



NRG Power Marketing LLC
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October 17, 2014

Via Air Resource Board's Comment Portal

Ms. Rajinder Sahota
California Air Resources Board
1001 I Street, 6th Floor
Sacramento, CA 95812-2828

Re: NRG Power Marketing LLC's Comments
on Clean Harbors Incineration Facility Preliminary Determination

Dear Ms. Sahota:

Pursuant to the preliminary determination (PD) posted on October 8, 2014 addressing the status of offset credits issued for ozone depleting substance (ODS) destruction events that took place at the Clean Harbors Incineration Facility in El Dorado, Arkansas (Clean Harbors Facility), NRG Power Marketing LLC (NRG) provides the following comments. NRG's comments address three separate topics: 1) the absence in the PD of a discussion of the standard followed by the Air Resources Board (ARB) when determining to exercise its discretion to invalidate ODS offsets; 2) the unauthorized seizing of offset credits; and 3) the time it took to issue a PD.

As recounted in NRG's initial comments on this topic, NRG is an active participant in ARB's cap and trade program. Affiliates of NRG are covered entities. NRG has acquired allowances through ARB-conducted auctions, and NRG has been particularly active in the procurement of compliance offset credits. Accordingly, NRG's views are informed from both a compliance perspective and a trading perspective.

ARB'S Exercise of Discretion

While NRG can ultimately accept the outcome identified in the PD, NRG has concerns about what this proceeding and its anticipated resolution will mean for the future of California's offsets market in particular and the cap and trade program in general. Specifically, the PD creates bad precedent in that it does not provide a fully reasoned determination why ARB believes it is necessary to invalidate any of the ODS offsets generated by the Clean Harbors Facility.

Section 95985(c) provides that, “ARB **may** determine that an ARB offset credit is invalid . . .” based on a subsequent list of reasons. The use of the word, “may,” means that ARB has discretion whether to invalidate particular offsets; ARB is not required by its rule to invalidate offsets if one of the conditions in Section 95985(c) is satisfied.

In this case and as recounted in the PD, the Clean Harbors Facility has generated a calcium chloride brine material that was used as a commercial chemical product and sold for end use in oil and gas exploration and development. While the Arkansas Department of Pollution Control & Ecology, the predecessor agency to the Arkansas Department of Environmental Quality (ADEQ), approved the use of the brine material as an effective substitute for commercial products, the U.S. EPA apparently disagreed. At best, there appears to be a technical violation of federal environmental requirements. Regardless, the environmental violations alleged against the Clean Harbors offsets do not implicate the integrity of those offsets as real, quantified, and verified reductions of greenhouse gases.

On these facts, ARB should use its discretion NOT to invalidate the Clean Harbors offsets. However, if ARB intends to approve the PD, then at a minimum it should explain why it is appropriate to invalidate the offsets when the environmental violations in no way implicate the integrity of the offsets and appear to be technical in nature. Absent such a change, the participants in the offsets market will receive the signal that ARB intends to use a strict liability standard under Section 95895(c), which will only serve to undermine an already fragile market.

Seizure of Offset Credits

In its initial comments on this topic, NRG also raised concerns with the manner in which ARB seized the offsets in question and transferred them into an escrow account. The PD does not address this very significant issue. If ARB intends to use this seizure mechanism in the future, it should explicitly express that intention and commit to pursuing a rulemaking process that might lead to ARB granting to itself the right to seize offsets.

The Time to Issue a PD

Casting a cloud over a group of offsets by issuing a notice of initial determination disrupts the market. To mitigate this disruption, ARB’s regulations provide a timeline by which a determination to invalidate must be resolved. *See* Section 95985(f). However, in this case, it does not appear that any particular timeline was observed. ARB should use this opportunity to inform the market how this process comported with the timing requirements in its rules and to identify a path forward for either ensuring that timelines

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are observed or changing its rules to provide future impacted parties a better sense of what to expect.

Should you have any questions regarding the foregoing, do not hesitate to contact me either by telephone (925.427.3483) or by email (sean.beatty@nrgenergy.com).

Very truly yours,

Sean P. Beatty

Sean P. Beatty
Regional General Counsel - West
NRG Energy, Inc.

cc: Yuhau Lin – NRG