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element
MARKETS

April 27, 2018

HAND DELIVERED

Clerk of the Board
California Air Resources Board
P.O. Box 2815
Sacramento, CA 95812

Re: Proposed Amendments to the Low Carbon Fuel Standard Regulation

Dear Air Resources Board Members and Staff,

In its role as a biomethane and renewable fuel credit marketer and opt-in party under the LCFS program, Element Markets Renewable Energy, LLC (“EMRE” or “Element Markets”) interacts with a variety of constituents to bring transportation fuel to California and further the objectives of the LCFS, including biomethane producers, CNG/LNG transportation fuel producers and purchasers of LCFS credits. We are pleased to provide feedback regarding the Proposed Amendments to the Low Carbon Fuel Standard (LCFS) Regulation posted March 6, 2018 (the “**Proposed Regulation**”), and we greatly appreciate the willingness of the California Air Resources Board (“CARB”) and staff to consider our comments. We hope our unique perspective on the program will be helpful in improving compliance with the LCFS without impeding progress toward its objectives. Our comments are focused on the following concepts, and our proposed modifications to address those concerns are also summarized below:

(1) **Conflict of interest requirements.** We propose that the types of services that create a high potential of conflict of interest be divided into two tiers – the first comprising services that may be provided by a verification body or employee during the lookback period but not a member of the verification team itself (i.e. that mandate rotation of the verification team members rather than the firm itself) and the second comprising services that may not be provided by the verification body or employee at all during the lookback period (i.e. mandating rotation of the verification body entirely). Additionally, we propose a clarifying modification to Section 95503(b)(2)(U).

(2) **Buffer accounts.** To ensure that the benefit of outperforming a certified/verified operational CI remains with the producer and maintain the liquidity benefits of the buffer account, we propose the creation of two types of buffer accounts – a general account (similar to what is currently contemplated in the Proposed Regulation), comprised of credits from deactivated LRT-CBTS accounts and CCS projects pursuant to the CCS Protocol, and an individual buffer subaccount for the benefit of each active fuel producer, comprised of any credits arising from the difference between a producer’s reported CI and the verified operational CI in any compliance year. In the event the producer’s reported CI exceeds the verified operational CI in any compliance year, credits would be retired from the individual buffer subaccount prior to enforcement pursuant to Section 95488.10(a)(7).

(3) **Proposed “margin of safety” and consequences of exceeding certified carbon intensity (“CI”) values.** To encourage the reporting of actual verified emission reductions under the LCFS program, we believe the “margin of safety” concept should be replaced with creation of an individual buffer subaccount, which could be populated not only as described in the previous paragraph but also

proactively by the producer to set aside credits that would be retired to make the system whole if credits were over-generated due to CI variability in a compliance year.

(4) ***Proposed time limit for use of the environmental attributes from RNG.*** We propose that any environmental attributes from RNG injected into a pipeline that are matched to a quantity of natural gas injected into physical storage be excluded from the current proposed time limit of two calendar quarters or alternatively, subject to a time limit of twelve months from the date the RNG is initially injected.

(5) ***Attestations required in connection with RNG used as transportation fuel.*** We provide proposed modifications to the Proposed Regulation intended to allow for the use of contracts and other documents in conjunction with attestations to collectively demonstrate the producer's exclusive rights to the environmental attributes associated with RNG.

Conflict of Interest Requirements for Verification Bodies and Verifiers

Element Markets supports the proposal to supplement the work of CARB staff with a third-party verification program and applauds the efforts of CARB staff to integrate the program with the U.S. EPA's Quality Assurance Plans under the Renewable Fuel Standard. From a practical perspective, however, we are concerned that the conflict of interest provisions of the Proposed Regulation are likely to severely limit the ability of responsible entities to find and retain qualified verifiers at a reasonable cost.

Section 95503(b)(2) outlines certain services that, if provided to a responsible entity by a verification body or employee of a verification body at any time during a five-year lookback period, would constitute a high potential for conflict of interest and preclude the verification body from performing verification services for the responsible entity. It is increasingly likely that Section 95503(b)(2) will apply in some way to any large responsible entity or verification body, or to any responsible entity or verification body that has a longer history in its respective industry. To avoid this result, we propose that the list of services in Section 95503(b)(2) be bifurcated into two tiers -- Tier I and Tier II. Tier I services would constitute a high potential for conflict of interest only if provided by a member of the proposed verification team during the lookback period, while Tier II services constitute a high potential for conflict of interest if performed by the verification body or an employee thereof during the lookback period.

Additionally, the description of services provided in Section 95503(b)(2)(U) is overly broad and may inadvertently eliminate a number of qualified verification bodies. We propose that the language be modified to read as follows (additions or deletions relative to the provision as currently written in the Proposed Regulation are marked in underlined or strikethrough text, as applicable):

“Expert services to the entity required to contract for verification services, ~~a trade or membership group to which the entity required to contract for verification services belongs,~~ or a legal representative, in either case for the purpose of advocating the entity required to contract for verification services interests in litigation or in a regulatory or administrative proceeding or investigation.”

Buffer Accounts

We support the efforts of CARB staff to enhance the liquidity of the LCFS market by creating a buffer account (Section 95486(a)(3)). As currently proposed, credits placed in the buffer account may be retired to address invalidation of credits if the person responsible no longer exists or is otherwise unavailable to reimburse the program generally. While we agree that a buffer account is great for the

LCFS program, we encourage staff to further refine the concept by creating both a general buffer account for the program and individual buffer subaccounts for each active producer. While the general buffer account would be comprised of credits described in clauses (A), (C) and (D) of Section 95486(a)(3), the individual buffer subaccount would be created from any credits described in clause (B) of that section – any credits arising from a reported CI lower than the verified operational CI in any reporting year. The purpose of the individual buffer subaccount would be the same as the general buffer account (to potentially address the invalidation of credits pursuant to Section 95495), but it would do so on an individual producer level. As noted below, we are also proposing that producers be given the ability to place additional credits into the individual buffer subaccount as a means to potentially eliminate the need for an enforcement action.

Proposed “Margin of Safety” and Consequences of Exceeding Certified/Verified Carbon Intensity

Section 95488.4(a) provides that a “fuel pathway applicant may add a conservative margin of safety” to its certified CI value to “account for potential process variability and diminish the risk of non-compliance with the certified CI”. A certified CI that represents anything other than the actual lifecycle fuel pathway emissions of the fuel delivered to California undermines the goals of the program and results in the forfeiture of economic value associated with the production and use of a low carbon fuel.

As the Proposed Regulation reads today, if the reported CI of a pathway for a compliance year is lower than the verified operational CI, the credits associated with that difference are deposited into a general buffer account. On the flip side, if the reported CI of a pathway for a compliance year is higher than the verified operational CI, the producer is out of compliance with the LCFS regulation and subjected to possible enforcement action under Section 95488.10(a)(7). Because the enforcement powers granted to CARB staff under the LCFS are largely unlimited in scope, we believe that absent any aggravating factors, enforcement should be a means of last resort to make the system whole if a producer over-generates credits in this instance. As an alternative to enforcement, credits from the individual buffer subaccount would be retired to address any over-generation. If a shortfall exists, the producer would have the obligation to procure the additional credits necessary to comprise the invalidated amount. Unless aggravating factors exist, these remedies would apply prior to being deemed out of compliance with the LCFS regulation and subjected to possible enforcement action.

Proposed Time Limit for Use of the Environmental Attributes from RNG

Section 95488.8(i)(2) of the Proposed Regulation provides that if a quantity of RNG is injected into the pipeline system during a calendar quarter, the environmental attributes associated with that RNG must be matched to natural gas sold as vehicle fuel in California no later than the end of the following calendar quarter. We respectfully request that the Proposed Regulation be modified to provide that to the extent the environmental attributes are matched with natural gas delivered (directly or indirectly) into physical natural gas storage within the same month as injection of the RNG into a pipeline, the environmental attributes associated with the RNG would be excluded from the proposed timing limitation entirely (or, if a limitation is required, eligible to be matched to natural gas sold as vehicle fuel in California within twelve months of injection of the RNG into the pipeline).

Requirement for Attestations Regarding Environmental Attributes from RNG

Section 95488.8(i)(2)(C) of the Proposed Regulation requires that any entity pipeline-injected RNG reported as transportation fuel in LRT-CBTS must obtain and keep “attestations from each upstream party collectively demonstrating that (a) the entity claiming the environmental attributes has the exclusive right to claim environmental attributes associated with the sale or use of the biogas or

biomethane, and (b) the environmental attributes have not been used or claimed in any other program or jurisdictions with the exception of the federal RFS". We believe that requiring attestations as the only form of documentation is unnecessarily restrictive. Under the Renewable Fuel Standard program, documentation of a generator's rights to environmental attributes associated with RNG may be accomplished in a variety of ways, including through contracts and attestations.

Because Section 95488.8(i)(2)(c) specifies that the inability to promptly produce the attestations constitutes ground for credit invalidation pursuant to Section 95495, we respectfully request that the documentation requirement be modified to more clearly align with the documentation requirements of the RFS. We suggest the modifications shown below (additions or deletions relative to the Proposed Regulation are marked in underlined or strikethrough text, as applicable):

"An entity reporting any RNG as a transportation fuel in LRT-CBTS, and a fuel pathway holder using biogas or biomethane as process energy, must obtain and keep ~~attestations from each upstream party~~ documentation (including, without limitation, contracts or attestations) collectively demonstrating that (a) the entity claiming the environmental attributes has the exclusive right to claim environmental attributes associated with the sale or use of the biogas or biomethane, and (b) the environmental attributes have not been used or claimed in any other program or jurisdictions (with the potential exception of the federal RFS, as applicable)."

Element Markets appreciates the opportunity to provide comments to the Proposed Regulation and we commend the outstanding efforts of CARB staff throughout this process. We greatly appreciate the willingness of CARB staff to work with stakeholders like us to continue incentivizing the continued use of RNG as transportation fuel. If you have any questions or concerns regarding these comments, please contact me at your convenience.

Sincerely,



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