COMMENTS OF THE POWER GENERATORS AIR COALITION TO THE CALIFORNIA AIR RESOURCES BOARD ON THE INFORMATION SOLICITATION TO INFORM IMPLEMENTATION OF CALIFORNIA CLIMATE DISCLOSURE LEGISLATION: SENATE BILLS 253 AND 261, AS AMENDED BY SB 219

The Power Generators Air Coalition ("PGen") respectfully submits these comments to the California Air Resources Board ("CARB") in response to CARB's Information Solicitation to Inform Implementation of California Climate Disclosure Legislation: Senate Bills 253 and 261, as amended by SB 219. CARB explains that it is "soliciting feedback to help inform its work to implement" Senate Bill 253 (California's Climate Corporate Data Accountability Act) (hereinafter referred to as "SB 253") and Senate Bill 261 (California's Climate Related Financial Risk Act) (hereinafter referred to as "SB 261"), as each of these statutes were amended by Senate Bill 219.[1] The Information Solicitation "allows CARB to gather important information, from a wide range of stakeholders, relating to developing approaches to implementation."[2]

PGen appreciates the opportunity to provide these comments to CARB in response to the Information Solicitation. PGen is an incorporated nonprofit 501(c)(6) organization whose members are diverse electric generating companies – public power, rural electric cooperatives, and investor-owned utilities – and a national trade association. PGen members own and operate a mix of solar, wind, hydroelectric, nuclear, and fossil generation. PGen is a collaborative effort of electric generators to share information and expertise in the interest of effectively managing air emissions to meet and exceed environmental laws and regulations and in the interest of informing sound regulation and public policy.[3] PGen's members include leaders in the fundamental transition to cleaner energy that is currently occurring in the industry. PGen as an organization does not participate in legislative lobbying or litigation. PGen and its members work to ensure that environmental regulations support a clean, safe, reliable, and affordable electric system for the nation. Several PGen members participate in the Western Energy Imbalance Market that is operated by the California Independent System Operator ("CAISO") and provide energy to California through this market.

PGen members have been publicly reporting certain greenhouse gas ("GHG") emissions for decades. As part of the 1990 Amendments to the Clean Air Act, Congress required the owners or operators of electric generating units subject to the Acid Rain Program to publicly report the carbon

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[1] CARB, Information Solicitation to Inform Implementation of California Climate Disclosure Legislation: Senate Bills 253 and 261, as amended by SB 219 at 1 (Dec. 16, 2024) ("Information Solicitation"), available here.

[2] *Id.*

[3] Additional information about PGen and its members can be found at https://pgen.org/. The National Rural Electric Cooperative Association and Wabash Valley Power Alliance do not join these comments.

dioxide ("CO_2") emissions from those units beginning in 1995.[4] In addition, since 2010 all electric generating units have been required to report their GHG emissions under the U.S. Environmental Protection Agency's ("EPA") Greenhouse Gas Reporting Program, with units subject to the Acid Rain Program reporting under Subpart D,[5] and other units reporting under Subpart C.[6] As such, PGen members are uniquely qualified to provide comments to CARB on issues related to the reporting of GHG emissions from electric generators.

The electricity generating sector has made significant GHG reductions, and is the industry with by far the greatest amount of CO_2 reductions from 2000 to 2022.[7] Since 2005, the electric power sector's CO_2 emissions have fallen more than 36 percent.[8] By comparison, CO_2 emissions in the transportation sector have fallen only 6 percent between 2005 and 2021,[9] with transportation surpassing the electric power sector as the biggest contributor to U.S. GHG emissions around 2016.[10] The majority of PGen members have established goals to reduce their GHG emissions, and several PGen members have set net-zero goals.

While PGen members take seriously the need to reduce GHG emissions, they take equally seriously their obligation to provide reliable electricity at an affordable price. As CARB considers how to implement SB 253 and SB 261, it should be mindful of the potential impact of SB 253 and 261 on energy reliability and affordability. With this backdrop in mind, PGen offers the following comments to CARB in response to the Information Solicitation.

I. Background of SB 253 and SB 261

SB 253 requires a "reporting entity" to annually disclose their Scope 1, Scope 2, and Scope 3 GHG emissions. Reporting of Scope 1 and 2 emissions is to begin with the entity's 2026 emissions, and Scope 3 reporting is to begin with the entity's 2027 emissions.[11] SB 253 defines Scope 1, Scope 2, and Scope 3 GHG emissions in accordance with the definitions developed by the Greenhouse

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[4] Clean Air Act Amendments of 1990, Pub. L. No. 101-549, Section 821, 104 Stat. 2399 (Nov. 15, 1990); 40 C.F.R. Part 75.

[5] 40 C.F.R. § 98.42(a).

[6] *Id.* § 98.42(b).

[7] Center for Climate and Energy Solutions, U.S. Emissions, https://www.c2es.org/content/u-s-emissions/ (graphic showing Energy-Related Carbon Dioxide Emissions by Sector) (citing EIA data for 2023) ("CCES US CO_2 Emissions").

[8] *Id.* By comparison, the transportation sector's GHG emissions fell by almost 9 percent and the industrial sector reduced its emissions by a little more than 4 percent over the same period of time.

[9] Congressional Budget Office, Emissions of Carbon Dioxide in the Transportation Sector at 2 (Dec. 2022), https://www.cbo.gov/system/files/2022-12/58566-co2-emissions-transportation.pdf.

[10] CCES US CO_2 (graphic showing Energy-Related Carbon Dioxide Emissions by Sector).

[11] Cal. Health & Safety Code § 38532(c)(1)(A)(i)(I)-(II).

Gas Protocol ("GHG Protocol"), which are the global standard.[12] Scope 1 emissions are "all direct greenhouse gas emissions that stem from sources that a reporting entity owns or directly controls…."[13] Scope 2 emissions are "indirect greenhouse gas emissions from consumed electricity, steam, heating, or cooling purchased or acquired by a reporting entity…."[14] Scope 3 emissions, which are the most difficult to calculate, are "indirect upstream and downstream greenhouse gas emissions, other than scope 2 emissions, from sources that the reporting entity does not own or directly control…."[15]

SB 261 requires a "covered entity" to "prepare a climate-related financial risk report" that discloses both its climate-related financial risk (which is defined as "material risk of harm to immediate and long-term financial outcomes due to physical and transition risks"[16]) and the measures it has "adopted to reduce and adapt to" the disclosed climate-related financial risk.[17] This report must be prepared "[o]n or before January 1, 2026, and biennially thereafter."[18]

II. General Applicability: CARB's interpretation of "does business in California"

In Question 1 of the Information Solicitation, CARB seeks input on the applicability requirements for SB 253 and SB 261. The definitions of "reporting entity" in SB 253 and "covered entity" in SB 261 are similar, as both apply to a "partnership, corporation, limited liability company, or other business entity formed under the laws of the state, the laws of any other state of the United States or the District of Columbia, or under an act of the Congress of the United States … and that does business in California."[19]

To be considered a reporting entity under SB 253, the entity must have total annual revenues exceeding one billion dollars, while for SB 261, the covered entity must have total annual revenues in excess of five hundred million dollars.[20] In both cases, applicability is determined based on the entity's revenue from the prior fiscal year.[21]

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[12] *Compare Id.* § 38532(b)(3)-(5) *with* The Greenhouse Gas Protocol, A Corporate Accounting and Reporting Standard (Rev. Ed.) at 25 (hereinafter "Greenhouse Gas Protocol"), available here.

[13] Cal. Health & Safety Code § 38532(b)(3).

[14] *Id.* § 38532(b)(4).

[15] *Id.* § 38532(b)(5).

[16] *Id.* § 38533(a)(2).

[17] *Id.* § 38533(b)(1)(A)(i)-(ii).

[18] *Id.* § 38533(b)(1)(A).

[19] *Id.* § 38532(b)(2) (definition of "reporting entity"); *id.* § 38533(a)(4) (definition of "covered entity" with the only difference being that the word corporation comes before partnership in the covered entity definition).

[20] *Id.* §§ 38532(b)(2), 38533(a)(4).

[21] *Id.*

Neither SB 253 nor SB 261 define what it means that an entity "does business in California."

A. CARB should not adopt the definition of "doing business in California" contained in section 23101 of the California Revenue and Tax Code (Question 1.a.).

In Question 1.a. of the Information Solicitation, CARB asks whether it should interpret "doing business in California" similarly to section 23101 of the California Revenue and Tax Code. PGen urges CARB not to adopt this definition because it is exceptionally broad and could lead to unintended consequences and negative impacts on the state.

Under section 23101, the existence of any of the four following conditions constitutes "doing business in California" for purposes of the Revenue and Tax Code:

- The entity "is organized or commercially domiciled" in California, meaning it is either incorporated in California or has its principal place of business there;
- The entity's sales in California exceed either the lesser of $735,019[22] or 25% of the entity's total sales;
- The entity's real and tangible personal property in the state exceeds either the lesser of $73,502[23] or 25% of the entity's total property; or
- The entity's payroll in the state exceeds either the lesser of $73,502[24] or 25% of the entity's total payroll.

If CARB adopts this definition, the three conditions other than being organized or commercially domiciled in the state would subject numerous business entities with minimal contact with the state into the SB 253 and SB 261 programs. Because SB 253 and SB 261 impose onerous and costly requirements, business entities with very limited California contacts will likely take steps to eliminate the conditions that qualify them as doing business in the state to avoid becoming a reporting entity and/or a covered entity. This, in turn, would lead to deleterious economic consequences for the state.

For example, following the COVID-19 pandemic, remote work has become much more common, and businesses frequently have employees who work from their homes in locales throughout the

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[22] Section 23101 specifies this amount as $500,000, Cal. Rev. & Tax. Code § 23101(b)(2), but this amount is adjusted annually, *id.* § 23101(c). The current adjusted sales amount for 2024 is $735,019. *See* California Franchise Tax Board, Doing business in California, available here (hereinafter "FTB, Doing Business in California").

[23] This is also an adjusted amount; the amount in the statute is $50,000. *See* Cal. Rev. & Tax. Code § 23101(b)(3); FTB, Doing Business in California.

[24] This is also an adjusted amount; the amount in the statute is $50,000. *See* Cal. Rev. & Tax. Code § 23101(b)(4); FTB, Doing Business in California.

United States, including California.[25] The payroll condition in section 23101 could be met by simply having just one employee in the state as one person's salary may easily exceed the $73,502 threshold. As a result, businesses with only one or a very small number of employees in the state might terminate those employees or request that they relocate out of California rather than become subject to SB 253 and/or SB 261. This could lead to job losses, a decrease in the state's tax base, and an exodus of residents leaving the state to avoid losing their jobs. Additionally, it could lead to fewer employment opportunities for California residents because a business entity that advertises a remote job will be hesitant to hire a person in California if doing so would mean the company would end up subject to SB 253 and SB 261 requirements.

The other two conditions related to sales and property in the state could also lead to unintended economic consequences for California. For example, if a business entity owned only a small amount of real or tangible property in California, it may choose to sell that property or move it out of the state rather than trigger the "does business in California" requirements of SB 253 and SB 261. The real property could be in remote areas or the tangible property if immovable out of state could be highly specialized. If there is only a limited market of buyers and a business entity wants to avoid being subject to the costs and burdens associated with SB 253 and SB 261, it might sell the property far below its market value. This would result in less property tax being paid on any real property and less sales tax being paid on any tangible property. And if enough business entities were selling real property, it could even result in depressed real estate prices throughout the state.

With regard to the sales conditions, a business entity could easily exceed the $735,019 sales threshold depending on the nature of its products. If the business entity does the bulk of its sales outside the state and has only limited sales opportunities in California, it may choose to avoid selling in California to avoid compliance with SB 253 and SB 261. For instance, assume for hypothetical purposes that a company headquartered in the Midwest invents a highly specialized piece of equipment for the steel production industry that costs more than the $735,019 sales threshold. This piece of equipment streamlines steel production, which decreases production costs significantly and results in fewer air emissions because of the increased efficiency. The Midwest company has a robust business selling this equipment in steel production heavy states like Indiana, Ohio, and Michigan. Although California recently announced construction of the first steel production facility in California in over 50 years,[26] steel production in the state is almost nonexistent, with only one plant currently operating in Southern California.[27] This Southern California plant decides it would like to purchase the new equipment from the Midwest company, but the Midwest company refuses to sell the equipment to the Southern California plant. Because the definition of doing business in California in SB 253 and SB 261 is overly broad, the Midwest company determines that the sale would result in the Midwest company being brought into the

[25] Pew Research Center, *About a third of U.S. workers who can work from home now do so all the time* (Mar. 30, 2023), available here.

[26] Governor Gavin Newsom, Press Release, California's economy forges ahead: Pacific Steel breaks ground on state's first new steel mill in 50 years (Mar. 5, 2025) (noting the project "will bring steel manufacturing back to the Golden State"), available here.

[27] Major Fontana steelmaking facility gets special visit by congresswoman, FONTANA HERALD NEWS (Aug. 13, 2023) (facility is "the last steel mill in Southern California"), available here.

program, and because the market for more sales in California is non-existent, the Midwest company decides that the profits from the sale do not justify the costs of complying with the California laws.

This decision not to sell by the Midwest company results in numerous unintended consequences to the state, including the Southern California steel company being unable to compete economically with out-of-state steel producers that have access to more efficient equipment, higher air emissions due to the California plant's inability to upgrade its operations, and the loss of sales tax revenue from the equipment purchase. Additionally, if the inability of the California steel company to compete with out of state steel becomes severe enough, there is a possibility that the steel production company may need to move out of California altogether or close, both of which lead to job loss in the state.

For these reasons, PGen urges CARB not to adopt section 23101 of the Revenue and Tax Code in determining what it means to "do business in California" for purposes of implementing SB 253 and SB 261. If CARB wants to use section 23101 as a model, it could adjust the percentage thresholds for the amount of payroll in California, ownership of real or tangible property in California, and sales in California to a level that would bring into the program only those business entities that have significant and meaningful contacts with the state, thus avoiding the negative and unintended consequences discussed herein.

If CARB insists on retaining the dollar thresholds in some form, then the amounts need to be increased exponentially to avoid the unintended consequences discussed herein. PGen does not recommend this approach, however, because a fixed dollar figure that is untethered to anything else is meaningless. An extremely, highly paid employee may live in California, a single piece of equipment for a small industry in the state may cost millions of dollars, and sales of $1,000,000 are miniscule in the context of the revenues of a Fortune 100 company but are tremendous for an individual selling a craft on Etsy.

For all of these reasons, CARB should not adopt the definition of "doing business in California" found in section 23101 of the Revenue and Tax Code and should instead limit the applicability of SB 253 and SB 261 only to those entities with much more significant and meaningful contacts with the state.

B. CARB should not consider entities that sell energy or other goods and services into California through separate markets, like the CAISO Western Energy Imbalance Market or Extended Day Ahead Market, to be "do[ing] business in California" (Question 1.d.).

In Question 1.d. of the Information Solicitation, CARB asks whether "entities that sell energy, or other goods and services, into California through a separate market, like the energy imbalance market or extended day market" should be covered by SB 253 and SB 261. The short answer to this question is that the sale of energy or other goods and services (e.g., transmission, reserves, or other energy-related products) into California through a separate market should not subject an entity to SB 253 and SB 261. Further, Senator Wiener and Senator Stern, the authors of SB 253 and SB 261, have clarified that it was not their intent for wholesale electricity transactions that occur through the CAISO Western Energy Imbalance Market or Extended Day Ahead Market to be within the scope of SB 253 and SB 261.[28]

Similar to the issues discussed above in Section II.A. of these comments, subjecting entities to the requirements of SB 253 and SB 261 solely because they sell energy or other energy-related products into California through the CAISO or other markets, including any markets currently in development or to be developed in the future (such as with regard to a regional organization initiated by the West-Wide Governance Pathways Initiative that is currently being considered) will lead to unintended, negative consequences for California. At a minimum, subjecting these suppliers to SB 253 and SB 261 will increase the already high cost of energy in the state, and at worst, lead to Californians experiencing even more unreliability in their energy supply if out-of-state entities decide to leave those markets rather than become subject to SB 253 and SB 261.

CAISO currently operates the Western Energy Imbalance Market, which "extends [CAISO's] real-time market to other balancing authority areas in the West," leading to "substantial economic, operational, and environmental advantages by trading energy supply and demand across a large geographic area in real time."[29] In addition to the fact that this market "has produced more than $5 billion in benefits," it provides important reliability benefits during emergencies because the increased coordination between market participants "can help all [market] participants share energy," which in turn "can automatically solve grid stress."[30]

According to 2022 data from the U.S. Department of Energy, from 2002 to 2022, California experienced 2,684 power outages, the most of any state in the United States by a huge margin. Second place state Texas experienced 1,119 fewer outages than California in that same period of time.[31] In 2022, California accounted for 24 percent of all power outages in the United States, with 142 outages occurring that year.[32] The California Energy Commission's most recent analysis of energy resources and reliability, which forecasted energy reliability in the state for the years 2024 to 2030, found that if there were no imports of energy into the state, California would be able to meet reliability targets only after 2026 by which time new resources will come online.[33] But the assessment also found that if new resources were reduced by 40 percent, without energy being imported into California, reliability targets would not be met in any year from 2024 to 2030.[34]

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[28] Letter from Senator Scott Wiener and Senator Henry Stern to Ms. Erika Contreras, Secretary of the Senate, as published in the California Senate Daily Journal, Senate, 2024-01-30, at 3058-59, available here (hereinafter "Senators Wiener and Stern Letter").

[29] CAISO, Western Energy Imbalance Market Fact Sheet, available here.

[30] *Id.*

[31] Payless Power, The Most At-Risk States for Power Outages, available here.

[32] *Id.*

[33] California Energy Commission, Draft Staff Report, California Energy Resource and Reliability Outlook, 2024 at 4 (Aug. 2024), available here.

[34] *Id.*

With its already tenuous energy reliability, California cannot afford to disincentivize entities from providing energy and other energy-related products into the state. As the California Energy Commission analysis shows, the state will not meet reliability targets without energy imports,[35] and thus, CARB should not include entities that provide energy and other energy-related products into California through the CAISO or other markets in the SB 253 and SB 261 programs. Doing so runs the risk that some entities may choose to exit the applicable market rather than be forced to comply with the onerous and costly requirements of these programs.

In addition, it is important for CARB to recognize that any further decreases in energy reliability in the state that occur due to out-of-state entities leaving those markets will likely also have a deleterious impact on the state's air quality. If energy outages increase due to entities leaving these markets, Californians will be more likely to purchase backup generators for their homes to keep their power on. While some Californians may select environmentally friendly options like solar or fuel cells, many Californians will choose to purchase diesel or gasoline generators simply because they "present a more budget-friendly entry point for backup power solutions, with initial costs significantly lower than [cleaner] alternatives," which "makes them an attractive option for homeowners seeking emergency power without a major upfront investment."[36] This will negatively impact the environment through increased emissions of greenhouse gases and other pollutants, as well as increased noise pollution.[37]

Even if entities that participate in these markets decide to continue to sell energy and other energy-related products into California if they become subject to SB 253 and SB 261, the entities might seek to recover through these markets the compliance costs associated with these programs, which could increase the cost of the energy and other energy-related products being imported into California. This could ultimately impact California consumers through increased energy costs. Californians already have "the second highest residential electricity rates after Hawaii, with average rates that are close to double the national average."[38] CARB should be careful not to increase these rates even more by including out-of-state entities that provide energy and other energy-related products into California when implementing SB 253 and SB 261.

Additionally, bilateral sales of energy or other energy-related products that occur in interstate commerce should not be considered doing business in California under SB 253 and SB 261 for similar reasons. These transactions constitute another type of wholesale electricity transactions,

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[35] *Id.*

[36] Anker Solix, Solar vs Gas Generator: Which is Best for Home Backup Power? (Nov. 20, 2024), available here.

[37] *Id.*; *see also* CARB, Release No. 19-52, Take control and help clean the air with nonpolluting generator options (Nov. 7, 2019) (noting that operating an average, new gasoline generator at an average load "for 1 hour emits as much smog-forming pollution as driving an average passenger vehicle for about 150 miles" and operating an average industrial diesel generator at an average load for 1 hour "is equivalent to driving nearly 660 miles in an average heavy duty diesel truck"), available here.

[38] G. Petek, Legislative Analyst, Legislative Analyst's Office, Assessing California's Climate Policies—Residential Electricity Rates in California at 12 (Jan. 2025), available here.

and Senator Stern and Senator Wiener, the authors of SB 253 and SB 261, have stated that neither SB 253 nor SB 261 are "intended to include a business entity whose only activity within California consists of wholesale electricity transactions that occur in interstate commerce."[39]

Further, neither renewable energy certificate (REC) sales nor carbon credit sales should constitute doing business in California for the purposes of SB 253 and SB 261. Because these transactions mitigate GHG emissions, they should not be discouraged in any way.

C. CARB should not include federal or state government entities that generate revenue in the definition of a "business entity" that "does business in California" (Question 1.b.).

In Question 1.b. of the Information Solicitation, CARB asks whether federal or state government entities that generate revenue should be considered a "business entity" that "does business in California" for the purpose of determining the applicability of SB 253 and SB 261. Government entities and their subdivisions (such as a political subdivision of a state) are *not* business entities—regardless of whether they generate revenue. Section 25179 of the California Health and Safety Code defines a "business entity" as "any ***private*** organization or enterprise ***operated for profit***, including, but not limited to, a proprietorship, partnership, firm, business, trust, joint venture, syndicate, corporation, or association."[40] Government entities and their subdivisions are not "private," nor are they "operated for profit," even if they generate revenue.

For example, "public power utilities are owned by the community and run as a division of local government."[41] Public power utilities provide energy to the residents they serve on a ***not-for-profit*** basis.[42] Public power utilities can exist at various levels of government: the federal level (such as the Bonneville Power Authority, which "is a ***nonprofit*** federal power marketing administration"[43]); the state level (such as the Nebraska Public Power District, which is "a political subdivision of the State of Nebraska"[44] that provides "***[n]ot-for-profit***, cost-of-service-based-

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[39] Senators Wiener and Stern Letter, *supra* note 28.

[40] Cal. Health and Safety Code § 25179(c) (emphasis added). This definition is also consistent with other definitions of "business entity" in the California code. *See, e.g.*, Cal. Gov. Code § 82005.

[41] American Public Power Association, About Public Power: Powering Strong Communities at 2, available here.

[42] U.S. Energy Information Administration, Electricity explained: How electricity is delivered to consumers (characterizing municipal electric utilities as "not-for-profit"), available here; American Public Power Association, Public Power (describing public power utilities as "not-for-profit"), available here.

[43] Bonneville Power Administration, DOE/BP-5295, BPA Facts (Sept. 2024), available here.

[44] Nebraska Public Power District, About Us, available here.

rates"[45]); and the municipal level (such as the Sacramento Utility District, which is a "community-owned, ***not-for-profit*** electric service"[46]).

Because government entities and their subdivisions are not private and are not operated for profit (even if they generate revenue as public power utilities do), they should not be considered to be a business entity, as confirmed by the definition of business entity found in section 25179 of the Health and Safety Code. Therefore, CARB should not include government entities and their subdivisions in the SB 253 and SB 261 programs.

Moreover, government entities and their subdivisions have an existence based in sovereignty, providing for the public welfare, or similar bases—not a business existence. Each such entity is not a business entity based upon the plain meaning of that phrase. Therefore, for this additional reason, CARB should not include government entities and their subdivisions in the SB 253 and SB 261 programs.

III. In defining "limited assurance" and "reasonable assurance" under SB 253, CARB should recognize that calculating GHG emissions—particularly Scope 3 emissions—is inherently subject to less certainty and therefore should require a lower level of assurance (Question 8.b.).

In Question 8.b. of the Information Solicitation, CARB asks what standards should be used to define a limited level of assurance and a reasonable level of assurance. CARB also asks whether the existing definition for "reasonable assurance" in the regulations implementing California's Mandatory Reporting of Greenhouse Gas Emissions Rule ("MRR") should be used.

Under SB 253, reporting entities must obtain an assurance engagement from a third-party assurance provider of their Scope 1 and Scope 2 emissions. The assurance engagement must "be performed at a limited assurance level beginning in 2026 and at a reasonable assurance level beginning in 2030."[47] An assurance engagement must be performed for Scope 3 emissions "at a limited assurance level beginning in 2030."[48]

As a preliminary matter, CARB needs to recognize that reporting indirect emissions (Scope 2 and Scope 3) is an inherently uncertain practice. As the GHG Protocol notes, "GHG measurements, estimates, or calculations should be systemically neither over nor under the actual emissions value, ***as far as can be judged***, and that ***uncertainties are reduced as far as practicable***."[49] Because indirect emissions are estimates and cannot be calculated with any certainty, the assurance level must reflect this uncertainty—particularly for Scope 3 emissions where "it is accepted that data

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[45] Nebraska Public Power District, Public Power, available https://nppd.com/powering-nebraska/public-power.

[46] SMUD, Company information, available [here]().

[47] Cal. Health and Safety Code § 38532(c)(2)(F)(i)-(ii).

[48] *Id.* § 38532(c)(2)(F)(iii).

[49] Greenhouse Gas Protocol at 9 (emphasis added), *supra* note 12.

accuracy may be lower" and where "[e]mission estimates are acceptable as long as there is transparency with regard to the estimation approach."[50] Indeed, given the high level of uncertainty involved in Scope 3 reporting, a safe harbor for Scope 3 reporting should be provided in the implementation regulations for SB 253 as was proposed in connection with the Security and Exchange Commission's climate disclosure rule.[51] Under the proposed safe harbor, Scope 3 emissions reporting would be fraudulent only if it "was made or reaffirmed without a reasonable basis or was disclosed other than in good faith."[52]

The MRR program involves the reporting of direct Scope 1 emissions by certain sources. The SB 253 program is different, however, in that it will require the additional reporting of indirect Scope 2 and Scope 3 emissions. Because of the inherent uncertainties present in the calculation of indirect Scope 2 and Scope 3 emissions, the definition of "reasonable assurance" from the MRR, which requires "a high degree of confidence that submitted data and statements are valid"[53] should not be used in connection with the SB 253 program.

Notably, the GHG Protocol does not define "limited assurance" or "reasonable assurance." Rather, it provides procedures that should be followed to provide each type of assurance. CARB could consider not defining these terms but instead outlining the procedures for each review, as the GHG Protocol does. In the GHG Protocol, the procedures for a limited assurance review are less extensive than for reasonable assurance, focusing mainly on identifying obvious errors or inconsistencies. The typical wording for a limited assurance opinion states that based on the assurer's review, they "are not aware of any material modifications that should be made to the company's assertion that their scope 3 inventory is in conformance with the requirements of the GHG Protocol Scope 3 Standard."[54] The procedures for a reasonable assurance review, on the other hand, require a more detailed and comprehensive evaluation, typically requiring a greater level of data scrutiny, cross-checking against independent records, and a more structured audit process. The typical wording for a reasonable assurance opinion states that based on the assurer's review, "the reporting company's assertion of their scope 3 emissions … is fairly stated, in all material respects, and is in conformance with the GHG Protocol Scope 3 Standard."[55]

Another possibility CARB could consider is adopting the definitions of "limited assurance" and "reasonable assurance" recently included in New Jersey Senate Bill 4117. That bill, which is also called the Climate Corporate Data Accountability Act, proposes to define "limited assurance level"

[50] *Id.* at 31.

[51] 87 Fed. Reg. 21,334, 21,390-92 (Apr. 11, 2022). The Securities and Exchange Commission ultimately decided not to require Scope 3 emissions reporting in its final rule. 89 Fed. Reg. 21,668, 21,675 (Mar. 28, 2024).

[52] 87 Fed. Reg. at 21,391.

[53] Cal. Code Regs. Tit. 17, § 95102(a).

[54] Greenhouse Gas Protocol, Corporate Value Chain (Scope 3) Accounting and Reporting Standard, Supplement to the GHG Protocol Corporate Accounting and Reporting Standard at 115, available here; *see also generally id.* at 112-17 (Chapter 10, Assurance).

[55] *Id.*

as "the degree of verification of greenhouse gas emissions data that may reasonably be obtained by an assurance provider using exclusively data that is provided by the reporting entity."[56] The bill would define "reasonable assurance level" as "the degree of verification of greenhouse gas emissions data that may reasonably be obtained by an assurance provider that validates data provided by a reporting entity."[57] Both of these definitions are more appropriate for reporting that includes Scope 2 and Scope 3 emissions than the MRR definition.

IV. CARB should strive to minimize duplication, preserve flexibility, and keep compliance costs to a minimum in implementing SB 253 and SB 261 (Questions 3.b., 3.c., 4, 7, 9, 11).

Questions 3.b., 3.c., 4, 7, 9, and 11 of the Information Solicitation involve questions about minimizing duplication with other reporting programs, flexibility in reporting methods, and costs. As a general matter, PGen urges CARB to focus on minimizing duplication and conflicts with other greenhouse gas reporting programs (whether mandatory or voluntary). To the extent that entities are already providing this information in accordance with other established and accepted programs such as EPA's Greenhouse Gas Reporting Program,[58] the GHG Protocol, the Carbon Disclosure Project, The Climate Registry, or the International Sustainability Standards Board, PGen would encourage CARB to accept emissions reports under those programs for compliance with SB 253. Doing so would not only have the benefit of minimizing duplication, but also reducing compliance costs for regulated entities.

Furthermore, PGen encourages CARB to maximize flexibility in reporting methods to the extent possible, and CARB should incorporate flexibilities offered in programs like the GHG Protocol into its implementation of SB 253 and SB 261. For instance, the GHG Protocol does not require entities to select a specific reporting method and then use it consistently indefinitely. Instead, it allows the entity to use reporting methods that evolve over time to best estimate emissions, noting that "[a] company might report the same sources of GHG emissions as in previous years, but measure or calculate them differently."[59] This might occur, for example, if a company "obtain[s] more accurate … emission factors … that better reflect the GHG emissions…."[60] CARB should not impose rigid requirements that prevent entities from adjusting their methods if they determine that a different way of calculating emissions would be better. The GHG Protocol correctly simply requires that "[i]f there are changes in the inventory boundary, methods, data or any other facts affecting emission estimates, they need to be transparently documented and justified."[61] CARB should similarly follow an approach that maximizes flexibility and does not unduly limit entities in the methods that they may use. This approach will allow companies to continue to refine the

[56] New Jersey Senate Bill 4117, § 3 (introduced Feb. 3, 2025).

[57] *Id.*

[58] 40 C.F.R. Part 98.

[59] Greenhouse Gas Protocol at 38, *supra* note 12 (discussing "Recalculations for changes in calculation methodology or improvements in data accuracy").

[60] *Id.*

[61] *Id.* at 8.

calculation of their emissions as the various methods evolve, which will allow not only for more accurate emissions reporting but will also lower compliance costs.

Calculating Scope 1, Scope 2, and Scope 3 emissions is a very time intensive and involved process. To allow time for data collection, calculations, verification, and third-party assurance, emission reports under SB 253 should not be due until 10 months following the end of the reporting entity's fiscal year at the very earliest.

Finally, in Question 11 of the Information Solicitation, CARB asks whether the timeframe for the preparation of biennial reports under SB 261 should be standardized or allow for reporting in any two-year period of time. In the interest of maximizing flexibility, PGen suggests that CARB allow for reporting any time in a two-year period of the entity's choice, rather than a standardized reporting year.

As CARB pursues rulemaking to finalize the regulations necessary to implement SB 253 and SB 261, it should prioritize three principles: minimizing duplication with other programs; maximizing flexibility for reporting entities and covered entities; and minimizing compliance costs. PGen looks forward to reviewing CARB's rulemaking efforts and may provide additional feedback during that process as PGen deems appropriate.

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PGen appreciates the ability to respond to CARB's Information Solicitation. If CARB has any questions regarding PGen's comments, it should contact PGen's counsel listed below, who will work with PGen's Board of Directors to respond to any questions or to schedule a time to meet with relevant PGen members.

Dated: March 21, 2025

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