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September 18, 2012

By E-Mail and 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: Amendments to the Regulation for the Mandatory Reporting of Greenhouse Gas Emissions and Conforming Amendments to the Definition Sections of the AB 32 Cost of Implementation Fee Regulation and the Cap-and-Trade Regulation

Dear Madame Chairman:

Calpine Corporation ("Calpine") appreciates the opportunity to provide these comments on the California Air Resources Board's ("CARB" or the "Board") Proposed Amendments to the Regulation for the Mandatory Reporting of Greenhouse Gas Emissions, California Code of Regulations ("Cal. Code Reg."), tit. 17, sections 95100 *et seq.* ("Mandatory Reporting Rule" or "MRR") and Conforming Amendments to the Definition Sections of the AB 32 Cost of Implementation Fee Regulation and the Cap-and-Trade Regulation.

I. INTRODUCTION AND SUMMARY

Calpine is a long-time advocate for low-carbon and renewable electricity generating resources and has consistently supported CARB's regulation of greenhouse gas emissions. Calpine commends Chair Nichols, the CARB Board Members, and staff for their diligent efforts in refining and promulgating the MRR, the AB 32 Cost of Implementation Fee Regulation, and the Cap-and-Trade Regulation. Calpine has been an active stakeholder in the rulemaking proceeding for development of the Cap-and-Trade Program and looks forward to successful launch of the program this fall.

In support of CARB's efforts, Calpine provides the following comments on the Proposed Amendments to the Mandatory Reporting Rule ("Proposed Amendments"), which are discussed in more detail in Section II below:

- Emissions Data Report Verification Requirements: The current MRR requires reporting entities that emit 25,000 metric tons of CO₂ equivalent ("MTCO₂e") or more per year to satisfy certain verification requirements. CARB staff is proposing amendments to the MRR intended to clarify applicability of the verification requirement and effectuate staff's intent that verification not be required for entities with emission less than 25,000 MTCO₂e/ year. Although Calpine welcomes the Proposed Amendments and staff's clarification of its intent, Calpine does not believe the existing MRR can reasonably be

interpreted to require verification for entities with emissions of less than 25,000 MTCO₂e/ year or to enforce the verification requirement against such entities.

II. DISCUSSION

A. The Proposed Amendments Only Clarify What Is Already Clear From The Existing MRR: Verification Is Only Required For Facilities With Emissions Of 25,000 MTCO₂e/ Year Or Greater

Section 95103(f) of the current MRR clearly limits verification to entities with emissions greater than 25,000 MTCO₂e/ year. It provides as follows:

- (f) *Verification Requirement and Deadlines.* The requirements of this paragraph apply to each reporting entity submitting an emissions data report for the previous calendar year *that indicates emissions equaled or exceeded 25,000 metric tons of CO₂e*, including CO₂ from biomass-derived fuels and geothermal sources, or each reporting entity that has or has had a compliance obligation under the cap-and-trade regulation in any year of the current compliance period. The reporting entity must obtain third-party verification services for that report from a verification body that meets the requirements specified in Subarticle 4 of this article. Such services must be completed and separate verification statements for emissions data and for product data, as applicable, must be submitted by the verification body to the Executive Officer by September 1 each year. Each reporting entity must ensure that these verification statements are submitted by this deadline. Contracting with a verification body without providing sufficient time to complete the verification statements by the applicable deadline will not excuse the reporting entity from this responsibility.

Cal. Code Reg. tit. 17 § 95103(f) (emphasis added).

Section 95130 of the existing MRR similarly confirms that verification is only required for entities exceeding the 25,000 MTCO₂e/ year threshold specified in section 95103(f). First, the introductory paragraph to section 95130 provides as follows:

§ 95130. Requirements for Verification of Emissions Data Reports.

The reporting entity who is required to report under section 95101 of this article, and who is not eligible for abbreviated reporting under section 95103(a), must obtain the services of an accredited verification body for purposes of verifying each emissions data report submitted under this article, *as specified in section 95103(f)*.

Id., § 95130 (emphasis added).

Second, the immediately succeeding paragraph confirms that verification is required only as specified by section 95103(f):

(a) *Annual Verification.*

- (1) Reporting entities required to obtain annual verification services *as specified in section 95103(f)* are subject to full verification requirements in the first year that verification is required in each compliance period.

Id. § 95130(a)(1) (emphasis added).

As indicated above, section 95103(f) is abundantly clear that the verification requirement only applies to entities with emissions at or above the 25,000 MTCO₂e/ year threshold. Accordingly, we believe that neither the introductory paragraph to section 95130, nor section 95130(a)(1), can reasonably be interpreted to broaden the verification requirement to reach entities with emissions less than 25,000 MTCO₂e/ year. Rather, both of these paragraphs make explicit that the scope of the verification obligation is “as specified in section 95103(f)”, which clearly limits verification to entities with emissions equal or greater to 25,000 MTCO₂e/ year.

Despite the seeming clarity of the current MRR, CARB proposes to amend both section 95103(f) and section 95130 to clarify that the verification requirement does not apply to facilities with emissions less than 25,000 MTCO₂e/ year. In particular, the Proposed Amendments would amend the MRR by adding the underlined language to section 95103(f):

- (f) *Verification Requirement and Deadlines.* The requirements of this paragraph apply to each reporting entity submitting an emissions data report for the previous calendar year that indicates emissions equaled or exceeded 25,000 metric tons of CO₂e, including CO₂ from biomass-derived fuels and geothermal sources, or each reporting entity that has or has had a compliance obligation under the cap-and-trade regulation in any year of the current compliance period. The reporting entity subject to verification must obtain third-party verification services for that report from a verification body that meets the requirements specified in Subarticle 4 of this article,

Proposed Amendments, § 95103(f).

In addition, the Proposed Amendments would also add the following underlined language and delete the following strikethrough language in the introductory paragraph to section 95130:

§ 95130. Requirements for Verification of Emissions Data Reports.

The reporting entity who is subject to verification ~~required to report under section 95101 of this article, and who is not eligible for abbreviated reporting under section 95103(a),~~ must obtain the services of an accredited verification body for purposes of verifying each emissions data report submitted under this article, as specified in section 95103(f).

Proposed Amendments, § 95130.

Calpine welcomes the Proposed Amendments as clarifications of the existing MRR. However, Calpine does not believe that these changes are necessary to effectuate the stated intention of CARB staff to require verification for only those entities with emissions equal to or greater than 25,000 MTCO₂e/ year. As explained by the Initial Statement of Reasons for the Proposed Amendments, “[i]t was not the intent of ARB staff to require facilities to obtain verification services if their emissions are below 25,000 MTCO₂e.” CARB, Initial Statement of Reasons, MRR Amendments, 17 (Aug. 2012) (“ISOR”).

However, according to CARB staff’s interpretation of existing MRR, “[s]ection 95130 included wording that was inconsistent” with section 95103(f), which “specifies that verification is required by facilities meeting certain requirements”, *inter alia*, emissions equal to or greater than 25,000 MTCO₂e. ISOR, 67. The inconsistency, in CARB’s assessment, is that section 95130 “required verification by certain facilities emitting less than 25,000 metric tons of CO₂e that are not subject to abbreviated reporting.” *Id.* CARB elsewhere explains the problem in more detail:

Section 95130 of the reporting regulation currently indicates that reporting entities subject to reporting under section 95101 which are not eligible for abbreviated reporting must obtain third-party verification services. This means facilities subject to the no emissions threshold reporting requirements of section 95101 must have their emissions data reports verified even if their emissions are below 25,000 MTCO₂e.

ISOR, 17.

We disagree with CARB staff’s apparent conclusion that, under the existing MRR, every entity not eligible for abbreviated reporting is subject to verification requirements. Such an interpretation ignores and reads out of the MRR the explicit provisions dictating that verification is only required for entities with emissions equal to or greater than 25,000 MTCO₂e/ year and/or subject to the Cap-and-Trade compliance obligation. In so doing, Staff’s interpretation essentially collapses the criteria for eligibility for abbreviated reporting with those for verification and is plainly erroneous.

As suggested above, section 95130 clarifies that only “[r]eporting entities required to obtain annual verification services *as specified in section 95103(f)* are subject to full verification requirements...” *Id.* § 95130(a)(1) (emphasis added). Likewise, section 95130 confirms that the requirement to obtain annual verification services is “*as specified in section 95103(f)*”. *Id.*, § 95103 (emphasis added). Section 95103(f), in turn, states that the verification requirement only applies to entities meeting or exceeding the 25,000 MTCO₂e/ year threshold. Nowhere in section 95103 or 95130 does it state that entities with emissions below 25,000 MTCO₂e/ year must satisfy verification requirements. Further, the implication of CARB’s interpretation – that an oblique reference to abbreviated reporting in the introductory paragraph to section 95130 can override the more specific provisions governing applicability of verification appearing elsewhere in the Regulation (at section 95103(f)) and, in effect, mandate verification for every entity ineligible for abbreviated reporting – is unreasonable.

While we are appreciative that CARB has now made clear that “[i]t was not the intent of ARB staff to require facilities to obtain verification services if their emissions are below 25,000 MTCO₂e” (ISOR, 17), any interpretation of the existing MRR that would mandate verification for entities with emissions less than 25,000 MTCO₂e is unsupportable. Not only would such an interpretation conflict with CARB’s clear intent and supporting rationale – that verification is only required for facilities subject to the Cap-and-Trade Program’s compliance obligation – but it would ignore the clear language of the MRR specifying when verification is required. Although an agency is given some discretion in interpreting its own regulations, its interpretation cannot ignore the plain language of the text, particularly where doing so would result in an interpretation demonstrably at odds with the regulation’s stated purpose, intent and overall design.

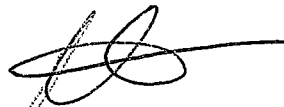
Thus, while Calpine welcomes CARB’s clarification of its intent, Calpine does not believe the current MRR can reasonably be interpreted to require verification for facilities with emissions of less than 25,000 MTCO₂e/ year. Accordingly, principles of regulatory interpretation and fair notice would preclude CARB’s enforcement of the verification requirement in the existing MRR against entities with emissions below this threshold.

* * * *

Calpine looks forward to working with the Board and staff to support the smooth launch of the Cap-and-Trade Program this fall, including through the Proposed Amendments to the MRR. Please feel free to contact me with any questions or concerns.

Thank you for the opportunity to submit these comments.

Sincerely,



Barbara McBride
Director, Environmental Services - Western Region

cc: James Goldstene, Executive Officer
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