State of California
AIR RESOURCES BOARD

Addendum to the Final Statement of Reasons for Rulemaking

2012 AMENDMENTS TO THE CALIFORNIA CAP ON GREENHOUSE GAS EMISSIONS AND MARKET-BASED COMPLIANCE MECHANISMS

Public Hearing Date: June 28, 2012
Agenda Item: 12-4-5
Addendum Prepared: August 23, 2012

I. Background

On July 30, 2012, the Air Resources Board (ARB or Board) submitted the Final Statement of Reasons (FSOR) for the "Adoption of the 2012 Amendments to the California Cap on Greenhouse Gas Emissions and Market-Based Compliance Mechanisms to the Office of Administrative Law (OAL) for its review and approval. In the course of its review, OAL questioned a regulatory change that it interpreted as being potentially impermissibly retroactive, and identified several minor and nonsubstantive clarification issues. Each of these issues is addressed in turn below.

A. RETROACTIVITY

ARB understands there to be two types of retroactivity that regulatory text might present: a prohibited "primary" retroactive effect, and an allowable "secondary" retroactive effect. "Primary" retroactivity is altering "the *past* legal consequences of past actions." (20th Century Ins. Co. v. Garamendi, (1994) 8 Cal. 4th 216, 281, original italics, citing Bowen v. Georgetown Univ. Hosp., (1988) 488 U.S. 204, 219). "Secondary" retroactivity is altering "the *future* legal consequences of past transactions." (20th Century Ins. Co. v. Garamendi, (1994) 8 Cal. 4th 216, 281, original italics, citing Nat'l Med. Enterprises, Inc. v. Sullivan, (9th Cir. 1992) 957 F.2d 664, 671). "Secondary" retroactivity is "an entirely lawful consequence of rulemaking and hence does not itself offend any law, including the United States and California Constitutions and their respective due process clauses." (20th Century Ins. Co. v. Garamendi, (1994) 8 Cal. 4th 216, 281-282).

In fact, ARB has, with OAL approval, exercised this "entirely lawful consequence" several times in the last few years, primarily in response to the economic downturn that began in 2008. Rulemakings in which ARB provided relief shortly before or even during the compliance year include our Truck and Bus rule (OAL Regulatory Action No. 2011-1028-04s), the In-Use Off-Road rule (OAL Regulatory Action No. 2011-1028-03s), and

the Transport Refrigeration Unit rule (OAL Regulatory Action No. 2011-0204-06s). These rulemaking amendments were noticed before the compliance year had begun but were formally adopted after it had begun. ARB has also provided some compliance relief for new motor vehicle manufacturers having to comply with on-board diagnostic (OBD) requirements under both the light-and medium duty-vehicle OBD II regulation and the heavy-duty OBD regulation. Some of these OBD amendments were not noticed or adopted until the first model-year affected by the amendments was already underway. Like the amendments at issue here, these prior ARB rulemakings address real world, future consequences of past transactions as allowed, without changing the past legal consequences of past actions, as would be arguably prohibited.

As explained in Section II below, the regulatory change OAL identified as potentially impermissibly retroactive has at most a "secondary" retroactive effect and so is permissible.

B. MINOR ADDITIONAL NON-SUBSTANTIVE CHANGES

OAL identified several additional, minor non-substantive changes in its review that ARB agrees add clarity and consistency to the regulations.

II. Retroactivity

Section 95812(b):

> If an entity's reported or reported and verified annual emission in any data year from 200~~8~~9 ~~to~~ through 2011 from the categories specified in section 95852(a) equal or exceed the thresholds identified below, that entity is classified as a covered entity as of January 1, 2013, and for all future years until any requirement set forth in section 95812(e) is met.

These amendments do not impose an impermissible "primary" retroactive obligation. No entity, under the current regulation or under the proposed amendments, has a compliance obligation before January 1, 2013. Rather, entities that exceed the threshold, based on information required to be reported pursuant to the Mandatory Reporting Regulation in 2011, will now be included. No changes are occurring that impose or change an obligation that accrued in the past based on these past emissions. Rather, this change imposes a future obligation – compliance with the program commencing on January 1, 2013 – based on emissions during 2009 through 2011 and reports submitted pursuant to the Mandatory Reporting Regulation. Hence this situation continues to permissibly present a future consequence (compliance starting January 1, 2013) of past transactions (emissions in the 2009-2011 time period). Since the entity cannot be considered a covered entity prior to January 1, 2013, the change does not impermissibly apply the amended regulations retroactively.

III. Additional minor and non-substantive changes

Section 95830(c)(1)

OAL has requested this section to be corrected by removing subdivision 95830(c)(1)(I) from the list in (c)(1) and re-numbering it to subdivision 95830(c)(2) and then re-numbering the remaining subdivisions in that section.

This change simply reorganizes and renumbers the proposed additional text, since this paragraph does not list information required. The paragraph lists the bases on which an applicant may be denied, and is more appropriately its own subsection

Section 95913(d)(2)

OAL has requested this section be revised to say "Subsequent Reserve sales shall be conducted on the first business day six weeks after each quarterly allowance auction scheduled pursuant to section 95910 ~~that is also a business day in California~~."

This minor editorial change simply restates that the first reserve sale is required to be on a business day in California, and is therefore nonsubstantive.

Subdivision 95920(c)(1)(D) and 95920(c)(2)

OAL has requested this section to be revised by re-lettering subdivision 95920(c)(2) to subdivision 95920(c)(1)(D) to make it part of the list as it belongs.
This change simply reorganizes and renumbers the proposed additional text, since this paragraph also contains how holdings of allowances will be calculated, and does not need to be a separate subdivision. It is more appropriately included under section 95920(c)(1).

Subdivision 95921(b)(7)

OAL has requested this section to be revised by moving subdivision 95921(b)(7) to be the first sentence in subdivision 95921(b), but to leave the text as is.

This change simply moves proposed text to the beginning of the section, as the text applies how information must be maintained and provided to ARB, not the information that must be submitted.

IV. Compliance with Gov. Code section 11346.9(a)(4)

ARB did not evaluate any alternatives to this rulemaking as these amendments to the cap-and-trade regulation serve only to clarify the process of how to meet the existing regulatory requirements and for staff to implement the program. No alternative would be more effective at providing detail to regulated entities on how they will be required to comply during the implementation of the program, nor as effective and less burdensome

than what is included in the rule making. Finally, ARB did not identify any alternative that would be more cost effective to regulated entities.