

REQUEST FOR EARLY EFFECTIVE DATE

Pursuant to Government Code section 11343.4(b)(3), the California Air Resources Board (CARB or Board) requests that the Office of Administrative Law (OAL) prescribe an “earlier effective date” for the amendments to the Regulation for the California Cap on Greenhouse Gas Emissions and Market-Based Compliance Mechanisms (Cap-and-Trade Regulation or Regulation) that were approved for adoption by the Board at the March 22, 2018, public hearing and are submitted to OAL for review and approval on April 17, 2018. The following demonstrates “good cause” for OAL to allow the amendments to be effective upon submission to the Secretary of State.

DEMONSTRATION OF GOOD CAUSE

In this rulemaking, the Board adopted amendments to the Cap-and-Trade Regulation to (1) clarify that the Cap-and-Trade Regulation requires a successor entity after a change in ownership to be responsible for the outstanding, pretransfer compliance obligation of the predecessor covered entity and (2) clarify the process for setting the Auction Reserve Price, by comparing the California Auction Reserve Price with the Auction Reserve Prices set by all linked jurisdictions (currently Québec and Ontario) when expressed in a common currency and selecting the highest value.

As discussed in the Staff Report (or ISOR) entitled “Proposed Amendments to the California Cap on Greenhouse Gas Emissions and Market-Based Compliance Mechanisms Regulation” (released January 30, 2018), a bankruptcy court recently held that “[t]he Regulation does not provide for successor liability nor does it in anyway make a Purchaser of a Facility liable for the emissions of the former-Covered Entity. Nor does it explicitly express the need for a purchasing entity to provide for the former-Covered Entity’s emissions.” (See ISOR, at 10.) While CARB is appealing this ruling and is confident in its litigating position, CARB recognizes the negative implications of the uncertainty created by this bankruptcy court opinion, which is why it amended the Regulation to clarify the applicability of successor liability. As long as the opinion stands and prior to the effective date of the regulatory amendment, other covered entities could attempt to sell their facilities in order to avoid their compliance obligations and other purchasing entities could assert that they are not responsible for the compliance obligations stemming from the pre-sale emissions of facilities they purchase. This could result in other entities’ compliance obligations being unaccounted for and require CARB to be involved in costly litigation against such entities. Therefore, to avoid this risk to the Cap-and-Trade Program, the amendment clarifying successor liability must be effective as soon as possible.

Furthermore, amendments to clarify the process for setting the Auction Reserve Price (section 95911(c)(3)(D)) must be effective as soon as possible to avoid confusion and possible error in upcoming Joint auctions, and to reflect the regulations of Quebec and Ontario, to which this program is linked. The next conducted Joint auction will take place on August 14, 2018, and the Auction Notice is posted on June 15, 2018.

For the foregoing reasons, CARB hereby requests that OAL approve these amendments to be effective upon submission to the Secretary of State.

A handwritten signature in black ink, appearing to read 'Ben Carrier', is written over a solid horizontal line.

Ben Carrier, Attorney, Air Resources Board

DATE: May 29, 2018