State of California
California Environmental Protection Agency
AIR RESOURCES BOARD

Supplement to the
Final Statement of Reasons for Rulemaking

ADOPTION OF THE REGULATION FOR THE MADATORY REPORTING OF GREENHOUSE GAS EMISSIONS

Public Hearing Date: December 6, 2007
Agenda Item No.: 07-12-3

The ARB submits this supplement to the Final Statement of Reasons to the Office of Administrative Law (OAL) on December 2, 2008 for inclusion in OAL Regulatory Action File Number 2008-1016-02S.

Need for ARB to determine a verifier's conflict of interest under certain circumstances (section 95133(f)(4))

Section 95133 of the proposed regulation establishes conflict of interest rules that apply to verification bodies, lead verifiers and verifiers. Subsection 95133(b) sets forth in detail a number of objective circumstances that establish a high potential for conflict that disqualifies a verifier or verification body from being hired to provide verification services for a particular reporter. Subsection 95133(c) sets forth objective standards for determining circumstances where potential conflict is judged "low" and verification services may be provided.

There will be circumstances that fall between the high and low potential conflicts established in the regulation, as described in subsection 95133(d). These situations where a medium potential for conflict of interest is established fall into a gray area in which ARB believes it must examine the specific facts of the relationship between verifier and reporter and other circumstances giving rise to a potential conflict of interest to determine whether the potential conflict should disqualify the verifier from providing verification services to that reporter. Among other things, ARB will need to review the mitigation plan submitted under subsection 95133(d)(1) to determine the degree to which it will effectively prevent the potential conflict from materializing.

ARB has determined that it cannot establish objective standards for deciding these "medium potential" conflict cases, and that any attempt to articulate sufficient standards to govern potential medium-level conflicts will inevitably fail to address some of the relevant facts that are likely to arise in individual cases. For that reason, ARB concluded that a fact-driven, case-by-case review and decision-making process was a necessary part of the proposed regulation. ARB has identified some of the criteria that ARB's Executive Officer will consider in making his determination of whether verification services can be provided when a medium potential for conflict of interest exists, in

subsection 95133(f)(4). In addition, the Executive Officer will review the plan to avoid, neutralize, or mitigate the potential conflict that is required by section 95133(d)(1) when the verification body identifies a medium potential for a conflict of interest. The submitted plan must meet the specific criteria of section 95133(d)(1)(A)-(C), providing a basis for judgment by the Executive Officer.

Need for ARB to obtain and consider additional information on a case-specific basis for accreditation of verifiers (section 95132(b)(6))

Subsections 95132(b)(1)-(3) of the proposed regulation list in detail the information that must be submitted to ARB as part of any application for accreditation as a verification body, lead verifier, or verifier. These requirements apply to all applicants within each of the three verification categories and are a complete list of the information and documentation that ARB will require of every applicant. However, ARB anticipates that during its review of some accreditation applications, it may identify additional information or documentation that is needed to fully explain an applicant's qualifications such as training and experience and to clearly establish whether the applicant meets standards for accreditation. The need for this type of supplemental information is anticipated to arise from time to time but not with any frequency; furthermore, the type of information or documentation that ARB may need to obtain in order to resolve potential qualification issues will depend on the specific information submitted in the application. Because of this, ARB cannot specifically identify the additional information that will be required during review of applications, and must necessarily include in the regulation its right to require additional information or documentation from the applicant or from others to determine whether the applicant meets the accreditation standards.

Nonsubstantial Changes Made to the Final Regulation Order

ARB has authorized OAL to make several nonsubstantial changes to the final regulation order to correct erroneous citations, correct other typographical errors, and make other minor changes in the regulatory text. The changes made do not materially alter any requirement, right, responsibility, condition, prescription, or other regulatory element of any California Code of Regulations (CCR) provisions. These changes are detailed in a December 2, 2008 memorandum from Ms. Amy Whiting of ARB to Mr. Craig Tarpenning of OAL.

One of the changes is to the definition of "retail provider" at subsection 95102(a)(173). This definition lists the types of entities that are subject to the retail providers provisions in the regulation. Revisions to this definition correct an erroneous reference to Public Utilities Code section 9604 and also correct the term that is defined by that statute, from "public owned electric utility" to the correct term, "local publicly owned electric utility." These changes are without regulatory effect because the addition of the adjective "local" to this definition does not exclude any non-local publicly owned electric utilities from the definition of retail providers. Said another way, all electric utilities in California are either: 1) local publicly owned electric utilities as defined by Public Utilities Code section 9604, or 2) fall within another part of the definition of retail provider. For that

reason, ARB does not believe these changes will have any effect on the entities that are subject to the retail provider requirements in the proposed regulation.

Comments and Responses

Sup – 1 Combine Hydrogen Plant and Refinery Reporting

Comment: Oil refinery Hydrogen Plant emissions (one of the fastest growing and largest stationary sources of CO_2 in the state) should be included as part of oil refineries' emissions. Throughout the state, oil refining companies are in the process of permitting for huge expansions and new hydrogen plants. Although the hydrogen plants are frequently farmed out to other companies for actual day to day operation, these are often located on refinery property, are inherently part of the integrated oil refinery operation, and in actuality, the oil refineries are responsible for the siting, sizing, and functions of these facilities.

Separating their emissions from oil refineries (by identifying only the operating company as the responsible party) can limit ARB's control over this massively expanding source of GHGs in the state. It also obscures the fact that the oil refineries are driving the process of building these plants, which use fossil fuels to make hydrogen for the purpose of switching to processing higher-sulfur, higher carbon crude oil. These plants are building huge GHG emissions into the state infrastructure for decades to come. (Please see the attached Powerpoint we submitted at the Board hearing in June that provided a preliminary list at that time of new hydrogen plants and associated CO_2.)

As a result of our presentations, ARB staff in the Early Action Item process proposed developing a statewide tracking process of these expansions. It would be inconsistent with that process to allow Hydrogen Plants to be separated from oil refinery emissions. [CBE(21)]

Hydrogen plants were piecemealed out, segregated from refineries. The hydrogen plants are probably the fastest growing source of greenhouse gases in the state. Because most of the refineries are switching to dirty crude oil that's high carbon and high sulfur, they need a lot more hydrogen to strip the sulfur and to crack the hydrocarbons, the heavy high carbon crude oil. So they're going the wrong way. They're building an infrastructure that's going to use a lot more hydrogen. One example, in the Bay Area, one in a quarter million metric tons of CO2 increase at one refinery mostly from a hydrogen plant. They're going to be separating out the hydrogen plants from the oil refineries. We oppose this. They should be included with the refineries. Because even though the refineries are frequently farming these out to other companies, most of the time they're on refinery property. They're contracted by the refineries. They can even use fuels from the refineries. And they're making a product that goes back into the refineries. They're not doing this as an alternative energy source. And frequently are

oversizing these sources. CEQA really needs to be addressed in this issue in a way that looks holistically at the refinery. We ask those plants be included with the refineries. [CBE(T16)]

Agency Response: There are two primary business configurations in which hydrogen is produced for use in multiple refinery processes. Either a hydrogen plant is owned and operated by the refinery it serves, or a merchant hydrogen plant located on or adjacent to the refinery to which it sells hydrogen is operated by a third party. The commenter recommends that GHG emissions from hydrogen production at refineries be included as part of the overall refinery emissions total. If the hydrogen plant is under the operational control of the refinery, as in the first case above, then the hydrogen production GHG emissions are included as part of the refinery emissions. These hydrogen plant emissions are included in the refinery emissions report, but are included as a separate emissions source within the report.

In the case where a third party produces and sells hydrogen to a refinery, it is unnecessary and unreasonable to require the merchant hydrogen producer to provide their client (the refinery) with proprietary information that is necessary to report GHG emissions resulting from hydrogen production. The regulation is written in this manner for two reasons: ARB cannot require a merchant hydrogen producer to provide their client with economically sensitive data. This would in effect allow the hydrogen purchaser (the refiner) to calculate the exact cost of producing the product (hydrogen) they are purchasing. Also, the regulation is designed to require that the party responsible for the emissions report the GHG emissions. Thus the reporting company (e.g., the hydrogen producer, in this case) has operational control over the facility and thus the ability to reduce GHG emissions.

The current regulation in no way reduces the ability of the State or the public to obtain a full accounting of GHG emissions produced by refineries and hydrogen plants. Whether the hydrogen plant emissions are integrated within refinery emissions reports, or reported separately by operators of hydrogen facilities, ARB will obtain a complete and transparent inventory of the GHG emissions produced by these facilities.