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By *Electronic Submission*: <http://www.arb.ca.gov/lispub/comm/bclist.php>

Hon. Mary D. Nichols, Chairman
California Air Resources Board
1001 I Street
Sacramento, CA 95814

Re: Comments on Proposed Amendments to the Ozone Depleting Substances
Projects Compliance Offset Protocol

Dear Madam Chairman:

On behalf of Calpine Corporation (hereinafter, “Calpine”), thank you for the opportunity to submit these written comments on the California Air Resources Board’s (“CARB”) Proposed Amendments to the Ozone Depleting Substances (“ODS”) Projects Compliance Offset Protocol (“ODS Protocol”) (collectively, “Proposed Amendments” or “Proposed ODS Protocol Amendments”) of the California Cap on Greenhouse Gas Emissions and Market-Based Compliance Mechanisms Regulation (Cal. Code Reg. tit. 17, §§ 95800 *et seq.*, “Cap-and-Trade Regulation” or “Regulation”).

Summary

Calpine fully supports the Proposed ODS Protocol Amendments because they would clarify what we believe to have been the purpose and intent of the Cap-and-Trade Regulation and existing ODS Protocol all along: The regulatory compliance requirement is placed upon and limited to the offset project, and does not encompass operations or activities that are unrelated to GHG emission reductions or occur outside of the offset project boundary. In the context of CARB’s ongoing investigation of offset credits generated at the Clean Harbors Incineration Facility, the Proposed Amendments clearly demonstrate that the violations alleged against Clean Harbors do not provide a basis for invalidation of such offset credits because none of the alleged violations pertains to “the collection, recovery, storage, transportation, mixing, and destruction of ODS.” Proposed ODS Protocol Amendments § 3.8.

Regulatory Background

The ODS Protocol currently states—under the heading “Regulatory Compliance”—that “[a]s stated in the Regulation, [] Offset Project Operators or Authorized Project Designees must fulfill all applicable local, regional and national requirements on environment impact assessments that

apply based on the offset project location. Offset projects must also meet any other local, regional, and national requirements that might apply. Offset projects are not eligible to receive ARB or registry offset credits for GHG reductions that occur as the result of collection or destruction activities that are not in compliance with regulatory requirements.” ODS Protocol § 3.5.

The ODS Protocol continues: “The regulatory compliance requirement extends to the operation of destruction facilities where the ODS is destroyed. Destruction facilities have the potential to contribute to environmental impacts beyond ozone depletion and climate change. Accordingly, all destruction facilities must meet the full burden of applicable regulatory requirements during the time the ODS destruction occurs. Any upsets or exceedences of permitted emission limits must be managed in keeping with an authorized startup, shutdown, and malfunction plan required by EPA (40 CFR 63.1206).” *Id.*

The first paragraph of section 3.5 of the ODS Protocol stated above is substantially similar to section 95973 of the Cap-and-Trade Regulation. This section of the Regulation states that “[a]n Offset Project Operator or Authorized Project Designee must fulfill all local, regional, and national requirements on environmental impact assessments that apply based on the offset project location. In addition, an offset project must also fulfill all local, regional, and national environmental and health and safety laws and regulations that apply based on the offset project location and that directly apply to the offset project, including as specified in a Compliance Offset Protocol. The project is out of regulatory compliance if the project activities were subject to enforcement action by a regulatory oversight body during the Reporting Period. An offset project is not eligible to receive ARB or registry offset credits for GHG reductions or GHG removal enhancements for the entire Reporting Period if the offset project is not in compliance with regulatory requirements directly applicable to the offset project during the Reporting Period.” Cap-and-Trade Regulation § 95973(b). Relatedly, if “[t]he offset project activity and implementation of the offset project was not in accordance with all local, state, or national environmental and health and safety regulations during the Reporting Period for which the ARB offset credit was issued”, CARB “may determine that [such] ARB offset credit is invalid.” *Id.* § 95985(c)(2).

Proposed ODS Protocol Amendments

The Proposed ODS Protocol Amendments would revise the Regulatory Compliance section by striking the two paragraphs cited above (i.e., ODS Protocol § 3.5) and inserting the following:

- (a) An offset project must meet the regulatory compliance requirements set forth in section 95973(b) of the Regulation.
- (b) The regulatory compliance requirements apply to the collection, recovery, storage, transportation, mixing, and destruction of ODS.

Proposed ODS Protocol Amendments § 3.8.

Discussion of Proposed Amendments

Calpine fully supports the Proposed ODS Protocol Amendments. We believe the Proposed Amendments clarify how the ODS Protocol is intended to function vis-à-vis the existing Cap-and-Trade Regulation and, therefore, promulgating the Proposed Amendments would promote regulatory coherence.

The ODS Protocol currently states that “[t]he regulatory compliance requirement extends to the operation of destruction facilities where the ODS is destroyed.” ODS Protocol § 3.5. This statement can be read in a way that does not align with the Cap-and-Trade Regulation. The Cap-and-Trade Regulation states that “*an offset project must [] fulfill all local, regional, and national environmental and health and safety laws and regulations that apply based on the offset project location and that directly apply to the offset project...*” Cap-and-Trade Regulation § 95973(b) (emphasis added). Significantly, the focus of the Regulation’s compliance requirement is on the offset project. Indeed, if “[t]he *offset project activity* and implementation of the *offset project* was not in accordance with all local, state, or national environmental and health and safety regulations during the Reporting Period for which the ARB offset credit was issued”, CARB may invalidate such offset credit. *Id.* § 95985(c)(2) (emphasis added).

The Regulation defines offset project as “all equipment, materials, items, or actions that are *directly related to or have an impact upon* GHG reductions, project emissions, or GHG removal enhancements within the offset project boundary.” *Id.* § 95802(a)(245). In turn, the offset project boundary is “defined by and includes all GHG emission sources, GHG sinks or GHG reservoirs that are affected by an offset project and under control of the Offset Project Operator or Authorized Project Designee. GHG emissions sources, GHG sinks or GHG reservoirs not under control of the Offset Project Operator or Authorized Project Designee are not included in the offset project boundary.” *Id.* § 95802(a)(246). Accordingly, the offset project consists of those actions that are directly related to the actual GHG emission reductions in the location where the project operates. Under the Regulation, the offset *project* has the responsibility to comply with all environmental laws. *Id.* § 95973(b).

On the other hand, the current ODS Protocol states that “[t]he regulatory compliance requirement extends to the operation of destruction facilities where the ODS is destroyed.” ODS Protocol § 3.5. While Calpine believes the most reasonable interpretation of this statement is to define it in terms of section 95973(b) of the Regulation—which speaks exclusively to the compliance requirements of offset projects—one could view this statement as encompassing operations at destruction facilities that are *unrelated* to the offset project and/or *outside* the offset project boundary. This latter reading would be incorrect, in our view, because the whole purpose and intent of the regulatory compliance requirement is to ensure that offset projects comply with all environmental laws.

The Proposed Amendments would clarify the regulatory compliance requirement in the ODS Protocol by deleting this language and stating that “[t]he regulatory compliance requirements apply to the collection, recovery, storage, transportation, mixing, and destruction of ODS.” Proposed ODS Protocol Amendments § 3.8. This revision clarifies the ODS Protocol in two

important respects. First, it explicitly shifts the focus of the regulatory compliance requirement from the operation of the ODS destruction facility to the process of destroying the ODS itself. This more closely aligns with the regulatory compliance requirement of the Cap-and-Trade Regulation, which places such requirement on offset projects (i.e., the set of actions that are directly related to the GHG emission reductions).

Additionally, the regulatory compliance requirement explicitly applies to a specific set of actions—the collection, recovery, storage, transportation, mixing, and destruction of ODS—that parallel the meaning of an “offset project” in the ODS destruction context. In other words, the collection, recovery, storage, transportation, mixing, and destruction of ODS are the “actions that are directly related to or have an impact upon GHG reductions” (Cap-and-Trade Regulation § 95973(b)) and, therefore, these actions constitute the ODS offset project. It is logical that the regulatory compliance requirement would apply to these actions (and these actions only) because the offset project is confined to these actions with respect to ODS destruction.¹

Relation of Proposed Amendments to Investigation of Offset Credits Issued for ODS Destruction Events at Clean Harbors Incineration Facility

Calpine purchased offset credits that were issued by CARB for ODS destruction events occurring at the Clean Harbors Incineration Facility in Arkansas.² On May 29, 2014, CARB provided notice that it is reviewing if certain offset credits issued for destruction events occurring at this facility may have been generated while the facility was not in compliance with provisions of its operating permit issued under the federal Resource Conservation and Recovery Act (“RCRA”). The alleged noncompliance related exclusively to alleged violations occurring *after* ODS destruction, or with respect to standards for completely unrelated storage tanks or an unrelated and immaterial administrative violation.

Calpine believes that the existing Cap-and-Trade Regulation and ODS Protocol fully support our view that the offset credits issued for destruction events occurring at the Clean Harbors Incineration Facility should not be invalidated. The violations alleged against Clean Harbors have nothing to do with the offset project that generated the relevant offset credits and, therefore, there is *no* basis to assert that “[t]he offset project activity and implementation of the offset project was not in accordance with all local, state, or national environmental and health and safety regulations”, such that invalidation of the offset credits would be permissible in this instance. *See* Cap-and-Trade Regulation § 95985(c)(2). As we have previously conveyed, it is not the act of destroying ODS which was the subject of the U.S. Environmental Protection

¹ Indeed, for all potential ODS projects (i.e., Refrigerant Projects, Appliance Foam Projects, and Building Foam Projects), the project boundary terminates upon destruction of the ODS. *See* ODS Protocol § 4, pp. 9-10. The project boundary does not continue to downstream activities occurring after the destruction of the ODS.

² These offset credits were initially verified pursuant to the Climate Action Reserve’s (“CAR”) U.S. Ozone Depleting Substances Project Protocol, Version 1.0 (Feb. 3, 2010). Offset projects verified pursuant to the CAR Protocol are expressly recognized as early action offset credits pursuant to the Cap-and-Trade Regulation, which may be converted to compliance-grade offset credits upon completion of CARB’s subsequent review and approval. Cap-and-Trade Regulation § 95990(c)(5)(C).

Agency's ("EPA's") enforcement action, but Clean Harbors' alleged mismanagement of the Saturator Sludge *after* completion of the incineration process and removal of the resulting sludge from the associated air pollution control equipment.³ Invalidation of offset credits due to Clean Harbors' failure to accurately characterize its sludge as hazardous waste and then manage that sludge in accordance with the requirements for same would be no different than invalidation of offset credits generated under the U.S. Forest Projects protocol due to a forest products manufacturer's failure to adhere to applicable requirements when processing sustainably harvested timber. Neither the Cap-and-Trade Regulation, nor the ODS Protocol, reaches so broadly in defining the scope of the offset project activity and regulatory compliance requirement.

Nevertheless, Calpine believes the Proposed Amendments are a welcome revision to the ODS Protocol. The Proposed Amendments clarify what Calpine believes to have been the purpose and intent of the Cap-and-Trade Regulation and existing ODS Protocol all along: that the regulatory compliance requirement is placed upon and limited to the offset project, and does not encompass operations or activities that are unrelated to GHG emission reductions or occur outside of the offset project boundary. In the context of CARB's ongoing investigation of offset credits generated at the Clean Harbors Incineration Facility, the Proposed Amendments clearly demonstrate that the violations alleged against Clean Harbors do not provide a basis for invalidation of ODS offset credits generated at the facility because none of the alleged violations pertains to "the collection, recovery, storage, transportation, mixing, and destruction of ODS." Proposed ODS Protocol Amendments § 3.8.

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Please feel free to contact me at 713.830.8362 if you have any questions regarding this letter.

Sincerely,

/S/

Jason Armenta
Director, Power Trading

cc: Rajinder Sahota, Branch Chief, Cap-and-Trade Program, CARB

³ See letter from Jason Armenta, Alternate Account Representative for Calpine Energy Services, L.P., to Rajinder Sahota, Branch Chief, Cap-and-Trade Program, re: Additional information Submitted by Calpine Energy Services, L.P. in Response to Initial Determination of Grounds for Invalidation of Ozone Depleting Substances Offset Credits, June 20, 2014, at 6, note 11, citing 40 C.F.R. § 264.351, Comment ("...throughout the operating period, unless the owner or operator can demonstrate, in accordance with §261.3(d) of this chapter, that the residue *removed* from the incinerator is not a hazardous waste, the owner or operate *becomes* a generator of hazardous waste and must manage it in accordance with applicable requirements of parts 262 through 266 of this chapter.") (emphasis added)).