



CALPINE CORPORATION

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January 20, 2017

Clerk of the Board
California Air Resources Board
1001 I Street
Sacramento, CA 94812

Subject: Comments on 15-Day Changes to Proposed Amendments to
Mandatory Reporting Regulation and Cap-and-Trade Regulation

Dear Chair Nichols and Members of the Board:

Calpine Corporation (“Calpine”) is writing to provide comments on the proposed amendments to the Regulation for the Mandatory Reporting of Greenhouse Gas Emissions (“MRR”) and California Cap on Greenhouse Gas Emissions and Market-Based Compliance Mechanisms Regulation (the “Cap-and-Trade Regulation”), which were made available on December 21, 2016 by the California Air Resources Board (“ARB”) and are collectively referred to hereinafter as “15-day changes”.

INTRODUCTION

Calpine previously commented on ARB’s proposed amendments to the MRR and Cap-and-Trade Regulation and proposed compliance plan for the federal Clean Power Plan,¹ affirming ARB’s authority to continue with implementation of the Cap-and-Trade Program beyond 2020 and the proposal to rely upon the Cap-and-Trade Program to satisfy the requirements of the federal Clean Power Plan, which Calpine is currently defending alongside ARB in the U.S. Court of Appeals for the District of Columbia Circuit. Calpine also commented on ARB’s public workshop held on October 21, 2016 concerning the Cap-and-Trade Regulation,² reiterating Calpine’s support for continuation of the Cap-and-Trade Program and offering its view as to why extension of the

¹ See letter from Barbara McBride, Director—Environmental Services, Calpine Corp., Sep. 19, 2016, available at: <https://www.arb.ca.gov/lists/com-attach/17-ghg2016-AGMHYFA9WHsLZAIn.pdf>.

² See letter from Cassandra Gough, Director, External Affairs, Calpine Corp., and B. McBride, Nov. 4, 2016, available at: <https://www.arb.ca.gov/lists/com-attach/55-ct-amendments-ws-AGNUM1wxVXYFagBu.pdf>.

Program beyond 2020 is consistent with and responsive to California's enactment of Assembly Bill ("AB") 197 and Senate Bill ("SB") 32.

Calpine's comments on the proposed 15-day changes concern two discrete issues:

- First, Calpine confirms that certain changes ARB has proposed making to the amendments to the MRR improve the clarity and readability of the reporting requirements for operators of geothermal generating facilities.
- Second, Calpine believes that changes ARB has proposed making to the Cap-and-Trade Regulation's provisions concerning when an offset project will be deemed out of compliance with applicable regulatory requirements are overly prescriptive and should be rejected.

These comments are described in more detail below.

DISCUSSION

1. Calpine appreciates clarifications ARB has made to the proposed amendments concerning the reporting requirements for operators of geothermal generating facilities

The proposed 15-day changes to Section 95112(e) of the MRR would amend certain proposed reporting requirements for operators of geothermal generating facilities as follows, with the language of the original proposed amendments shown in single-underlined text and the 15-day changes to same shown by double-underlined text:

Operators of geothermal generating facilities must also report whether the source is, (i) a geothermal binary cycle plant or closed loop system, or (ii) a geothermal steam plant or open loop system.

As the operator of the largest number of geothermal generating facilities in California, Calpine appreciates these 15-day changes and concurs in ARB's assessment of them as improving the clarity and readability of the proposed amendments.³

2. Proposed changes to the provisions governing when an offset project will be deemed out of compliance with applicable regulatory compliance should not be adopted

ARB has proposed making several changes to the Cap-and-Trade Regulation's provisions concerning the relevance of initiation of an enforcement action to ARB's determination of whether an offset project was out of compliance with all applicable regulatory requirements and

³ See First Notice of Public Availability of Modified Text and Availability of Additional Documents, Public Hearing to Consider Amendments to the Regulation for the Mandatory Reporting of Greenhouse Gas Emissions, Dec. 21, 2016, at 6, available at: <https://www.arb.ca.gov/regact/2016/ghg2016/ghg15daynotice.pdf>.

documentation of when such noncompliance began and ends. These proposed changes, which would provide the basis for determinations of when an offset project is ineligible for issuance of offset credits or previously issued credits could be subject to invalidation, are overly prescriptive and should be rejected.

The current Cap-and-Trade Regulation requires that offset projects must fulfill all applicable local, regional, and national environmental and health and safety laws and further provides that, “[t]he project is out of regulatory compliance if the project activities were subject to enforcement action by a regulatory oversight body during the Reporting Period.” Cal. Code Reg. tit. 17, § 95973(b). The proposed amendments would add the caveat that, “whether such enforcement action has occurred is not the only consideration ARB may use in determining whether a project is out of regulatory compliance.” Proposed Amendments § 95973(b). In other words, ARB may consider other information establishing whether an offset project is out of compliance in determining whether a project should be deemed ineligible for issuance of offset credits and/or whether previously issued credits should be invalidated.

The proposed amendments would also set forth specific criteria for determining the time period of noncompliance for offset projects implemented under the ozone depleting substances (“ODS”), livestock and mine methane protocols, as follows:

The time period that the offset project is out of regulatory compliance begins on the date that the activity which led to the offset project being out of regulatory compliance actually began and not necessarily the date that the regulatory oversight body first became aware of the issue.

Proposed Amendments, Aug. 2, 2016, at § 95973(b)(1)(A).

The proposed amendments then provide that, “[f]or determining the initial date of the offset project being out of regulatory compliance the Offsets Project Operator or Authorized Project Designee must provide [*inter alia*] ... [d]ocumentation from the relevant local, state, or federal regulatory oversight body that initiated the enforcement action identifying the precise start date of the offset project being out of regulatory compliance.” *See id.* at § 95973(b)(1)(A)1. In the absence of such documentation, then, under the August proposed amendments, ARB will presume that the offset project was out of compliance starting on the day after the last inspection conducted by the relevant regulatory agency which initiated the enforcement action that did not indicate that the project was out of compliance (i.e., the last compliant inspection). *See id.* at § 95973(b)(1)(A)2.-3.

In the proposed 15-day changes, ARB proposes to remove all references to initiation of an enforcement action from these provisions. *See* 15-day changes at § 95973(b)(1)(A)1., 2. and 3. Similarly, for purposes of determining the date “when the offset project returned to regulatory compliance,” ARB has deleted references to initiation of an enforcement action, but is nevertheless requiring documentation from the relevant regulatory agency “stating that the offset project is back in regulatory compliance...”. *See id.* at § 95973(b)(1)(B).

Calpine does not disagree that whether or not an enforcement action has been initiated is not wholly determinative of whether an offset project was out of compliance with applicable

regulatory requirements. However, the provisions ARB has proposed to add to the regulation prescribing how it will determine the start and end dates of noncompliance for ODS, livestock and mine methane projects reflect unrealistic assumptions about the type of documentation agencies regularly provide concerning regulated entities' compliance status.

Even in cases where an enforcement action was initiated or where a settlement agreement confirms that a specific violation has been remedied, it would be highly unusual for a regulatory agency to provide documentation "stating that the offset project is back in regulatory compliance", as required by proposed Section 95973(b)(1)(B). To further suggest, as do the proposed 15-day changes, that such a "clean bill of health" would be provided in circumstances where no agency enforcement action was initiated is even less realistic. Stated simply, regulatory agencies, due to limitations on their resources, are not generally in the business of providing written statements affirming a regulated entities' compliance with applicable requirements.

The assumption that such statements will be provided appears to have been informed by the specific facts and circumstances of the one high-profile invalidation action taken to-date concerning ODS projects conducted at Clean Harbors' El Dorado, Arkansas destruction facility. But the facts and circumstances of that case were unique and involved U.S. EPA's preparation of detailed inspection reports with findings of noncompliance of the sort that are only rarely provided when an agency issues a notice of violation. Moreover, it is unlikely that a similar set of facts and circumstances will present itself in future ineligibility or invalidation determinations involving ODS, livestock or mine methane projects, particularly where no agency enforcement action has been commenced. And the set of rules ARB proposes for determining when the project was out of compliance risks ineligibility or invalidation for a much lengthier period than may be necessary to assure the Regulation's requirements have been met.

Assume that ARB should receive information indicating that an ODS destruction facility was out of compliance with the requirements of its air permit for some period of time, but there was no involvement of the relevant regulatory agency in initiating an enforcement action or even in inspecting the facility during the past year. Under the proposed amendments and 15-day changes, the offset project could be deemed out of compliance all the way back until when the last inspection occurred and even beyond when the violation was completely remedied in the event that the facility or project operator cannot provide a written statement from the relevant regulatory agency of the sort contemplated by proposed Section 95973(b)(1)(B). This would potentially result in invalidation of offsets from destruction events occurring over a much lengthier period of time than necessary, even during periods when there was no evidence whatsoever of noncompliance. Such an outcome is not necessary to assure that the regulatory compliance requirement has been met and could only lead to the same type of market uncertainty that occurred in the wake of the initial of invalidation in the Clean Harbors case, an outcome that the proposed amendments are likely intended to avoid.

Calpine believes that the less prescriptive approach reflected by the current regulation for all offset projects and by Section 95937(b)(2) of the proposed amendments for projects implemented under the urban forests, U.S. forests and rice cultivation protocols would allow greater flexibility for ARB to consider the facts and circumstances of any particular case and decide on the appropriate period of time for ineligibility or invalidation based on all the evidence

available to ARB. While this very well might include written statements from the relevant regulatory agency and/or inspection reports of the sort that were obtained in the Clean Harbors case, it also could include a wide variety of other information of the sort suggested by Section 95973(b)(1)(A)1. of the proposed amendments.

Calpine does not disagree with the proposition reflected by ARB's guidance that, ultimately, under the current rules, it is up to the buyer of any offset credit to perform adequate due diligence to assure that the regulatory compliance requirement has been met and reduce the risk of invalidation, just as it is incumbent on ARB to assure that it has done a thorough job in evaluating each offset project's compliance with the Regulation.⁴ However, adopting a prescriptive set of rules for determining when the project first was out of compliance and then returned to compliance may only prevent ARB from considering all the relevant evidence and then deciding on an appropriate outcome in any particular case.

Accordingly, Calpine would urge ARB not to adopt the more prescriptive approach reflected by Section 95937(b)(1) for ODS, livestock and mine methane projects, but to maintain the flexibility provided by the current regulation and apply the same approach for determining the period of ineligibility or invalidation to all offset project types. If ARB thinks more detailed information may be helpful on the type of information that will be relevant to its determination, it should consider providing additional guidance of the sort it has previously issued on the subject.⁵

* * * *

Thank you for the opportunity to submit these comments. Please contact us if you have any questions at 916-491-3366 or 925-577-2238.

Sincerely,



Kassandra Gough
Director, External Affairs
Calpine Corporation

⁴ See Offset Credit Regulatory Conformance and Invalidation Guidance, available at: http://www.arb.ca.gov/cc/capandtrade/offsets/arboc_guide_regul_conform_invalidation.pdf, at 2 (“Requiring the user to replace the invalidated ARB offset credit with another valid ARB offset credit or allowance, if it has been surrendered for compliance, ensures that purchasers and users of offsets do their due diligence in seeking out offset credits that meet the full regulatory requirements.”), 4 (“Market participants must have confidence in these compliance instruments and confidence that ARB has done its due diligence in reviewing and issuing valid ARB offset credits just as market participants should do their due diligence when contracting for ARB offset credits.”).

⁵ See *id.*

A handwritten signature in black ink, appearing to be 'B. McBride', with a long horizontal line extending to the right.

Barbara McBride
Director—Environmental Services
Calpine Corporation

cc: Hon. Mary Nichols, Chair
Richard Corey, Executive Officer
Edie Chang, Deputy Executive Officer
Michael Gibbs, Assistant Executive Officer
Rajinder Sahota, Branch Chief, Cap-and-Trade Program
Jason Gray, Manager, Cap-and-Trade Market and Monitoring
Craig Segall, Staff Counsel