BEFORE THE
AIR RESOURCES BOARD
OF THE
STATE OF CALIFORNIA

SOUTHERN CALIFORNIA PUBLIC POWER AUTHORITY COMMENT ON SECOND 15-DAY PROPOSED CHANGES TO THE CAP AND TRADE REGULATION

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The Southern California Public Power Authority ("SCPPA") [1] respectfully submits this comment on the proposed changes ("Proposed Changes") to the California Cap on Greenhouse Gas Emissions and Market-Based Compliance Mechanisms regulation ("Regulation") released by the California Air Resources Board ("ARB") on September 12, 2011, in a Second Notice of Public Availability of Modified Text and Availability of Additional Documents and Information ("Second 15-Day Change Notice").

In general, the Proposed Changes significantly improve the Regulation. SCPPA particularly appreciates the adoption of many of the proposals that SCPPA recommended in its August 11, 2011 comments in response to the July 25, 2011 Notice of Public Availability of Modified Text and Availability of Additional Documents ("First 15-Day Change Notice").

Some of SCPPA's August 11, 2011 recommendations were not included in the Proposed Changes. SCPPA continues to recommend adoption of those recommendations, including the following:

- Revise the resource shuffling provisions.[2]
- Revise section 95854 so that the 8 percent offset limit will apply cumulatively from the start of the cap-and-trade program rather than separately for each compliance period.[3]

[1] SCPPA is a joint powers authority. The members are Anaheim, Azusa, Banning, Burbank, Cerritos, Colton, Glendale, Los Angeles Department of Water and Power, Imperial Irrigation District, Pasadena, Riverside, and Vernon. This comment is sponsored by Anaheim, Azusa, Banning, Burbank, Cerritos, Colton, Glendale, the Imperial Irrigation District, Pasadena, Riverside, and Vernon.

[2] SCPPA August 11, 2011 Comment at 1-9.

- Delete or revise section 95890(b) to eliminate compliance with the requirements of the Regulation for the Mandatory Reporting of Greenhouse Gas Emissions ("MRR") as a condition for eligibility for an electrical distribution utility to receive a direct allocation of allowances.[4]

In this comment, SCPPA recommends some revisions to the Proposed Changes to improve the clarity and efficacy of certain portions of the Regulation. Most of these further revisions can be made without further 15-day public comment, insofar as they are "nonsubstantial or solely grammatical in nature" under section 11346.8(c) of the Government Code. In some instances SCPPA also proposes some clarifying text for insertion in the resolution that the ARB staff will prepare for the ARB to adopt at the October 20-21, 2011, Board meeting ("Resolution").

I. SECTION 95892(d)(5) RESTRICTIONS ON USE OF ALLOWANCE VALUE SHOULD BE DELETED OR REVISED.

Section 95892(d)(5) (p. 143) prohibits the use of allocated allowances to meet compliance obligations for electricity sold into the California Independent System Operator ("CAISO") markets. Section 95892(d)(5) provides:

> Prohibited Use of Allocated Allowance Value. Use of the value of any allowance allocated to an electrical distribution utility, other than for the benefit of retail ratepayers consistent with the goals of AB 32 is prohibited, including use of such allowances to meet compliance obligations for electricity sold into the California Independent System Operator markets.

As written, with the phrase "including use of such allowances to meet compliance obligations for electricity sold into the California Independent System Operator Markets" at the end, section 95892(d)(5) would have the unintended consequence of unduly discriminating against publicly-

[3] SCPPA August 11, 2011 Comment at 20-21

[4] SCPPA August 11, 2011 Comment at 24-26.

owned utilities ("POUs") that are members of the CAISO. The section should be deleted or revised to avoid the undue discrimination.

A. Prohibiting the use of allowances to meet compliance obligations for electricity sold into the CAISO would discriminate against POUs that are members of CAISO.

The prohibition on using allowances allocated to POUs to meet their compliance obligations for electricity that POUs generate and sell into the CAISO would discriminate against the POUs that are members of the CAISO. Under section 95890(b) of the Regulation, all electrical distribution utilities will receive a direct allocation of allowances if they comply with the MRR. Under section 95892(b), POUs may direct the ARB Executive Officer to place their allocated allowances in their compliance accounts. POUs that are not members of the CAISO may use the allowances that the Executive Officer places in their compliance accounts to meet their compliance obligations. In fact, their allocated allowances may not be withdrawn from their compliance accounts for any other purpose.

The situation is different for POUs that are members of the CAISO. A peculiarity of the CAISO is that CAISO members are required to sell the electricity they generate or import into the CAISO market and then bid the electricity back in the wash transaction in order to use the electricity that they generate or import to serve their native load. Due to section 95892(d)(5), CAISO POUs would not be able to direct the Executive Officer to place their allocated allowances in their compliance accounts to meet their compliance obligation. If the allowances were place in their compliance accounts, section 95892(d)(5) would bar them from using their allowances to meet their compliance obligation for the electricity they sell into the CAISO market and then buy back to serve their native load. The CAISO POUs would have to have their allowances placed in limited use holding accounts and sent to auction. Thus, as written, section

95892(d)(5) would discriminate against POUs that are members of the CAISO in comparison to non-CAISO POUs solely because they are members of the CAISO.

B. The discrimination against CAISO POUs would be an unintended consequence of section 95892(d)(5) as currently drafted.

The discrimination that section 95892(d)(5) would impose on CAISO POUs is an untended consequence of the section as currently drafted. The ARB climate change staff has made it clear to SCPPA that the prohibition on using allowances to meet compliance obligations for electricity sold into the CAISO is intended to mean that if a POU elects to elect to have its allocated allowances placed in its limited use holding account rather than its compliance account and then sells the allowances, the monetary value of the allowances may not be used to meet the POU's compliance obligation for generation that is sold into the CAISO market. Staff has confirmed to SCPPA that the reference to "the value of any allowance allocated to an electrical distribution utility" in section 95892(d)(5) means the money that a utility receives after auctioning administratively allocated allowances that are placed in its limited use holding account. Thus, under the staff's interpretation, if a CAISO POU directs the Executive Officer to place its allocated allowances in its compliance account, it may use the allowances to cover its compliance obligation just like a non-CAISO POU.

While SCPPA is pleased by the climate change staff's interpretation of section 95892(d)(5), SCPPA is concerned that at some future time staff members in the ARB's enforcement branch may interpret this section differently.

C. Section 95892(d)(5) as currently written might be interpreted to prohibit the use of allocated allowances to meet a POU's compliance obligation for electricity sold into the CAISO.

In spite of the climate change staff's interpretation of section 95892(d)(5) as currently written, the section is susceptible to being interpreted differently. Although the staff has told

SCPPA that the section only prohibits the use of revenue derived from auctioned allowances to cover the compliance obligation of electricity sold into the CAISO, that interpretation appears to be contradicted by the wording in other parts of section 95892. Elsewhere in section 95892 the term "auction proceeds" is used to refer to revenue from auctioned allowances. The term "allowance value" is used to refer to the value of allocated allowances that are placed in a utility's compliance account and used for compliance rather than being auctioned. For example, section 95892(e) refers to "auction proceeds" in sections (1) and (2) and separately refers to the "value of allowances, deposited directly into compliance accounts" in sections (3) and (4). Section 95892(d)(3) and the first paragraph of section 95892(e) refer to "auction proceeds and allowance value" conjunctively, indicating that each phrase has a separate meaning and that both meanings are addressed in those sections.

Likewise, the Second 15-Day Change Notice distinguishes between "the use of auction proceeds from the sale of allowances" and "the value of allowances freely allocated and used for compliance" in discussing the proposed changes to section 95892(d).[5]

Section 95892(d)(5) uses the phrases "allocated allowance value" and "value of any allowance allocated" to a utility and refers to the "use of such allowances to meet compliance obligations." There is no reference to "auction proceeds" in this subsection. Thus, section 95892(d)(5) as currently drafted is susceptible to being interpreted to provide that allowances that are allocated to a CAISO POU and placed in that POU's compliance account cannot be used to meet that POU's compliance obligation.

[5] Second 15-Day Change Notice at 19.

D. Section 95892(d)(5) should be deleted or revised to eliminate the unintended consequence of discriminating against CAISO POUs.

Section 95892(d)(5) should be revised to eliminate the unintended consequence of discriminating against CAISO POUs. There are several options for remedying the discriminatory effects of section 95892(d)(5).

1. Option 1: Delete section 95892(d)(5) in its entirety.

One solution would be to delete section 95892(d)(5) in its entirety. Section 95892(d)(5) is superfluous. Section 95892(d)(3) mandates that *both* auction proceeds and allowance value "shall be used exclusively for the benefit of retail ratepayers" and not for other purposes:

> (3) Auction proceeds and allowance value obtained from an electrical distribution utility shall be used exclusively for the benefit of retail ratepayers of each electrical distribution utility, consistent with the goals of AB 32, and may not be used for the benefit of entities or persons other than such ratepayers.

Thus, section 95892(d)(5) restates as a prohibition which is stated affirmatively in section 95892(d)(3). To the extent that section 95892(d)(5) is redundant, deleting it would be a "nonsubstantial" change under section 11346.8(c) of the Government Code that would not require a further opportunity for 15-day comment.

2. Option 2: Revise section 95892(d)(5) to limit its applicability to the value of allowances placed in limited use holding accounts.

The second option would be to revise section 95892(d)(5) to reflect the climate change staff's understanding that the section applies only to the use of allowance value associated with allowances that are placed in limited use holding accounts rather than compliance accounts:

> **§ 95892. Allocation to Electrical Distribution Utilities for Protection of Electricity Ratepayers.**
>
> (d)(5) Prohibited Use of Allocated Allowance Value. Use of the value of any allowance allocated to an electrical distribution utility and placed in the electrical distribution utility's limited use holding account, other than for the benefit of retail ratepayers consistent with the goals of AB32 is

prohibited, including use of such allowance to meet compliance obligations for electricity sold into the California Independent System Operator markets.

This revision would be a "nonsubstantial" change under section 11346.8(c) of the Government Code. It merely conforms the wording of section 95892(d)(5) to the staff's understanding of the meaning of section 95892(d)(5).

3. Option 3: Revise section 95892(d)(5) to refer to "auction proceeds."

An alternative approach to conforming section 95892(d)(5) to the climate change staff's understanding would be to revise the section to refer to "auction proceeds" instead of "allowance value." This would limit the scope of the section to allowances that are placed in a utility's limited use holding account and would be consistent with the terminology used in other subsections of section 95892:

§ 95892. Allocation to Electrical Distribution Utilities for Protection of Electricity Ratepayers.

(d)(5) Prohibited Use of Auction Proceeds~~Allocated Allowance Value~~. Use of ~~the value of any allowance allocated to~~auction proceeds obtained by an electrical distribution utility, other than for the benefit of retail ratepayers consistent with the goals of AB32 is prohibited, including use of such ~~allowances~~ proceeds to meet compliance obligations for electricity sold into the California Independent System Operator markets.

As with the second option, this would be a "nonsubstantial" change under section 11346.8(c) of the Government Code, insofar as it does nothing more than conform the wording of section 95892(d)(5) to the staff's understanding of what is meant by section 95892(d)(5).

4. Option 4: Revise section 95892(d)(5) to exclude native load.

A fourth option would be to revise section 95892(d)(5) as proposed in SCPPA's comment submitted to the ARB on August 11, 2011,[6] to allow CAISO POUs to use their

[6] SCPPA August 11, 2011 Comment at 28.

allocated allowances to meet their compliance obligation associated with the electricity they generate or import to serve their native load:

> **§ 95892. Allocation to Electrical Distribution Utilities for Protection of Electricity Ratepayers.**
>
> (d)(5) Prohibited Use of Allocated Allowance Value. Use of the value of any allowance allocated to an electrical distribution utility, other than for the benefit of retail ratepayers consistent with the goals of AB32 is prohibited, including use of such allowances to meet compliance obligations for electricity sold into the California Independent System Operator markets in excess of the electricity needed to meet the electrical distribution utility's native load in the same hour.

E. Absent deletion or revision, 95892(d)(5) should be addressed in a rulemaking in 2012.

If the ARB concludes that the changes discussed above cannot be made at this stage because they would require further 15-day public comment, the ARB should address this issue in a supplemental rulemaking in 2012. To this end, the Resolution should include the following statement:

> BE IT FURTHER RESOLVED THAT the Board directs the Executive Officer to initiate a public process for the revision of section 95892(d)(5) no later than February 2012, to ensure that this provision allows POUs to use allowances that are placed in their compliance accounts to meet the compliance obligation associated with the electricity they generate or import to serve their native load.

II. THE RESOLUTION SHOULD CLARIFY THAT A POU CAN DIRECT THE EXECUTIVE OFFICER TO PLACE A PORTION OF ITS ALLOCATED ALLOWANCES IN ANOTHER UTILITY'S ACCOUNT IN CERTAIN CIRCUMSTANCES UNDER SECTION 95892(b)(2).

SCPPA appreciates the efforts of ARB staff to accommodate the particular circumstances of POUs in the provisions on the allocation of allowances to utilities, in particular the situation exemplified by the Magnolia generating facility in Burbank, California. Magnolia is owned by SCPPA, a joint powers authority, but it is operated by Burbank Water & Power ("Burbank").

Burbank rather than SCPPA will have the compliance obligation for Magnolia. As such, Burbank will need to have the other SCPPA members that participate in Magnolia direct the Executive Officer to place a share of their directly allocated allowances into Burbank's compliance account to cover their share of Burbank's compliance obligation for Magnolia.

Section 95892(b)(2) (p. 141) appears to permit SCPPA members to direct the Executive Officer to place a share of their allowances in Burbank's account to meet the Magnolia compliance obligation. Section 95892(b)(2) provides:

> (2) Publicly Owned Electric Utilities or Electrical Cooperatives. When allocating to a publicly owned electric utility or an electrical cooperative, the Executive Officer will place allowances in either a limited use holding account or in a compliance account per the entity's preference. Prior to receiving a direct allocation of allowances, publicly owned electric utilities or electrical cooperatives will inform the Executive Officer of the share of their allowances that is to be placed:
>
> > (A) In the compliance account of an electrical generating facility operated by a publicly owned electric utility, an electrical cooperative, or a Joint Powers Agency in which the electrical distribution utility or electrical cooperative is a member and with which it has a power purchase agreement; or
> >
> > (B) In the publicly owned electric utility's or electrical cooperative's limited use holding account. …

However, the Second 15-Day Change Notice states that section 95892(b) was amended to clarify that POUs "may only ask for allocations to be placed into compliance accounts of facilities they (or a Joint Powers Agency) operate."[7] This summary of the changes to section 95892(b) is more limited than the actual language in section 95892(b)(2), and it would not accommodate the Magnolia situation. Neither SCPPA nor the non-Burbank SCPPA POUs operate Magnolia. Thus,

[7] Second 15-Day Change Notice at 19.

under the summary, the non-Burbank SCPPA POUs would not be able to direct the Executive Officer to place allowances in the Burbank compliance account to cover Magnolia emissions.

SCPPA is concerned that the restrictive summary in the Second 15-Day Change Notice could result in a misinterpretation of section 95892(b)(2) in the future. To avoid the possibility of misinterpretation, SCPPA requests that the Resolution include the following statement to correct the public record:

> WHEREAS, pursuant to section 95852(b) of the [Cap and Trade Regulation], publicly-owned electric utilities may direct the Executive Officer to place a share of their allowances in the compliance account of the operator of an electricity generating facility that delivers electricity to multiple utilities.

III. THE RESOLUTION SHOULD PROVIDE FOR FURTHER EVALUATION OF RESOURCE SHUFFLING PROVISIONS IN SECTION 95802(a)(251) AND SECTION 95852(b)(2).

The Proposed Changes retain the concept of resource shuffling, although they shorten the definition in section 95802(a)(251) (p. 44) and slightly revise the resource shuffling provisions in section 95852(b)(2) (p. 90). SCPPA fully supports the AB 32 requirement that the ARB's GHG emission reduction program "minimize leakage," which AB 32 defines as being "a reduction in emissions of greenhouse gases within the state that is offset by an increase in emissions or greenhouse gases outside the state."[8] However, the resource shuffling provisions in the Regulation and related provisions in the MRR require a thorough review as was discussed in SCPPA's August 11, 2011comments.[9] The ARB staff and stakeholders should be given a reasonable opportunity to better understand the intent of the provisions, to properly assess the potential implications for the electricity sector, and to prepare detailed revisions of the Regulation to avoid counterproductive and unintended consequences.

[8] H&S Code §§ 38505(j), 38562(b)(8).

[9] SCPPA August 11, 2011 Comment at 1-5.

A. The definition of resource shuffling should be clarified.

In the Proposed Changes, "resource shuffling" is defined in section 95802(a)(251) (p. 44) as follows:

> "Resource Shuffling" means any plan, scheme, or artifice to receive credit based on emissions reductions that have not occurred, involving the delivery of electricity to the California grid.

The Proposed Changes remove troublesome sections that were included in the definition that was circulated in the First 15-Day Change Notice, but the text of the abbreviated definition is very vague. The definition should be revised to include sufficient detail to enable an entity to know in advance whether a particular energy transaction constitutes resource shuffling. This is particularly important, given that section 95852(b)(2) requires attestations that no resource shuffling has occurred.

Additionally, while the concept of resource shuffling should apply only to electricity generated outside California, the definition does not contain this limitation. The general phrase "delivery of electricity to the California grid" could include electricity from in-state generating facilities. It is not appropriate to extend the concept of resource shuffling to in-state generation given that the emissions liability for in-state generation is imposed directly on the operator of the generating facility and cannot be "shuffled" in any way.

B. The impact of the resource shuffling provisions on the wholesale electricity market should be fully evaluated.

The impact of the resource shuffling provisions on the wholesale electricity market should be fully evaluated. Given the harsh penalties that the ARB would impose for resource shuffling and the uncertainty about what actually constitutes resource shuffling, the resource shuffling provisions that are currently in the Proposed Changes could remove liquidity from the wholesale electricity market, reducing the potential for cost-effective trades as well as for trades

that enhance system reliability while increasing electricity prices. That would be a negative and counterproductive consequence of having an overly broad and ambiguous resource shuffling rule.

C. The potential for the resource shuffling provisions to discourage emission reductions should be fully evaluated.

Although subparagraph (B) of the definition of resource shuffling that was circulated in the First 15-Day Change Notice has been deleted in the Proposed Changes, it remains unclear under the revised definition whether an entity that permanently retires a power plant that has an emissions factor that is higher than the default emissions factor and replaces the output of the plant with unspecified system power would be considered to be engaging in resource shuffling. This would be an undesirable result as the consequence of retiring the high-emitting plant would be to reduce GHG emissions in total.

The resource shuffling provisions should not require covered entities to continue operating high-emitting plants until the deadline imposed by the SB 1368 Emissions Performance Standard ("EPS"). Entities should be able to withdraw from such plants before the EPS deadline without fear of committing resource shuffling.

D. A full review of resource shuffling should be undertaken in 2012.

SCPPA understands that the Board intends to provide an opportunity for full review of the resource shuffling provisions in a new rulemaking in 2012. SCPPA strongly supports having that new rulemaking. The Resolution should provide for that new rulemaking. Suggested wording for such a provision is set out below:

> BE IT FURTHER RESOLVED THAT the Board directs the Executive Officer to initiate a public process for the review of the resource shuffling provisions in section 95802(a) and section 95852(b) no later than February 2012, for the purpose of ensuring the appropriate operation of those provisions, including clarifying that those provisions apply only to electricity generated outside

California and in a jurisdiction where a GHG emissions trading system has not been approved for linkage by the Board.

SCPPA looks forward to providing further input on resource shuffling during the review process in 2012.

IV. SECTION 95852(b) REGARDING COMPLIANCE OBLIGATIONS FOR FIRST DELIVERERS OF ELECTRICITY SHOULD BE AMENDED.

Section 95852(b) (p. 88-94) provides for the calculation of the compliance obligation of first deliverers of electricity. Subject to the following comments, SCPPA generally supports the changes and clarifications made to this section in the Proposed Changes.

A. The compliance obligation calculation for electricity generators should refer only to the relevant section of the MRR.

Section 95852(b)(1)(A), setting out the compliance obligation for operators of electricity generating facilities in California, refers generally to "all emissions reported and verified or assigned pursuant to MRR." This is too broad. Particularly for SCPPA members and other POUs, first deliverers that are operators of California generating facilities may also be electricity importers and report under both section 95111 and section 95112 of the MRR. Not all data reported under section 95111 of the MRR will result in a compliance obligation, so it is incorrect to state that all emissions reported under the MRR by a utility that operates a generating station count towards that utility's compliance obligation.

Section 95852(b)(1)(A) should be revised as follows to clarify that the compliance obligation for operators of electricity generating facilities in California is based on emissions reported under section 95112 of the MRR only. This change can be made without further 15-day public comment, as it is "nonsubstantial or solely grammatical in nature" for the purposes of section 11346.8(c) of the Government Code.

§ 95852. Emission Categories Used to Calculate Compliance Obligations.

(b)(1) Calculation of emissions for compliance obligation.

(A) For first deliverers that are operators of an electricity generating facility in California, the calculation for compliance obligation includes all emissions reported and verified or assigned pursuant to MRR section 95112, except emissions without a compliance obligation pursuant to section 95852.2.

B. The compliance obligation calculation for electricity importers should include more specific cross-references.

The formula in section 95852(b)(1)(B) (p. 89) is of crucial importance to electricity importers and should be made as clear as possible. To this end, more accurate cross-references to the relevant sections of the Regulation and the MRR should be included. For example, the definition of "$CO_2e_{specified}$" refers generally to meeting the requirements of section 95111 of the MRR. Not all requirements set out in section 95111 relate to specified sources. To avoid confusion, only the relevant subsections of section 95111 should be referenced. (This comment also applies to the other references to section 95111 in section 95852(b)(1)(B).)

In addition to section 95111 of the MRR, requirements for specified sources are also set out in section 95852(b)(3) of the Regulation, so for completeness section 95852(b)(3) should also be referenced in the definition of "$CO_2e_{specified}$".

The proposed changes are set out below. These changes can be made without further 15-day public comment, as they are "nonsubstantial or solely grammatical in nature" for the purposes of section 11346.8(c) of the Government Code.

§ 95852. Emission Categories Used to Calculate Compliance Obligations.

(b)(1) Calculation of emissions for compliance obligation.

(B) For first deliverers that are electricity importers, emissions with a compliance obligation are calculated using the following equation:

…

$CO_2e_{unspecified}$ = Annual metric tons of CO_2e from ~~unspecified~~ imported electricity from unspecified sources calculated pursuant to MRR section 95111(b)(1).

$CO_2e_{specified}$ = Annual metric tons of CO_2e from imported electricity from specified sources that meet the requirements of section 95852(b)(3) and MRR sections 95111(a)(4), (b)(2) and (g).

$CO_2e_{specified\text{-}not\ covered}$ = Annual metric tons of CO_2e without a compliance obligation pursuant to section 95852.2~~.~~ from specified sources that meet the requirements in MRR section 95111(g).

$CO_2e_{RPS\ adjustment}$ = Annual metric tons of CO_2e calculated pursuant to MRR section 95111(b)(5) that meet~~s~~ the requirements of section 95852(b)(4).

$CO_2e_{QE\ adjustment}$ = Annual metric tons of CO_2e from qualified exports reported pursuant to MRR section 95111(a)(6) that meet the requirements of section 95852(b)(5).

C. There is no need to verify RECs.

Section 95852(b)(3)(D) (p. 91) refers to RECs from specified sources being "retired and verified pursuant to MRR." However, the MRR does not set out reporting and verification provisions relating to RECs. Nor does it need to. The existing REC tracking system endorsed by the California Energy Commission, the Western Renewable Energy Generation Information System, collects all necessary information regarding RECs. The ARB can access this information if required.

Section 95852(b)(3)(D) should be amended to remove the reference to verification of RECs under the MRR. This change can be made without further 15-day public comment, as it is "nonsubstantial or solely grammatical in nature" for the purposes of section 11346.8(c) of the Government Code.

§ 95852. Emissions Categories Used to Calculate Compliance Obligations.

(b)(3)(D) If RECs were created for the electricity generated and reported pursuant to MRR, then the RECs must be retired ~~and verified pursuant to MRR~~.

V. CHANGES TO THE DEFINITION OF ELECTRICITY IMPORTER SHOULD BE CONSIDERED.

The Proposed Changes amend the definition of "electricity importer" (§ 95802(a)(87), p. 18) to remove the requirement for the electricity importer to be the entity that holds title to the electricity that it imports into California. Similar changes are made to other definitions. In some cases these changes will result in a different entity becoming liable for emissions associated with the imported electricity.

The Los Angeles Department of Water and Power ("LADWP") is concerned about these changes. SCPPA supports LADWP's comments regarding those changes.

The new point of liability for imported electricity does not conform to the method by which allowances have been allocated between utilities. As a consequence, one utility may need to transfer allocated allowances to a second utility (or otherwise compensate the second utility) to cover the compliance obligation for emissions associated with electricity owned by the first utility but imported by the second utility.

These changes are an unexpected departure from the position on importer liability taken in all previous drafts of the Regulation, as well as the position recommended by other agencies.[10] The Second 15-Day Change Notice does not sufficiently explain the rationale for these changes, and stakeholders have not been given an adequate opportunity to discuss these changes with ARB staff in full. For these reasons and the reasons presented more fully by LADWP, these

[10] See for example California Public Utilities Commission Decision 08-03-018 in Rulemaking 06-04-009, page 71-72, issued on March 13, 2008, available at http://docs.cpuc.ca.gov/PUBLISHED/FINAL_DECISION/80150.htm.

changes should be reconsidered, or an opportunity for further review of these provisions should be provided in 2012.

VI. AMEND SECTION 95857(a)(2) TO REFLECT THE SIX-MONTH PERIOD TO REPLACE INVALID OFFSETS IN SECTION 95985.

Section 95857(a)(2) (p. 112) states that if the ARB has invalidated offset credits, the compliance obligation for untimely surrender will not apply until 90 days after notice of the invalidation. However, in the revised offset invalidation section of the Regulation, specifically sections 95985(h)(1)(B) (p. 286) and (h)(2)(A) (p. 287), the relevant party is given six months to replace the invalidated offset credits. This longer period should be reflected in section 95857(a)(2) as set out below to eliminate the conflict. This change can be made without further 15-day public comment, as it is "nonsubstantial or solely grammatical in nature" for the purposes of section 11346.8(c) of the Government Code.

> **§ 95857. Untimely Surrender of Compliance Instruments by a Covered Entity.**
>
> (a)(2) The compliance obligation for untimely surrender ("excess emissions") will not apply to a covered entity or opt-in covered entity which is determined to have transferred insufficient instruments to meet the compliance obligations of section 95856 solely because of the invalidation of an ARB offset credit by the Executive Officer pursuant to section 95985 until six months~~90 days~~ after notice of invalidation.

VII. SECTION 96014(b) SHOULD NOT USE AN UNDEFINED TERM.

SCPPA appreciates the Proposed Changes to section 96014 (p.336), particularly the reinsertion of the 45-day violation period in section 96014(b). However, some minor additional changes would improve the clarity of this section.

Section 96014(b) refers to the "Untimely Surrender Period." However, this term is not defined and is not used elsewhere in the Regulation. In order for covered entities to be aware of

the circumstances in which this penalty provision will apply, it is important to replace this term with a reference to the relevant section of the Regulation which is section 95857(b)(6):

> The untimely surrender obligation is due within five days of the first auction or reserve sale conducted by ARB following the applicable surrender date, whichever is the latter, and for which the registration deadline has not passed when the untimely surrender obligation is assessed.

This change can be made without further 15-day public comment, as it is "nonsubstantial or solely grammatical in nature" for the purposes of section 11346.8(c) of the Government Code.

> **§ 96014. Violations.**
>
> (b) A separate violation accrues every 45 days after the date determined pursuant to section 95857(b)(6)~~end of the Untimely Surrender Period~~ for each required compliance instrument that has not been surrendered.

VIII. SECTION 95985 ON OFFSET INVALIDATION SHOULD BE REFINED.

Although SCPPA continues to be concerned about ARB's "buyer liability" approach to addressing invalidation of offset credits identified after the offsets have been issued, SCPPA appreciates the Proposed Changes to section 95985 (p.274-291).

The Proposed Changes to section 95985(b) add a provision under which the period of time during which the offset credit is subject to invalidation ("invalidation period") can be shortened from eight years to three years if re-verification or subsequent verification by a different verifier takes place within the three years.

Section 95985(b) should be revised further so that the invalidation period expires upon the date of the re-verification or subsequent verification. There is no reason to require that a second verification "sit" until the expiration of the three year period before lifting the shadow of invalidation. Nothing is gained from the passage of time. However, much is lost: the marketplace will not consider an offset credit to be fully valid, fungible, and marketable until the invalidation period has ended.

In addition, some ambiguities in the drafting of the invalidation period should be addressed. For example, the phrase in section 95985(b)(1)(B) "may only be subject to invalidation within three Reporting Periods if a subsequent Offset Project Data Report for that offset project is verified..." is confusing, as it seems to indicate that invalidation may only occur if a subsequent report is verified. The numbering of section 95985(b) should also be revised, as there is a section (b)(1) but no (b)(2).

For the reasons discussed above, section 95985(b) (p. 279) should be revised as follows:

§ 95985. Invalidation of ARB Offset Credits.

(b) Timeframe for Invalidation. ARB may invalidate an ARB offset credit pursuant to this section ~~within the following timeframe~~at any time until eight years after issuance if a determination is made pursuant to section 95985(f), unless one of the following requirements is met:

~~(1) Within eight years of issuance of an ARB offset credit unless one of the following requirements is met;~~

(~~A~~1) ~~An offset project developed under Compliance Offset Protocol Ozone Depleting Substances Projects, [DATE], may only be subject to invalidation within three years of issuance of an ARB offset credit i~~If the Offset Project Data Report for an offset project developed under Compliance Offset Protocol Ozone Depleting Substances Projects, [DATE], is re-verified pursuant to sections 95977 through 95978 by a different offset verification body ~~within those three years~~, the ARB offset credits issued pursuant to that Offset Project Data Report may not be invalidated after the date of the re-verification; or

(~~B~~2) ~~An offset project developed under the protocols listed below, may only be subject to invalidation within three Reporting Periods i~~If a subsequent Offset Project Data Report for an~~that~~ offset project developed under the protocols listed below is verified pursuant to sections 95977 through 95978 by a different offset verification body and issued a Positive Offset or Qualified Positive Offset Verification Statement, ~~within three years of issuance of~~ the ARB o~~O~~ffset c~~C~~redits issued under the first Offset Project Data Report may not be invalidated after the date of the subsequent Offset Project Data Report. This provision applies if an offset project is developed under one of the following Compliance Offset Protocols:~~;~~

(A)~~1.~~ Compliance Offset Protocol Livestock Projects, [DATE];

(B)~~2.~~ Compliance Offset Protocol Urban Forest Projects, [DATE]; and

(C)~~3.~~ Compliance Offset Protocol U.S. Forest Projects, [DATE].

IX. CONCLUSION

SCPPA urges the ARB to consider these comments in finalizing the amendments to the Regulation. SCPPA appreciates the opportunity to submit these comments to the ARB.

Respectfully submitted,

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