expanded statements of these issues in other text in their March 15, 2010 comment. We refer to the specific responses dealing with the issues in prior comments, or respond to new comments within these areas, in our responses to the expanded comments below. For the issue of lack of cap on the fee, see response to Comment 60.3 SCPPA.

FF14.2 **Comment:** Failure to Recognize Net Electricity Imports Adversely Impacts Efficiency of the Electricity Market. The 15-Day Language properly excludes the application of the Fee to power that is wheeled through California and is not used to serve customers in the State (§ 95202(56)(A)). Wheeled power is not properly categorized as imported electricity, and therefore appropriately excluded from calculation of the Fee. Likewise, those transactions that involve power exchanges between imported and exported power should also be excluded from application of the Fee. The 15-Day Language proposes that certain power exchanges – those that occur simultaneously – be excluded from application of the Fee (§ 95202(56)(b)). However, while NCPA supports each of these changes, the proposed revisions do not address all power imports that are not used to serve electricity customers in California.

AB 32 authorized CARB to create a "schedule of fees to be paid by the sources of greenhouse gas [GHG] emissions."[4] Included in the upstream sources upon which the Fee is to be imposed is imported electricity. However, NCPA continues to be concerned with the overly prescriptive definition of imported electricity, and the adverse impact that the current proposed language will have on affected entities. Specifically, it is imperative (and entirely feasible) that the Fee be designed in such a manner as to not financially penalize the efficient and reliable operation of the west-wide electricity infrastructure.

If the Fee is imposed on all electricity imports without recognition of the electricity actually consumed in California, CARB risks jeopardizing the efficient and reliable provision of electricity throughout the State. The purpose of transactions that allow imported electricity to enter the State at one point, change ownership, and be exported back at a different location is to leverage the most effective operation of the entire western electric generation and transmission system, based on transmission constraints, differing peaks, and time of operating various facilities. This provision is especially problematic for entities that use lower-GHG emitting imported power in their portfolios in order to optimize generation and transmission usage. These efficiencies promote cost savings and environmental benefits, as more fully discussed in the June 24, 2009 and September 2, 2009 NCPA comments. If entities know that they are going to be assessed an additional Fee on this electricity, they will be less motivated to act to promote the greatest efficiencies, but rather will need to adjust their transactions to avoid imposition of the Fee. Such an outcome should be avoided, and can be avoided by adjusting the proposed Fee to reflect that the charge will only be assessed against the net electricity imports, which actually reflects the electricity consumed in California.[5]

Application of the fee should be limited to the amount of actual electricity consumed in California. Assessing the Fee to all electricity produced in California, as well as electricity imported into the State without recognition of electricity exported rather than the net imports adversely burdens the electricity sector by resulting in payment of the Fee on electricity not consumed in California. This outcome is clearly inconsistent with the stated purpose of the Fee in the ISOR and the treatment of other sources of emissions. A simple solution is to allow for the netting of electricity imports and exports that are associated with “energy exchange agreements” or seasonal transactions with a particular region. As more fully explained below, this change is necessary to avoid duplicative and burdensome imposition of the Fee on a single sector. The broad authority set forth in Health and Safety Code § 38597 gives CARB clear authority to craft the regulation in such a manner.

Staff has correctly noted that in order to include a mechanism to net imports in the Proposed Regulation, the provisions must be based on sound public policy and be administratively feasible. NCPA maintains that the netting of imports and exports associated with energy exchange agreements and seasonal/regional transactions are both.

Opponents of this concept have opined that allowing such netting ignores the language in AB 32 that calls for reporting of electricity produced in-state and electricity imports.[6] However, this is simply not true. Determination of the Fee does not change an entity’s reporting obligations under AB 32, nor the compliance obligation for emissions reductions as outlined in the statute and the Scoping Plan. Indeed, the Fee is intended to be applied in a manner that is administratively feasible, and the ISOR expressly states that the result is a Fee on approximately 85% of the state’s emissions – there is no actual link between a compliance obligation and assessment of the Fee. Additionally, ensuring that the Fee is assessed on the net of imported and exported electricity is also crucial in the development of a multi-jurisdictional cap-and-trade program. If not applied in this manner, electricity consumed in a partner jurisdiction will be assessed a different set of fees and subject to corollary requirements in that jurisdiction. Simply put, the same electricity should not be subject to two sets of fees, especially when the power at issue is not consumed in California.

Furthermore, netting imports and exports is also administratively feasible. These transactions are not uncommon. While power exchanges and seasonal agreements are not single transactions, like wheeled power, they are easily tracked and monitored, and present no additional burdens from a verification standpoint. The imports and exports are all reported, and accordingly, determining the net of these transactions is done in the normal course of business. The mechanism for calculating net energy imports is straightforward and would not entail additional administrative complexities. The reporting of imports and exports under the Mandatory Reporting Tool could be easily tracked with minor modifications to the Tool itself, making verification of the total imported electricity consumed in California easy to determine.

Finally, imposition of the Fee must not adversely impact the overall efficiency of the state and regional electricity grid operations. Any cost conclusions regarding the impact of the Fee on the state's electricity grid operations must be verified. Accordingly, the ISOR should include empirical data that substantiates a finding that "the imposition of the Fee is too small to affect wholesale market dispatch" (ISOR, p. 46) or have the language entirely removed from the document. See NCPA June 24, 2009 Comments, pp. 5-6 and NCPA September 2, 2009 Comments, pp. 2-4.

Footnotes:
[4] Health & Safety Code § 38597 provides, in pertinent part: "*The state board my adopt by regulation, after a public workshop, a schedule of fees to be paid by the sources of greenhouse gas emissions regulated pursuant to this division, consistent with Section 57001...*"
[5] The ISOR notes that "electric importers ...should be able to pass the Fee cost on to the load-serving entities. The load-serving entities can then recover the passed-through Fee cost as a price increase over all of their deliveries. ARB believes that the imposition of the Fee is too small to affect wholesale market dispatch." (ISOR, p. 46) There is no underlying data, however, to support this conclusion. Additionally, a significant portion of the Fee in the early years is based on past amounts, the pass-through of which is impossible.
[6] Health & Safety Code § 38530(b)(2).

Agency Response: Most of this comment repeats portions of NCPA's June 24, 2009 or September 2, 2009 comments. We respond to these issues primarily in the responses to Comments 50.1 to 50.5 SCPPA, BHJ-06.6 and BHS-06 NCPA, and also in our responses to Comments 38.5 to 38.9 NCPA. We also address these issues in our responses to Comments 5.1, 5.2, 5.3, 5.5, 5.9 to 5.12 SCPPA, and 53.1 to 53.11 SCPPA. However, there are a few new formulations in the text of this comment, to which we provide our responses here.

NCPA states its support of changes made to exclude simultaneous exchanges, but claims that the "proposed revisions do not address all power imports that are not used to serve electricity customers in California." We disagree. If an import is not simultaneous with an export (including wheeled electricity transactions) then the imported electricity must be consumed in California, and it is subject to the fee. The fact that an entity exports electricity at a different time as part of an exchange does not mean that the imported electricity does not serve California customers.

NCPA states a concern with "the overly prescriptive definition of imported electricity." The definition, in subsection 95202(a)(56), explains that imported electricity has a final point of delivery in California, which means that it is consumed in California. The definition specifically excludes wheeled electricity, and imported power that is simultaneously exchanged for exported power. For reasons explained in the responses referenced in the first paragraph of this response, we have not excluded non-simultaneous import-export transactions. We do not agree that the definition is overly prescriptive.

NCPA notes that effective operation of the western electricity system is leveraged by allowing electricity to "enter the State at one point, change ownership, and be exported back at a different location." As long as this is simultaneous, then the fee is not applicable. NCPA states that "This provision is especially problematic for entities that use lower-GHG emitting imported power in their portfolios in order to optimize generation and transmission usage." It is not clear to which provision NCPA is referring. However, through the mechanism of the Common Carbon Cost, the fee is always based on the amount of GHGs emitted, so that imports with lower GHG emissions will have a lower fee per megawatt-hour, and imports with zero emissions will not be subject to the fee.

FF14.3 Comment: Renewable Gas is Properly Not Subject to the Fee

The 15-day Language properly amends the definition of Natural Gas in § 95020(68) to specifically exclude "biogas." Entities that have biogas in the pipeline would be able to verify those amounts, and any Fees that would otherwise be applicable would be credited against any Fee obligation of the compliance entity. This proposed revision properly recognizes the renewable nature of biogas.

Agency Response: No response needed.

FF14.4 Comment: The 15-Day Language Creates Continued Ambiguity With Regard to the Total Amount of the Fee Obligation for Affected Entities.

Total Cap on the Fee Still Missing and Ambiguities are Prevalent Regarding the Payment Obligations. While the *February 26, 2010 Notice of Availability* provides a number of additional records and data to substantiate the costs incurred to date, it does not provide additional data regarding the total amount of the fee in future years, nor assurances regarding potential caps on those amounts, nor is the ISOR properly revised to address concerns regarding this matter. Furthermore, sections § 95203(2) ("...the remaining Debt shall be repaid in fiscal year 2013/2014 ...") and § 95203 (5) ("The annual Total Revenue Requirement is equal to the RR adjusted for the previous fiscal year's excess or shortfall amount . . .") in the "Calculation of Fees" and § 95207(b) (Severability) which allows for collection of past amounts from entities determined by a court to be "ineligible" for fee payment, create even greater uncertainty for compliance entities regarding the total amount of their annual obligation.

As widely noted by a broad range of stakeholders, the entire Fee Regulation is deficient in its failure to include any kind of a cap on the total amount of the Revenue to be collected. It is important to note that the Fee at issue is only designed to cover *the state's* administrative costs for implementing, carrying out, and enforcing a broad range of programs and measures under AB 32. However, affected entities will be faced not only with the cost of the Fee, but AB 32 compliance costs, as well. The costs to the electricity sector, for example, to carry out such measures as expanded energy efficiency programs, increased renewable energy portfolios, and construction of new combined-heat and power facilities, will be quite significant. Consequently, the Fee will amount to an additional financial burden on compliance entities. This financial impact should not be minimized when CARB is looking to the total economic impact on California's electricity customers.

As proposed, the Fee will be set in place to collect *whatever amounts* the state agencies may require in the coming years:
§ 95203(a)(1) provides that "the Required Revenue (RR) shall be the total amount of funds necessary to recover the costs of implementation of AB 32 program expenditures for each fiscal year . . ."

Because of the broad range of "AB 32 programs" that can be covered under the Revenue Requirement, including the proposed cap-and-trade program, the Fee has the potential to be quite large, and likely will increase annually. With CARB only at the nascent stages of implementing the provisions of the Scoping Plan, the total amount of the Fee obligation from year to year is not known. Hence, any reference justifying the structure of the Fee based on the overall amount must be disregarded. See NCPA June 24, 2009 Comments, pp. 3-4.[7]

Furthermore, as noted above, the additional language in § 95203(2) regarding the debt repayment obligation for 2013/2014 does not even specify the total amount of the debt repayment that will be added to the fee obligation for that fiscal year. Likewise, the fact that the Fee obligation is also subject to adjustment each year (§ 95203(5)), and affected entities essentially serve as guarantors for all uncollected debts from the previous year, makes it extremely difficult, if not impossible, for compliance entities to budget for the amount of their fee obligation, let alone structure their costs to address the pass-through of these costs.[8]

Accordingly, it is imperative that the Proposed Regulation be drafted in a manner that addresses these concerns and places some limit on the total fee obligation entities will be required to pay each year. As noted, this is especially crucial given the fact that those subject to the fee are paying the fee in addition to their AB 32 compliance costs.

Footnotes:
[7] As noted in the NCPA June 24, 2009 Comments, the failure to include a reasonable cap on the total annual Revenue Requirements is problematic and a fatal flaw to the Fee structure. The Regulation is largely based on

the Nonvehicular Source Fee Program (NVSF) that was developed as a result of 1999 legislation (Assembly Bill 1103), which extended indefinitely CARB's authority to collect permit fees from large nonvehicular sources of air pollution. While there are aspects of the NVSF that are similar to the Proposed Regulation (this fee is "intended to help defray the ARB's cost of implementing the nonvehicular provisions of the [California Clean Air Act]"7), there is an important difference in that the NVSF is based on a *capped amount*, not subject to annual adjustments. This distinction is crucial. Unlike the NVSF, however, the fee at issue is not subject to a statutorily established cap, nor an open review and approval process. The legislature can change the amount due annually, depending on the budgets submitted by the various state agencies, and indeed, even the State agencies eligible to receive funding under the Fee may change. For the average stakeholder – even sophisticated businesses – the opportunity for meaningful participation in the budget review process of any one agency, let alone at the legislature – is non-existent. Accordingly, those that will be burdened with the requirement to pay the Fee will have no opportunity to provide meaningful input on the amount of the Fee.
[8] Likewise, note that § 95207(b) also imposes further "guarantor" obligations on compliance entities.

Agency Response: See response to Comment 60.3 SCPPA regarding setting a cap on the fee.

FF14.5 **Comment: The Proposed Regulation Properly Uses the Most Recent Data for Calculation of the Fee.**
Several stakeholders, including NCPA, expressed concern with previous drafts of the Proposed Regulation regarding the accuracy of the data being used to calculate the Fee. The addition of § 95201(c) addresses this concern. The 15-Day Language properly revised the Proposed Regulation to reflect the fact that the Fee will be calculated based on the most recent emissions data reported to CARB.

Agency Response: No response needed.

FF14.6 **Comment: The 15-Day Language Needs Further Clarification in § 35205 Regarding the Treatment of Sums Not Collected.**
The 15-Day Language includes new language in the Payment and Collection section. As proposed, § 95205(a) provides that "ARB will not collect the fee from entities whose total amount due... is less than or equal to fifty dollars ($50)." The Proposed Regulation, however, does not provide any further information regarding the treatment of the "uncollected amounts" from §95205(a) and leaves many unanswered questions. For example, will the amounts accrue in future years, and the total amount be collected from the compliance entity once the amount reaches more than $50? Will the uncollected amount pursuant to this section be deemed a

"shortfall" in future years (see § 95203(5)) and added to the obligation of compliance entities paying more than $50 per year in fees? The treatment of the amounts not collected under this section need to be addressed with certainty, as they impact the obligations of the entities at issue, as well as all other compliance entities.

Agency Response: The sum of the individual fees equal to or less than $50 that will not be collected will not be considered a shortfall or accrue in future years. There will be no uncollected amounts carried forward.

FF14.7 Comment: The Provisions for Reporting in the 15-Day Language Should Reflect the Effective Date of the Regulation and the Obligations Under the Existing Mandatory Reporting Regulations. The 15-Day Language proposes revisions to § 95204(c) that require submission of reported data by March 1, 2010. Since the regulation is not yet effective, the addition of retroactive dates does not add anything to the regulation. Rather, the Regulation should be revised to reflect the deadlines for all future reporting. Additionally, the Regulation should make it clear that the data used for the calculation of the Fee is reported to CARB in once place – namely under the Mandatory Reporting Regulation (commencing with § 95100 of CCR Title 17).

Agency Response: The commenter is correct that the Fee Regulation was not effective March 1, 2010. The revisions to § 95204(c) states:

> "Reports from each affected entity for the 2008 calendar year data must be submitted to ARB by March 1, 2010, or 30 days after the operative date of this subarticle, whichever is later."

The inclusion of "or 30 days after the operative date of this subarticle, whichever is later" addresses the concern that the regulation will not be effective until later in 2010.

In response to the suggestion that the Regulation should make it clear that the data used for the calculation of the Fee is report to CARB in one place – namely under the Mandatory Reporting Regulation, Section 95204 (a) states that:

> "All reports required by this article must be submitted to ARB by using the California Air Resources Board's Greenhouse Gas Reporting tool, as specified in Title 17, California Code of Regulations, section 95104(e)."

Staff believe that this is clear.

FF14.8 Comment: The 15-Day Language Does not Clarify Procedures for Enforcement Actions and Imposition of Penalties. Provisions Should be Added to Address Resolution of Disputes and Clarification of Late Fees. The 15-day Language fails to address the deficiencies indentified with regard to the May 2009 daft of the Proposed

Regulation regarding the lack of provisions for timely review of potentially disputed amounts owed. A new section should be included to provide for a procedure for addressing disputed amounts. Likewise, the amount of the late fee referenced in § 95205(d) must be more clearly defined. Affected entities must have clarity regarding what the Board's "additional expenses incurred by the entity's untimely payment" may be. See NCPA June 24, 2009 Comments, pp.8-9.

Agency Response: See response to Comment 44.3 MID regarding dispute resolution.

FF14.9 **Comment: The Proposed Regulation Should Address Future Funding Sources for the Fee.**
Although not addressed directly in the Proposed Regulation, the issue of funding the administrative costs associated with AB32 should be reviewed when and if the State adopts a cap and-trade program. Accordingly, the regulation itself should clarify that the Fee proposed therein will only be an interim funding measure, and that the Fee will be revised to ensure that there is no duplication in collection, and to determine if the Fee should be adjusted, reduced, or eliminated in its entirety with the implementation of the proposed cap-and-trade program. Since it is anticipated that the cap-and-trade program will generate revenue for the State, consideration should be given to utilizing some of those revenues to fund the implementation of AB 32, and eliminate the Fee. (See NCPA June 24, 2009 Comments, p. 9)

Agency Response: As the state's cap-and-trade program becomes more developed funding the administrative costs associated with AB32 will be considered if appropriate. ARB disagrees that the regulation itself should clarify that the Fee proposed therein will only be an interim funding measure as it is premature to assume that funding will come from a cap-and-trade program, or any another source.

FF14.10 **Comment:** In § 95203(b), the Regulation calls for the calculation of the Fee on unspecified resources based on an emissions factor for unspecified sources. The use of default emissions factors could penalize certain entities and not accurately reflect the true carbon content of the imported electricity. Accordingly, the Regulation should provide for the use of a regional emissions factor, and should track the discussions and progress before the Western Climate Initiative regarding the use of regional emissions factors that are designed to address this very concern. (See NCPA June 24, 2009 Comments, p. 6 and NCPA September 2, 2009 Comments, p. 2)

Agency Response: We addressed this issue in our response to Comment 38.10 NCPA and 5.16 SCPPA. We continue to track discussions of default emission factors within the Western Climate Initiative (WCI), but no default emission factors have yet been adopted by WCI.

<u>Comment FF15: MSR, March 15, 2010</u>

Comment: The 15-Day Language correctly clarifies the fact that not all electricity imported into California is consumed in the State. Accordingly, the revisions to § 95202(56) regarding the exclusion of power wheeled through California (§ 95202(56)(A)) and simultaneous power exchanges (§ 95202(56)(B)) from the definition of "Imported Electricity" properly capture these important exclusions. However, the proposed definition falls short of addressing the total power imported into California, yet not consumed in the State, and should be revised to exclude application of the Fee on all annual imports that are offset by corresponding exports of electricity.

The need for such a revision is vital to the efficient and cost effective operation of the west-wide electricity generation and transmission system, and to ensure that the Regulation fully complies with the stated intent of the Initial Statement of Reasons (ISOR)[2] that the Fee only be imposed on the imported electricity consumed in California. The purpose of the fee is to cover electricity consumed in California. AB 32 includes in its definition of "statewide greenhouse gas emissions" all emissions of greenhouse gases from the generation of electricity "delivered to and consumed in California, accounting for transmission and distribution losses, whether the electricity is generated in the state or imported" (Health & Safety Code (H&S) § 39505). Thus, AB 32 specifically requires CARB to consider imported electricity in the implementation of the statute." (ISOR, p. 18) The Proposed Regulation assumes that the Fee must likewise be imposed on electricity imports and exports. However, doing so ignores the broad statutory authority granted to CARB in H&S § 38597. Accordingly, while AB 32 specifically requires CARB to consider imported electricity in the implementation of the statute, it also gives the agency the authority to design the Fee in a fair and nondiscriminatory manner. Just as importantly, it allows the agency to impose a fee that will not adversely impact the efficient and reliable operation of the west-wide generation and electricity infrastructure.

Many electricity providers engage in "exchange" transactions that allow entities to maximize the use of generation facilities and transmission planning throughout the west. For example, imports may come from generation in the Pacific Northwest at certain times of year when those facilities can operate the most economically and when the excess power is not needed for domestic purposes. This reduces the amount of electricity that must be generated in California at the same time, usually from resources that would not otherwise need to operate at that time. Similarly, during other times of the year, facilities operating in California export (or exchange) power with their out-of-state counterparts. These transactions are common, cost effective, and environmentally efficient, in addition to being easily tracked and administratively simple. The Fee should properly only be imposed on the net of these transactions – that is when California entities import more power than they export. This would reflect the true amount of power imported and consumed in California.

The total Fee obligation is going to change from year to year (and very likely increase) and be in addition to the financial obligations entities are already undertaking to comply with the mandates of AB32. By failing to recognize the net of electricity imports, the Fee effectively inhibits a key cost containment tool available to electricity providers, and forces even greater AB32 cost on California's electricity ratepayers. Such a result should be avoided. Accordingly, M-S-R urges the further revision of the Proposed Regulation to acknowledge that imported electricity be defined to only include the net of annual electricity imports.

Footnote:
[2] The *Staff Report: Initial Statement of Reasons for Rulemaking (ISOR) for the Proposed AB 32 Cost of Implementation Fee Regulation,* dated May 8, 2009.

Agency Response: We have addressed these issues, which have been raised in earlier comments by M-S-R and others, in our responses to Comments 38.5 to 38.9, 50.1 to 50.5, BHJ-06.6 and BHS-06 NCPA, and also in our responses to Comments 5.21, 5.22, and 53.1 to 53.11 SCPPA.

M-S-R states that "the Fee effectively inhibits a key cost containment tool available to electricity providers, and forces even greater AB32 cost on California's electricity ratepayers." As we have discussed, since AB 32 covers both all instate emissions and emissions due to imported electricity that is consumed in California, it would not be fair to other entities if they had to shoulder more of the burden because electricity providers did not pay the fee on these emissions. This kind of cost-containment would unfairly add to costs in other sectors covered by the fee.

Comment FF16: SCCPA, March 15, 2010

FF16.1 **Comment:** As currently drafted, the Fee Regulation will assess fees on both:

- the emissions associated with electricity that is imported into California under nonsimultaneous exchange agreements; and
- the emissions associated with electricity that is exported under such agreements.

This effectively imposes double fees on the same use of power within California.

Assessing fees on both exchange import emissions and exchange export emissions would discourage parties from entering into energy exchange arrangements that benefit electricity consumers and society as a whole by reducing the cost of generating electricity and reduce emissions by maximizing the use of hydroelectric generating resources in the Pacific Northwest. In addition, assessing fees on both energy exchange imports and exports conflicts with the Commerce Clause of the U.S. Constitution.

As discussed below, SCPPA proposes that the Fee Regulation be modified to avoid imposing the fee on exchange import emissions. The fee could still be assessed on exchange export emissions.

Changes to the Reporting Regulation are also required to allow energy exchange transactions to be reported as exchanges rather than as separate imports and exports, providing the necessary data for the exclusion of energy imports from the fee.

Agency Response: These comments are expanded in following sections of SCPPA's March 15, 2010 comment letter. We respond to these comments in the appropriate sections below.

FF16.2 Comment: Summary of issues raised in previous submissions
The revised Fee Regulation does not address several other issues which SCPPA raised in its previous comments. SCPPA urges the Air Resources Board ("ARB") to give further consideration to these issues:

- Applying an administrative fee on imported electricity would be inconsistent with Health & Safety Code ("HSC") section 38597, the section that authorizes the ARB to assess administrative fees. That section specifically provides for fees to be paid by *sources* of greenhouse gas emissions, but neither imported electricity nor the act of importing electricity are a source of emissions. Although the AB 32 definition of "statewide greenhouse gas emissions" in HSC § 38505(m) includes emissions associated with imported electricity, the Legislature elected not to write HSC section 38597 so as to authorize fees to be assessed on "statewide greenhouse gas emissions." Rather, HSC section 38597 was written to authorize "fees to be paid by the *sources* of greenhouse gas emissions regulated pursuant to this division…." The difference is significant and should be recognized by limiting the fees to sources. *See* SCPPA June 18, 2009 Comment, pp. 4-7.

- Assessing the fee on imported electricity at "a first point of delivery" of electricity in California would be preempted under the Federal Power Act. The Federal Power Act grants exclusive jurisdiction over wholesale sales of electricity in interstate commerce to the Federal Energy Regulatory Commission ("FERC"). Federal preemption of the field of wholesale transactions goes well beyond pricing issues. The FERC regulation of wholesale power attaches to all aspects of a jurisdictional seller and a jurisdictional transaction. ARB applying an administrative fee to wholesale sales of "electricity that is generated outside California and delivered to a first point of delivery into California" (revised Fee Regulation at section 95202(a)(56)) would intrude into a federally occupied field and would be unlawful. *See* SCPPA June 18, 2009 Comment, pp. 14-16.

- Cogeneration facilities should be treated like other generation facilities, with fees assessed directly on the basis of total emissions. The White Paper prepared for the Fee Regulation proposed that cogeneration facilities "would be treated as industrial facilities, with fees assessed to their fuels or on their emissions, but not on their electricity." This is reflected in the revised Fee Regulation at section 25201(a)(4)(C): "No fee shall be paid for any megawatt-hour of electricity generated at a cogeneration facility." As a result, electricity that is delivered to the grid by generators would bear the burden of a direct imposition of the administrative fee, but electricity that is delivered to the grid by cogenerators would not bear the fee except indirectly to the extent that upstream fuel suppliers elect to bill cogenerators to recover the suppliers' costs of paying the fee to the ARB. Staff has not presented any cogent rationale for discriminating between cogenerators and generators. Just as the fees can be directly assessed on the emissions from generation facilities, fees could be directly assessed on emissions from cogeneration facilities. *See* SCPPA September 3, 2009 Comment, pp. 11–12.

- The ARB should set a cap on the revenues that would be collected through the administrative fee. Section 95303(a) defines the "Total Required Revenue" ("TRR") that would be recovered annually through the administrative fee. It appears from section 95303(a) that the primary parameter for determining the TRR would be "the number of personnel positions, including salaries and benefits and all other costs, as approved in the California Budget Act for that fiscal year." Appendix C to the ISOR lists a plethora of programs for which funding would be provided through the administrative fee. The list and the accompanying staffing requirements could grow substantially in the future unless there is some reasonable constraint on the TRR that could be recovered each year through the administrative fee. SCPPA encourages the ARB to adopt a provision for a reasonable cap that would apply to administrative fees. *See* SCPPA June 18, 2009 Comment, p. 20

Agency Response: We have responded in detail to all of these issues in our responses to Comment 53 SCPPA, Comment 60 SCPPA, Comment 5 SCPPA.

FF16.3 **Comment: "The fee regulation should be modified so that the fee would not be applied to both the import side and the export side of energy exchange arrangements.** In accordance with some of SCPPA's previous comments, the Fee Regulation has been revised to exclude fees on imported electricity that is simultaneously exchanged for exported electricity (new section 95202(a)(56)(B)). By the same reasoning, i.e., to avoid imposing double fees on the same use of power within California, fees should also be excluded on imported electricity that is exchanged with exported electricity on a non-simultaneous or seasonal basis.

Seasonal exchanges do not involve a greater use of electricity or result in greater greenhouse gas emissions than would be the case if each of the parties to the exchange generated the power it needs at the time it needed it. The Fee Regulation should reflect this fact.

SCPPA recommends that the ARB revise the Fee Regulation and make appropriate conforming changes to the Reporting Regulation so that the fee is not payable on electricity that is imported under an exchange agreement with an out-of-state counterparty, to the extent that electricity generated in California is exported to the counterparty under that agreement. This would require the following change to section 95202(a)(56) (as amended by the ARB staff):

> "Imported electricity" means electricity that is generated outside of California and delivered to a first point of delivery into California with a final point of delivery in California. Imported electricity does not include:
>
> (A) Power wheeled through California, which is power that is imported into California that terminates in a location outside of California; or
>
> (B) Power transactions in which imported power is ~~simultaneously~~ exchanged for exported power, whether simultaneously or through a non-simultaneous exchange agreement, as reported under section 95111(b)(1)(A)(9).

Fees would remain payable on the basis of the emissions from the power generated in California that is exported under an exchange agreement, in accordance with section 95201(a)(4)(A), as revised by the ARB staff. This is consistent with the AB 32 requirement that the fee be paid by "sources" of greenhouse gas emissions (HSC 38597). The generation of electricity in California is a source of emissions, whereas the importation of electricity is not.

Applying double fees to interstate exchange arrangements would discourage these arrangements, which benefit society by reducing the cost of electricity generation, and would also discriminate against interstate commerce in violation of the Commerce Clause of the U.S. Constitution."

Agency Response: See our responses to Comments 5.22, 53.1 to 53.11, and 60.5 SCPPA.

FF16.4 Comment: Charging the Fee on Both the Import Side and Export Side of Exchange Arrangements Would Discourage Arrangements that Benefit Society.

Electricity exchanges are important tools used by retail providers to reduce the cost of electricity for the benefit of electricity consumers and ultimately society as a whole. Exchange arrangements between retail providers are contractual tools that permit each retail provider to generate electricity when it is cheaper for that retail provider to generate electricity. In the absence of an exchange agreement, each retail provider is required by the laws of physics to generate electricity at precisely the same time that demand occurs in its service territory. An exchange arrangement permits each retail provider to maximize the efficient use of generating resources by generating electricity non-coincidentally with demand in its service territory instead of generating coincidentally with demand. Even though the timing of generation is changed so that generation occurs at a time that is non-coincidental with demand, each retail provider still produces only one kilowatt hour of electricity to meet one kilowatt hour of demand in a typical exchange situation.

Exchanges often involve counterparties that are located outside of California. For example, during the spring and summer, it might be more cost effective for a California party to buy electricity from electric generating facilities in the Pacific Northwest ("PNW") that have surplus hydroelectric generating capacity. During the fall and winter, it might cost less for the California party to generate electricity than the PNW party. An exchange arrangement enables the PNW party to generate when its costs are lower and permits the California party to generate when its costs are lower. The result is a more efficient use of generation resources by both retail providers.

As currently proposed, the administrative fee would tend to discourage California retail providers from entering into exchange agreements with out-of-state counterparties, due to having to pay the administrative fee on both the imported and exported power. If a California retail provider meets a kilowatt hour of its local demand using its own local generation, then the fee would be imposed only on the emissions associated with generating one kilowatt hour of electricity. However, if a California retail provider enters into an exchange arrangement with a PNW counterparty, the California retail provider would be charged two fees:

- one fee when electricity is delivered to California from the PNW party (unless the power is specified as originating from a zero greenhouse gas emission generating facility); and
- another fee when electricity is returned to the PNW party from California.

The double assessment of administrative fees would discourage retail providers from realizing the efficiencies that can be gained from entering into exchange agreements. Discouraging retail providers from realizing efficiencies for the benefit of electricity consumers and society as a whole would be poor public policy.

Agency Response: This comment restates comments provided by SCPPA on September 23 and earlier. See our responses to Comments 5.22 and 53.3 to 53.8 SCPPA provide a complete response to this comment.

FF16.5 Comment: The Regulation as Applied to Interstate Exchange Arrangements Would Discriminate Against Interstate Commerce In Violation of the Commerce Clause of the U.S. Constitution.

Charging the fee on emissions on both sides of interstate exchange arrangements discriminates against interstate exchange arrangements as opposed to intrastate arrangements. If a California retail provider enters into an agreement with a California counterparty, the California retail provider would pay an administrative fee only when it generates electricity for delivery to its California counterparty. However, if a California retail provider enters into an exchange agreement with an out-of-state counterparty, the California retail provider would pay administrative fees twice, once on the exchange import emissions and again on the exchange export emissions.

The burden on interstate commerce is further illustrated by assuming that other states follow California's lead and adopt similar administrative fees. Consider the situation if California were to apply administrative fees on both the import leg and the export leg of energy exchanges and, for example, Oregon were to do the same. If a California party and an Oregon party entered into an exchange arrangement and two kilowatt hours of electricity were produced to meet two kilowatt hours of demand, one in California and one in Oregon, *four* charges would be assessed on the exchanged electricity, two by Oregon and two by California. If the California and Oregon retail providers avoided interstate exchange agreements and limited themselves to exchange agreements with counterparties in their own states, they would pay a total of two fees instead of four.

Thus, the Fee Regulation discriminates against interstate commerce by imposing additional fees upon interstate exchange arrangements in contrast to intrastate exchange arrangements. This would be unconstitutional.

The applicable constitutional principles were outlined in SCPPA's June 17, 2009 comments on the draft Fee Regulation. In summary, the "dormant" Commerce Clause (U.S. Constitution, article I, §8, cl. 3) limits the power of a state to regulate or tax interstate commerce, even in the absence of federal legislation on the subject. State statutes and regulations that impose taxes or administrative fees on interstate commerce, including interstate transmission of electricity, are subject to Commerce Clause scrutiny. If a state law discriminates on its face against businesses operating in interstate commerce, the law is subject to strict scrutiny that the Supreme Court has described as "virtually *per se* invalid". *Oregon Waste Systems, Inc. v. Dep't of Environmental Quality*, 511 U.S. 93, 99, 114 S. Ct. 1345, 128 L. Ed. 2d 13 (1994).

When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry.

Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 579, 106 S. Ct. 2080, 90 L. Ed. 2d 552 (1986).

The revised Fee Regulation, by imposing more fees on interstate exchanges than intrastate exchanges, facially discriminates against interstate commerce. Consequently, the rule of virtual *per se* invalidity applies. The Fee Regulation will be invalid unless it "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *Oregon Waste Systems*, 511 U.S. 93, 100-101, quoting *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 278, 108 S. Ct. 1803, 100 L. Ed. 2d 302 (1988).

In this case, there are reasonable nondiscriminatory alternatives. In order to avoid the unfair double imposition of administrative fees on interstate exchanges of electricity, the Fee Regulation can be amended as set out above, accompanied by amendments to the Reporting Regulation to permit the reporting of exchanges as a separate category of transactions (see below). These amendments would allow for a more evenhanded treatment of interstate and intrastate exchange arrangements. Thus, there are reasonable nondiscriminatory alternatives to the Fee Regulation, and the Fee Regulation as applied to interstate exchange arrangements would not survive strict scrutiny under the dormant Commerce Clause.

Agency Response: We have responded to the issues raised by SCPPA here in our response to Comment 60.5 SCPPA.

FF16.6 Comment: THE REPORTING REGULATION SHOULD BE AMENDED TO ADDRESS EXCHANGE TRANSACTIONS.

The ARB staff is proposing changes to the originally proposed amendment to the Reporting Regulation, section 95104(e), to support the revisions to the Fee Regulation.

If the Reporting Regulation is amended in accordance with the ARB staff's proposal to support reporting under the Fee Regulation, it should also be amended to permit reporting of electricity exchanges as a separate category, to support the carve-out in the Fee Regulation of electricity imported under exchange agreements. Specifically, SCPPA proposes that section 95111(b)(1)(A)(9) of the Reporting Regulation be modified as follows:

> 9. ~~Specify~~<u>Report energy exchanges that involve importing electricity into and exporting electricity from California by counterparty, aggregated on an annual basis as follows: 1)</u> electricity received under exchange agreements (<u>as measured at the point of receipt, specifying the source if known or the region of origin</u>)~~as purchases~~, and 2) electricity delivered under exchange agreements ~~as wholesale sales~~ <u>(as measured at the point of</u>

delivery, specifying the source if known or the region of origin). The retail provider or marketer must retain, for purposes of verification, exchange agreement contracts, NERC e-tags, settlement data, or other information to confirm the transactions. Energy exchanges that do not involve importing electricity into and exporting electricity from California are not subject to reporting.

This modification to the Reporting Regulation would permit reporting of imports and exports under exchange arrangements as linked transactions. This would enable electricity imported under an exchange agreement to be quantified, for the purposes of exclusion from the definition of "Imported electricity" in the Fee Regulation.

Agency Response: We have addressed these issues fully in our response to Comment 60.6 SCPPA. As noted in those responses, we cannot make additional amendments to the mandatory reporting regulation in this regulatory process. Furthermore, ARB is currently undertaking a process to amend the mandatory reporting regulation, and that would be the proper venue for this comment.

FF16.7 Comment:

THE REPORTING REQUIREMENTS OF THE FEE REGULATION SHOULD BE CLARIFIED. The revised Fee Regulation lists general reporting requirements in section 95204(b), which are similar but not identical to those in the Reporting Regulation. The new requirements to provide details of the official responsible for payment and the billing address are specific to the Fee Regulation.

In section 95204(g), the Fee Regulation also specifies that:

(1) All electricity generating facilities shall provide the same information that is required to be submitted under the Mandatory Reporting Regulation. …
(2) All electricity importers must report all information required to

This could be interpreted to mean that electricity generating facilities and electricity importers must report the same information twice, once to comply with the Reporting Regulation and once to comply with the Fee Regulation. For clarity, SCPPA suggests the following additional section be included in section 95204(g):

(3) An electricity generating facility or an electricity importer will have complied with the reporting requirements of this section 95204 if it has submitted:

(A) a report in compliance with the relevant sections of the Mandatory Reporting Regulation; and

(B) details of the official responsible for payment of the fee and the billing address of the facility.

Agency Response: Electricity generating facilities and electricity importers do not need to report the same information twice. The regulation requires that affected entities use the California Air Resources Board's Greenhouse Gas Reporting Tool, as specified in title 17, California Code of Regulations, section 95104(e). This tool is being modified to accept both data required for mandatory reporting, and any additional data required by this regulation. The reporting tool will make it clear what is required for each type of entity, and will not require double reporting.

FF16.8 **Comment: FEE DETERMINATION NOTICES SHOULD BE ITEMISED.** The revised Fee Regulation provides detailed formulas for calculating the fees for each affected entity. It would be helpful if the figures used in calculating the fee each year were set out in the fee determination notice provided to each affected entity under section 95205. This would allow affected entities to confirm that their fees were correctly assessed. SCPPA suggests the following amendments to the second sentence of section 95205(a):

> The amount of the fee shall be based on the reports submitted pursuant to section 95204 and the fee calculation formulas set forth in section 95203<u>, and the details of the calculation shall be set out in the fee determination notice.</u>

Agency Response: ARB is currently developing invoices to implement this regulation. ARB will consider this comment and consult with stakeholders in the implementation of the regulation.

<u>Comment FF17: WSPA, March 15, 2010</u>

FF17.1 **Comment:** WSPA member companies will be subject to the proposed Fee Regulation both for their direct greenhouse gas emissions at refineries and other facilities and for the volumes of fuel they produce or import for sale in California. While each refinery will have the information needed to allow reporting under the Fee Regulation for that refinery, since refineries are not generally responsible for fuel marketing and distribution they are not likely to have the information needed for meeting the reporting requirements for fuels. Moreover, since a company may have fuels enter commerce at different terminals or other facilities in California, it would be administratively more efficient for the company to be able to report that information on a single state-wide basis (i.e., at the "entity" level).

Reading the reporting requirement of section 95204(b) ("All entities subject to this article must report . . .") in conjunction with the applicability language in section 95201(a) and the section 95202 definitions of "entity," "producer" and "production facility," WSPA concludes that entity-level reporting is allowable under the Fee Regulation. However, the text of the regulation is not explicit on that point. We suggest that CARB either amend the regulation or provide a clear interpretation that entity-level reporting is acceptable.

We understand that CARB staff agrees that entity-level reporting is acceptable, and that companies may meet their overall reporting obligations under the Fee Regulation by reporting using multiple "entities." We also understand that each "entity" must be set up in the reporting system by CARB staff prior to use, and that corporate-level reporting entities or those reporting fuels information may have to access the pertinent portions of the reporting tool in a different manner and will be billed separately. We further understand that information collected under the LCFS reporting tool may be used.

Our members have advised that at this time, they do not have sufficient information regarding the specific reporting fields and other details of the reporting requirements to be able to fully align their internal data collection systems with the reporting program. WSPA appreciates the opportunity to review the beta testing site once it is up and running. WSPA encourages CARB to formally make its on-line reporting tool and details of the reporting fields available as soon as possible. This will help assure that entities subject to the Fee Regulation will be able to complete their reports in an accurate and timely manner.

Agency Response: Staff agrees that the term "entity" used in the fee regulations is broad enough that companies owning multiple refineries can report fuel supplied at the corporate level on a statewide basis. While it is not necessary to make a change to the regulatory language, our intent is clarified here, and will be reiterated in guidance issued by ARB.

Additionally, the commenter is correct that when corporations with multiple refineries wish to report on a state wide basis, it will be necessary for ARB staff to establish a new entity in the mandatory reporting tool. Staff have been working with WSPA members to demonstrate the applicable sections of the mandatory reporting tool in the beta version referred to by the commenter, and will make the finalized version generally available as soon as possible.

FF17.2 **Comment:** **June 1, 2010 Reporting Deadline** As proposed to be amended in the February 26 notice, section 95204(c)(1) and (2) specify that data for the 2008 calendar year must be reported by the later of March 1, 2010 or 30 days after the effective date of the Fee Regulation and that data for calendar year 2009 must be reported by the later of June 1, 2010 or 30 days after the effective date of the Fee Regulation.

WSPA is concerned that facility greenhouse gas emission data for 2009 and later calendar years will not have been verified in accordance with the

Mandatory Reporting Rule by the June reporting deadline and that reporting entities might be deemed to be out of compliance with the Fee Regulation reporting requirement for reporting unverified data. WSPA understands from our discussions with CARB staff that verification of the data reported for the Fee Regulation need not be verified. We would appreciate confirmation on this point.

WSPA is also concerned that the requirement for reporting of both 2008 and 2009 data in 2010 will lead to ARB billing reporting entities for the AB 32 cost of regulation fee for both 2008 and 2009 during 2010. WSPA's view is that such a double billing is not authorized under Health and Safety Code section 38597 and is not appropriate under the Fee Regulation.

Again, our understanding is that this is not CARB staff's intent, and that while both 2008 and 2009 data will be reported in 2010, the fee billing in 2010 will only be for 2008 emissions and fuels data. Bills for 2009 data will be issued in mid-2011, and thereafter the bill for emissions and production during a given calendar year will be issued about 18 months after the end of that calendar year (i.e, 2010 emissions will be billed in mid-2012, etc.)

Agency Response: The data reported under this fee regulation do not need to be verified. Nevertheless, under this fee regulation the data for calendar year 2008 and subsequent years must be certified for completeness and accuracy by the person responsible for submitting the data for all sectors, including electricity. In addition, ARB may conduct audits on these data to ensure its integrity and compliance with this program.

The reporting and billing schedule ensures that entities will be billed for 2008 emissions in 2010, for 2009 emissions in 2011, for 2010 emissions in 2012, etc.

FF17.3 Comment: Enforcement Concerns

Section 95204(c) requires reporting of certain information that is not currently required by the Mandatory Reporting Regulation, including fuels production and import data. While our members anticipate that most of this information will be available, with respect to 2008 and 2009 data in particular CARB's adoption and proposed amendment of the Fee Regulation after the end of the calendar year means that certain data and records contemplated by the Fee Regulation may not be available.

WSPA believes that entities reporting under the Fee Regulation should not be subject to potential liability for any failure to have created or retained records that were not required at the time and encourages CARB to clarify the Fee Regulation in that regard. We suggest that CARB add language such as the following to Section 95204(c) to assure that these issues are avoided: "For the 2008, 2009, and 2010 calendar year reports, best estimates may be used for any data that was not required to be collected and reported under the Mandatory Reporting Regulation." We understand that this language is generally consistent with CARB staff's intended approach on this point.

Section 95206(c) provides, among other things, that submission of incomplete or inaccurate information is a violation of the Fee Regulation. Section 95206(d) specifies that "failure to pay the full amount of any fee required" is also a violation. One possible reading of these two provisions is that an underpayment resulting from inaccurate reporting would be considered a violation even if the originally calculated fees and any supplemental fees based on corrected data were paid on time in accordance with the entity's fee billing from CARB. WSPA's view is that double penalties (i.e., liability under (c) and (d)) are not appropriate in this circumstance, and that penalties should be imposed under (d) only in cases where an entity fails to make a timely payment of the amount of fees billed.
Our understanding is that CARB staff intended (d) to address non-payment of billed fees, and not calculation errors that would be subject to penalties under (c). We request that CARB confirm this understanding, and further that (d) be revised to read: "*Payment Violations*. An entity's failure to pay the full amount of any fee billed to that entity in accordance with this subarticle shall constitute a singe, separate violation of this subarticle for each day or portion thereof that the fee has not been paid after the fee is due."

Agency Response: This comment does not directly address changes to 95204(c), rather it goes to the substance. However, the enforcement provisions as written are consistent with ARB's statutory authority. ARB's experience implementing and enforcing regulations suggest that any difficulties will be handled as they arise on a case by case basis. See response to Comment 17.33 WSPA.

FF17.4 **Comment:** **Operational Control** The definition of "Operational Control" in section 95202(a)(71) generally mirrors the analogous definition in the Mandatory Reporting Regulation. However, the definition in the Fee Regulation excludes the following concluding sentence that is included in the definition in the Mandatory Reporting Regulation: "In any circumstance where this authority is shared among multiple entities, the entity holding the permit to operate from the local air pollution control district or air quality management district is considered to have operational control for purposes of this article."

Facilities operated by WSPA members may include process units or entire facilities where operating responsibility is shared among more than one company (entity). In order to clarify the ultimate responsibility for a facility's compliance with the Fee Regulation in circumstances such as these, WSPA requests that that quoted sentence from the Mandatory Reporting

Regulation be added to the definition of “Operational Control” in the Fee Regulation.

Agency Response: The regulation was modified to reflect this comment.

FF17.5 **Comment:** **<u>Exclusion of Exempt Fuels</u>**

Section 95201(b) exempts liquefied petroleum gas and propane from the Fee Regulation. The reporting provision for refinery gas in section 95204(f)(4) provides an equation for excluding emissions from natural gas combustion from the reporting for emissions from combustion of refinery fuel gas, but does not address liquefied petroleum gas and propane. From our discussions with CARB staff, we understand that staff’s view is that commingling of exempt fuels with non-exempt fuels subjects the otherwise exempt fuels to the fee requirement, and that combustion of a pure exempt stream (such as butane) should be exempt from the fee and therefore not be included in emissions reporting. We also understand that ARB will re-evaluate this position so that all exempt fuel consumers are treated equally, whether the pure fuel is combusted alone or in combination with other fuels.

We also note that section 95204(e) similarly does not provide a mechanism for excluding biodiesel (also exempt under section 95201(b)) from the calculations for the total amount of fuels sold or supplied for use in California. WSPA respectfully requests that CARB add language to the Fee Regulation to establish a consistent approach for regulated entities to make these adjustments to their calculations of reportable emissions.

The applicability provision for “First Deliverers of Electricity” in section 95201(a)(4)(A) specifies that fees shall be paid for megawatt hours of electricity generated through combustion of fossil fuels, but does not include electricity generated through combustion of renewable fuels. In contrast, there is no such exclusion for combustion of renewable fuels at petroleum refineries. WSPA believes that all sectors should be treated equitably, so that emissions from combustion of renewable fuels would either be included in the reporting for all sectors or for none.

Agency Response: When fuels that are otherwise exempt when combusted as a pure stream (e.g., propane or LPG) are comingled in a non-exempt fuel stream, emissions from the aggregated fuel will be used to determine the fee. This is consistent with other fuels in the regulation, such as when normally exempt ethanol or biodiesel is included as part of the total volume for California gasoline or California diesel.

Additionally, the commenter notes that there is not a mechanism for subtracting biodiesel from the amount o fuels sold or supplied. As noted above, if biodiesel is a constituent of California diesel, it is not our intent to exclude it from the fee. However, when sold as a distinct fuel not meeting the definition of California diesel, biodiesel is exempt. The fee would not be applied to the latter case, so no method for subtracting the fraction of biodiesel in needed.

Finally, the commenter notes that the regulation does not include an exemption for biofuels combusted at a refinery as it does for electricity generated with biofuels. The regulation clearly defines the fuels to which the fee applies, i.e. coal, refinery gas, catalyst coke, etc. None of these are biofuels, therefore, an exemption is not necessary.

FF17.6 **Comment: Time to Respond to Data Requests**

The record retention requirement in the section 95204(i) requires that entities subject to the Fee Regulation make retained data available within five business days of a request from CARB staff. In contrast, the Mandatory Reporting Regulation provides a 20 business day period for responding to a CARB request for documents or records. Our members believe that five days will be unworkable as a practical matter in many cases, but that requests could generally be satisfied within 20 business days.

Accordingly, we recommend modifying section 95204(i) to match the 20 day requirement in the Mandatory Reporting Regulation. We also suggest that CARB specify that the 20 days runs from the entity's receipt of the request, since our members have no control over the length of time required for the request to get from CARB to the regulated entity.

Agency Response: This comment does not respond to the 15-day changes proposed. However, ARB's experience in implementing regulations suggests that difficulties in meeting the time to respond to data requests, if any, will be handled as they arise on a case-by-case basis.

FF17.7 **Comment: Incorrect Cross-References**

We have identified two cross-references in the text of the regulation that we believe are incorrect. First, the text for the certification statement to be provided in connection with each report by a regulated entity states that the "report has been prepared in accordance with subchapter 105, article 1, sections 95100 to 95133, title 17, California Code of Regulations." Sections 95100 through 95133 constitute the Mandatory Reporting Regulation, not the Fee Regulation. Accordingly, we believe that the proper citation for this certification would be "subchapter 105, article 3, sections 95200 to 95207, title 17, California Code of Regulations."

Second, the definition of "biodiesel" in section 95202(a)(10)(A) references title 40, Code of Federal Regulations, part 70 as providing the requirements for registration of motor vehicle fuels and fuel additives. Part 70 actually contains the requirements for the federal stationary source operating permit program under Title V of the Clean Air Act. It appears that CARB intended to reference 40 CFR Part 79, regarding fuel and fuel additive registration.

Agency Response: We have made corrections to these two errors as part of the second 15 day modifications to the regulation.

FF17.8 **Comment:** **<u>Fuel Fee Rate</u>**

WSPA understands that under section 95203(c) CARB will establish a uniform per-gallon fee applicable to production of gasoline and diesel, using the emission factors specified in the table in section 95230(d). Please confirm that this understanding is correct.

Agency Response: The regulation does use a fuel fee rate to calculate an entities' fee. The emission factors in section 95203(d) specify the emissions per gallon for gasoline and diesel. The regulation also includes the formula for calculating the common carbon cost in dollars per ton of emissions, based on the total revenue requirement and total emissions covered by the fee. Multiplying the emissions factor by that year's common cost of carbon provides the fuel rate (in dollars per gallon) for the fee. That fuel rate will be applied to the quantity of fuels supplied by an entity during the applicable prior year's reporting period. This dollar amount will then be remitted by the entity for the fuels supplied during that prior year.

<u>Comment FF18: BP, March 15, 2010</u>

FF18.1 **Comment:** *Exempted Fuels*

In general, further explanation, justification and consistency is needed in listing of fuels that are exempt from the fee, as contained in section 9520l(b) of the modified regulation. For instance, "renewable diesel" and "biodiesel" are listed as exempt from the fee. Staff has clarified in conversations that the exemption applies to neat renewable diesel or biodiesel - and not to low level blends of renewable diesel or biodiesel blended into conventional fuel. The regulation requires clarification of this point.

Moreover, the regulation does not contain adequate justification or even explanation as to why some fuels are exempt and others are not. For instance, why aren't biofuels in general exempted from the fee? Biofuels are traditionally considered to be carbon neutral because the combustion emissions are essentially equal to the carbon sequestered during the production of the biomass. If, instead, the intent is to apply the exemption to high volume blends or neat volumes, why is that not explained and justified? At a minimum, E85blends of biofuels should be listed as an exempt fuel.

Further, liquefied petroleum gas is listed as an exempt fuel. We note that the definition of liquefied petroleum gas includes normal butane and iso-butane (see 95202(a)(60». At times our refinery will bum normal butane and iso-butane as part of the feed fuel stream to our cogeneration unit. These butanes come from the refinery and are purified to such an extent that they are they same as that sold to other users as butane. These purified butanes are typically mixed with our refinery fuel gas. It is our understanding that because these butanes are part of the list of exempt fuels that we can remove their contribution from our calculations of emissions for fee determination. Please confirm this assumption.

Agency Response: The regulation is clear that the fee is applied to California gasoline and California diesel. These fuels are well in state law defined as containing maximum percentages of otherwise exempt constituents such as ethanol or biodiesel. Therefore the regulation is clear that if a fuel meets the definition of California gasoline or California diesel, the fee applies. If it does not meet these definitions, the fee does not apply. The example of E85 given by the commenter does not meet the definition of California gasoline.

Further, the regulation is specific as to other fuels to which the fee applies. All the fuels to which the regulation applies are fossil fuels, that may have a small biofuel constituent blended in to the total volume. The fuels to which the fee specifically applies are not biofuels, therefore, exemptions for biofuels are not necessary and may not be desirable. If only those fuels exempted specifically were excluded form the fee, new biofuels could inadvertently be subject to the fee. This is not our intent.

Finally, the commenter the commenter understands that butane, isobutene, or other fuels that are exempt from the regulation if combusted as alone can be subtracted from the emissions of refinery gas. This is incorrect. If an exempt fuel becomes a constituent of a non-exempt fuel, the fee applies to emissions from the final product. See comment FF17.5 WSPA for further discussion.

FF18.2 **Comment:** *Renewable Electricity Standard*

We do not see a provision in the regulation that provides a nexus for the payment of the administration of the RES to the regulated parties – i.e. Investor Owned and Municipal Utilities. Because renewable power is assumed to be emissions free, renewable power is essentially exempted from the fee – even though there will obviously be substantial staff time involved in designing and implementing this complex regulation. The analogy here is to the Low Carbon Fuel Standard (LCFS). The regulated parties for the LCFS will pay for the regulation through fees on conventional petroleum fuels – and through fees on blends of the lower carbon fuels. This is because even though the lower carbon fuels (traditionally considered carbon neutral) are lower carbon, CARB is giving them the same emissions factor as conventional fuels. To be consistent, the fee regulation <u>must</u> either assign an emission factor to renewable power that is equivalent to fossil generation – or exempt biofuels form the fee.

Agency Response: The only transportation fuels the fee is charged on are California gasoline and California diesel fuel which, by definition, are not biofuels. The application of the fee is consistent between fuels and electricity since fuels and energy that are defined as renewable are not charged the fee.

Additionally, the commenter discusses accounting for the lower carbon content of renewable fuels in the emission factors used in calculating the fee as is done in the LCFS. The purpose of the LCFS is to reduce carbon emissions of fuels, which is done by accounting for all “life cycle” emissions associated with manufacturing (e.g., refining, land-use, extraction) and transporting the fuel. The purpose of the Fee Regulation is to collect revenue to pay for implementation of AB 32 programs, not to *directly* bring about a change in carbon emissions. Accounting for the “low-carbon” nature of a fuel is only possible when life-cycle emissions are taken into account. The emissions factors used in the fee regulation account for combustion of the fuel only, not for life-cycle emissions.

In regards to the comment that there is no nexus between the fee and the RES development program, we disagree. The RES is a strategy that will reduce GHG emissions from the energy sector and contribute to meeting the requirements of AB 32. Exempting renewable energy from paying the fee does not negate the nexus between those entities paying the fee and strategies that achieve the goal of the program that the fee supports.

FF18.3 **Comment:** *Petroleum Coke*
The modified language in section 95201(a)(5) correctly places the point of fee collection for emissions from Petroleum Coke at the point of combustion. However, the regulation includes the term "consume" as analogous to "combust". If petroleum coke is "consumed" in a manner which results in few or no GHG emissions (through sequestration or other means), the fee liability should be commensurately reduced.

Agency Response: Section 95203 (b) states that “The Executive Officer shall calculate the Common Carbon Cost (CCC), which represents the annual cost per $MTCO_2$ emitted”. If a process using a fuel to which the fee applies does not produce emission of CO_2, then it will be excluded from the fee calculation.

F. Second 15-Day Changes Comments

<u>Comment FS1: NTel, March 23, 2010</u>

Comment: Will ARB consider coordinating efforts with other Agencies (CPUC,CEC, EPA) to consolidate reports requirements?

Agency Response: ARB is currently working with the Energy Commission (CEC), Public Utilities Commission (CPUC) and the US EPA to implement AB 32. For mandatory reporting requirements, ARB developed and implemented this regulation and will continue to work with stakeholder and other agencies, such as U.S. EPA to avoid duplicative requirements and reporting. Our intent in developing the fee regulation was to use existing data as much as possible. In instances where this data can be taken directly from another source, such as ARB's mandatory reporting program, we will not require additional submission of the data. However, in many instances ARB does not have direct access to some of the required data.

<u>Comment FS2: JDod, March 24, 2010</u>

Comment: Your law is a fraud. Repeal it.

A paper is available at www.scribd.com called Gravity causes Climate Changes. http://www.scribd.com/doc/27343303/Gravity-Causes-Climate-Change

It claims that the IPCC and GCMs FAIL to properly implement the Greenhouse Effect, by

1. ignoring that the amount of energy photons coming into the Earth limits the GHE, and

2. instead claiming that the simple addition of CO2 without added energy, causes warming in violation of the 2nd Law of Thermodynamics and

3. An additional source of incoming energy in the force of gravity and gravitational potential ennegy (sic) has been totally ignored in the IPCC analysis.

In simple terms, Svante Arrhenius in 1896 said that in order to get the GreenHouse warming Effect (GHE), you must add an energy photon to a greenhouse gas (GHG) which delays the photon's transport to space by a few nanosonds (sic) thus causing more warming. The GHE results in about 11% (32/287) of the Earths temperature due to the fraction of the spectrum of energy photons that can be absorbed and released a few nanseconds (sic) later. The IPCC however claims that you just need to add a GHG to the air to get the GHE.(AR4, WG1, Ch1, p116). Clearly the latter is impossible since you can not increase the temperature witout (sic) adding an energy photon without violating the Law of Conservation of Energy.

It is claimed that the IPCC mechanism is only valid as the Earth's atmosphere is coming up to energy equilibrium, when there would exist sufficient excess energy to provide the GHGs with the required absorbable photon of energy. Once the Earth reaches equilibrium when all the energy coming in is equal to the energy going out, and with both the Water Vapor and CO2 absorbtion (sic) spectra saturated or absorbing 100% of the absorbable photons, then the addition of any more GHGs will not result in any more GHE warming because there are no longer any absorbable photons available. This then results in an EXCESS of the GHGs in the air. The proof is simple- When you add more WV to the air, as when the humidity goes from a "normal" 33% to 100% when it rains, there is no increase in the GHE warming of the air. By the IPCC logic you would expect the WV GHE to triple from 32C to 96C. This does not happen because all of the absorbable photons are already in use. ie the absorbtion (sic) spectra for WV (& CO2) are saturated. This is why all of the Water in the oceans has not become water vapor in use by the GHE. The addition of more GHGs just results in more excess GHGs in the air, not more warming.

The idea of excess GHGs is also supported by the fact that whenever the temperature decreases, every night, every winter etc, then the amount of GHGs in use causing the GHE also decreases. This results in more GHGs becoming excess. Since the temperature is below the record highs and since man has added more CO2, then under normal average conditions today on Earth there is excess GHGs. If there is excess then then (sic) any increase is dictated by the energy coming in and out, and it would use the excess first (as it does every morning) rather than waiting until man adds more excess.

Now if there is excess GHGs and no available energy, then the IPCC/Models contention that more CO2 results in more feedback warming by WV, also is impossible. due to the lack of energy photons. Similarly the contention that more clouds will result in more positive feedbacks is also impossible if there are no available energy photons, even while in the lab more WV/clouds should result in more warming or posotive (sic) feedback IF THE PHOTONS WERE AVAILABLE. With the invalidation of the feedback models, then all derivations of forcing functions which depend on the models are also invalid.

The terminology that a Greenhouse Gas "traps" an energy photon to cause the Greenhouse Effect is incorrect and misleading.

The photon is absorbed and released within nanoseconds as the energized GHG molecule collides with other air molecules and returns the energy to the air. The concept that the energy is trapped is absurd. Since the GHE actually causes about an 11% temperature increase or (32C/287C on average), then if the energy photons were trapped for a significant period of time, say 10 days, let alone the 50+ years of disequilibrium claimed by Hansen, the air would have absorbed all of the energy that would have come in in (sic) a single day (ie 11% times 10 days=110%) yet the daily temp increase is on the order of 10 to 15 degrees C, but the increase in the GHE only claims 0.8 degrees per century. Clearly trapping does not happen. You do not see individual GHG molecules at 900C. They are all at air temperature.

In summary, the GISS/HADCRU/IPCC models are so flawed as to be totally worthless. They fail to model the reality of conditions on Earth. They mis-apply the GHE. If more CO2 does NOT cause more warming, then there is no reason to Cap or reduce emissions. However as Hansen points out, the increasing temperature data is complete enough to document that warming exists, the data on incoming energy , the sole source used in the models, has essentially not increased since the 1960s, so there MUST be some other source of energy, eg gravity, that is causing the very real warming. see the paper referenced above for further explanation.

Agency Response: This comment does not pertain to the regulation.

Comment FS3: TBat, March 26, 2010

Comment: I wish to submit my opposition to AB 32 and all provisions as currently written. It is based on a number of false assumptions and the data are obviously skewed to support political/ideological positions. The subject needs to be reevaluated by independent scientists using objective data. Even if the study were accurate, the ecomomic (sic) impact of its provisions should preclude is adoption/enactment at this precarious time. Please be sensible and look at the entire California picture.

Agency Response: This comment does not pertain to the regulation.

Comment FS4: WAPA, March 30, 2010

Comment: These comments are in response to the California Air Resources Board (CARB) request for comments on its Second 15-Day Notice of Public Availability of Modified Text for the Proposed Regulation AB 32 Cost of Implementation Fee.

Western Area Power Administration (Western), a federal agency, continues to express concerns that the CARB's regulations include Western as a regulated entity. While Western respects the state's initiatives to implement AB32, Western is bound by Federal laws and regulations. The Supremacy Clause of the United States Constitution does not allow a state to directly regulate the Federal government without its consent or within a field regulated entirely by the Federal government. Western understands the CARB believes the Clean Air Act provides a waiver of sovereign immunity for these regulations. While Section 118 of the Clean Air Act, 42 U.S.C. § 7418, provides a limited waiver of sovereign immunity and under certain circumstances requires federal facilities to comply with federal, state, interstate and local requirements for the abatement of air pollution to the same extent as any nongovernmental entity, under the Act, there must be an action by the United States to delegate authority over greenhouse gases to the state before a federal agency may comply with state regulations. There are current initiatives associated with comprehensive greenhouse gas regulations pending before both the U.S. Congress and EPA. However, as of this writing, Western understands neither the U.S. Congress nor the U.S. Environmental Protection Agency (EPA) has promulgated any such comprehensive laws or regulations on greenhouse gases. While Congress or EPA, in the near future, may decide to comprehensively regulate greenhouse gases as air pollutants, until such time, Western does not have authority to bind Congress, EPA or other federal agencies with jurisdiction over such matters. Furthermore, these regulations that CARB is proposing to promulgate directly impact Western's primary mission of marketing federal power, a field regulated entirely by the federal government. Therefore, Western continues to believe the regulations should not include Western as a regulated party in the RES.

In the past, Western has worked with state agencies, including CARB, to provide information that the state needs. For instance, Western voluntarily reports its greenhouse gas emissions to assist the state meet its goals. In the event CARB would like additional information from Western, Western is willing to evaluate the request and will work with CARB. However, Western, at this time, cannot consent to direct state regulation under AB32.

Agency Response: The comment does not relate directly to the 15-day changes and does not require a response. However, section 118 of the Clean Air Act (42 U.S.C. 7418 (a)) provides a waiver of sovereign immunity for regulations to control air pollution:

> Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government … engaged in any activity resulting, or which may result, in the discharge of air pollutants… shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of air pollution in the same manner, and to the same extent as any nongovernmental entity. The preceding sentence shall apply …(B) to any requirement to pay a fee or charge imposed by any State or local agency to defray the costs of its air pollution regulatory program… This subsection shall apply notwithstanding any immunity of such agencies, officers, agents, or employees under any law or rule of law.

The United States Supreme Court, in *Massachusetts v. EPA*, 549 U.S. 497 (2007) determined that greenhouse gases are "air pollutants" as that term is defined in the Clean Air Act. AB 32 and regulations adopted to implement AB 32 constitute an air pollution regulatory program designed to control greenhouse gas emissions, and the fee regulation is designed to defray the costs of this air pollution regulatory program. Therefore, the fee regulation falls squarely within the waiver of sovereign immunity provided by section 118 of the Clean Air Act, and the commenter is obligated to comply with the fee regulation. The commenter suggests that greenhouse gases are different than other air pollutants and that section 118 of the Clean Air Act does not apply. ARB does not agree; the commenter's position is inconsistent with both the language of section 118, which makes no distinction among different types of air pollutants, and the reasoning of the U.S. Supreme Court in *Massachusetts v. EPA*.

Comment FS5: CRRC, March 29, 2010

Comment: CRRC concurs with the modifications to section 95202 (a)(11) “Biogas” and section 95202 (a)(68) “Natural gas” does not include “biogas”.

> ***Applicability.***
> CRRC has observed that the modifications in the definitions of “biogas” and “natural gas”, has left the applicability of “biogas” in section 95201 in limbo. *For clarity, CRRC requests that the regulations add “biogas” to subarticle 95201 (b) when it is used as a fuel, or to emissions resulting from combustion of biogas as a fuel.* **Add: (10) biogas**.

Agency Response: See response to Comment FS6 Sempra.

Comment FS6: Sempra, April 2, 2010

Comment: With the advent of AB 32 and its evolution into ARB’s Scoping Plan (as well as the activities under review and refinement amongst many of California’s regulatory agencies), the Global Warming Solutions Act of 2006 is driving opportunities for new sources of renewable fuels to be discovered and developed at a pace previously considered profound. As well, existing renewable fuel supplies are being enhanced and refined to meet the demands required by consumers and regulatory constraints. Sempra Energy recommends the Air Resource Board position itself so it can readily adjust to these changing technologies and the renewable product’s applicability to be consumed within California’s regulatory plan.

A necessary change to the proposed amendments is to recognize that gas cannot be injected into regulated natural gas pipelines until it meets defined specifications. We respectfully request Air Resources Board to make the following changes (noted in **BOLD)** to the March 18 draft to either recognize specification obligations and/or to more clearly define the purpose or process involved in developing the renewable fuels:

I) Sempra Energy proposes the creation of a definition for “Biomethane Gas”
“Biomethane” means “biogas” that has been upgraded or otherwise conditioned to meet CPUC natural gas specifications and is suitable for injection into natural gas distribution pipeline systems operated by public and private utilities.

II) Sempra Energy recommends the following changes to Section 95202. Definitions.

(11) “Biogas” **~~(also means biomethane)~~** means ~~natural~~ gas that meets the ~~meets the requirements of 12 CCR §2292.5 and~~ is produced from the breakdown of organic material **under conditions with low to no availability** **~~in the absence~~** of oxygen. Biogas is produced in processes including, but not limited to, anaerobic digestion,

anaerobic decomposition, and thermo-chemical decomposition **under sub-stoichiometric conditions.** These processes are applied to biodegradable biomass materials, such as manure, sewage, municipal solid waste, green waste, and ~~**waste from**~~ energy crops, to produce landfill gas, digester gas, and other forms of biogas~~, agricultural waste, animal waste, or other biomass~~.

III) Sempra Energy recommends the following changes to Section 95202. Definitions.

(68) "Natural gas" means a naturally occurring mixture of hydrocarbons beneath the Earth's surface that maintains a gaseous state at standard atmospheric temperature and pressure under ordinary conditions. "Natural gas" does not include "biogas" **or "biomethane."**

Agency Response: ARB does not believe it is necessary to recognize that gas cannot be injected into regulated natural gas pipelines until it meets defined specifications. For the purposes of this regulation, the fee is to be charged on natural gas. Biogas and biomethane do not meet the definition of natural gas contained in this regulation at section 95202 (a)(68).