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By Electronic Transmission

Richard W. Corey
Executive Officer
California Air Resources Board
1001 I St.
Sacramento, CA 95814

Environmental Credit Corp. Comments on Proposed 15-Day Changes to Ozone Depleting Substances Offset Protocol

Dear Mr. Corey:

I write on behalf of Environmental Credit Corp. (“ECC”) concerning the 15-day changes proposed on October 2, 2014 to the Ozone Depleting Substances Offset Protocol (the “ODS Protocol”) by the Air Resources Board (“ARB”). ECC is North America’s leading developer of projects that create greenhouse gas emissions reduction credits. While ECC firmly agrees with ARB that offset projects must comply with all environmental laws and regulations directly applicable to the project activities, ECC opposes the proposed modification of the ODS Protocol to extend the “regulatory compliance” requirements beyond the scope of the project activity to the disposal of post-ODS destruction waste products.

Specifically, ARB proposes the following amendments to section 3.8(b) of the ODS Protocol:

The regulatory compliance requirements for a project apply to the collection, recovery, storage, transportation, mixing and destruction of ODS, including disposal of the associated post-destruction waste products. The regulatory compliance requirements extend to the destruction facility during the time ODS destruction occurs.

Proposed 15-Day Changes to ODS Protocol at § 3.8(b) (Oct. 2, 2014) (emphasis in original to indicate new language).

ECC Comments on ARB's Proposed 15-Day Changes to the ODS Protocol
October 17, 2014
Page 2

As discussed below, these proposed changes are inconsistent with the Cap and Trade Regulation ("CTR") and the California Administrative Procedure Act ("APA"), and will hurt the viability of future ODS projects. ECC urges the Executive Officer and the Board not to adopt the proposed 15-day changes to section 3.8 of the ODS Protocol.

1. Extending the Regulatory Compliance Requirement to the Disposal of Post-Destruction Waste Products is Contrary to the Regulation and the Goals of AB 32.

Section 95973(b) of the CTR governs regulatory compliance of offset projects, and provides as follows:

Local, Regional, and National Regulatory and Environmental Impact Assessment Requirements. An Offset Project Operator or Authorized Project Designee must fulfill all local, regional, and national requirements on environmental impact assessments that apply based on the offset project location. In addition, an offset project must also fulfill all local, regional, and national environmental and health and safety laws and regulations that apply based on the offset project location *and that directly apply to the offset project*, including as specified in a Compliance Offset Protocol. The project is out of regulatory compliance if the project activities were subject to enforcement action by a regulatory oversight body during the Reporting Period. An offset project is not eligible to receive ARB or registry offset credits for GHG reductions or GHG removal enhancements for the entire Reporting Period *if the offset project is not in compliance with regulatory requirements directly applicable to the offset project during the Reporting Period.*

17 C.C.R. § 95973(b) (emphasis added). Section 95973(b), therefore clearly limits the requirement for regulatory compliance of offset projects to those environmental, health and safety requirements that "*directly apply*" to the project. In addition, Section § 95858(c)(2) of the CTR provides that for an invalidation of offset credits due to regulatory noncompliance, ARB must find that, "The offset project activity *and* implementation of the offset project was not in accordance with all local, state, or national environmental and health and safety regulations during the Reporting Period for which the ARB offset credit was issued." (Emphasis added.) How the larger facility handles its waste streams simply has no bearing on the implementation of the offset project, which is the ODS destruction activity.

As ARB recently noted in its Preliminary Determination on its investigation of offset credits issued for destruction of ODS at the Clean Harbors facility, "[t]he Cap-and-Trade Regulation and the ODS destruction Protocol are complementary regulatory documents that must

ECC Comments on ARB's Proposed 15-Day Changes to the ODS Protocol
October 17, 2014
Page 3

be read in harmony with each other.” Preliminary Determination at 3 (Oct. 8, 2014). The proposed amendment to section 3.8 of the ODS protocol, which extends the regulatory compliance requirement to the “disposal of the associated post-destruction waste products” is not harmonious with nor reconcilable with CTR sections 95873(b) and 95858(c)(2).

At the Clean Harbors facility in El Dorado, Arkansas, as well as other ODS destruction facilities, wastes from the destruction of ODS are mixed with wastes from the destruction of other materials. Isolation of ODS wastes would surely increase the cost of ODS projects, and may be technically or practically unfeasible. ODS offset project operators do not control the management of waste streams by these larger facilities. Moreover, ODS offset project operators have no way of assuring that all other aspects of the destruction facility are fully compliant with all applicable environmental, health and safety requirements after the time of destruction. If adopted, the proposed amendments to section 3.8 of the ODS Protocol thus would threaten the viability of all ODS destruction projects, which would not serve the objectives of AB 32.

2. ARB's Proposed Changes to Section 3.8 of the ODS Protocol are not Appropriate for a 15-Day Rulemaking.

The APA provides that a state agency must give the public a 45-day notice and comment period before holding a hearing to adopt, amend, or repeal any regulation. Gov. Code § 11346.4(a). The APA further provides that

No state agency may adopt, amend, or repeal a regulation which has been changed from that which was originally made available to the public pursuant to Section 11346.5, unless the change is (1) nonsubstantial or solely grammatical in nature, or (2) sufficiently related to the original text that the public was adequately placed on notice that the change could result from the originally proposed regulatory action.

Gov. Code § 11346.8(c).

Neither the transcript of the September 18, 2014 Board meeting, nor the resolution adopted by the Board on that date, order staff to make substantial changes to the regulatory compliance requirements in the ODS Protocol. Indeed, in its September 18, 2014 resolution adopting and approving the 45-day changes, the Board simply noted that

The Proposed amendments to update three compliance offset protocols without making substantive changes to the protocols originally adopted in 2011 are necessary to address formatting changes and updates to quantification methodologies.

ECC Comments on ARB's Proposed 15-Day Changes to the ODS Protocol
October 17, 2014
Page 4

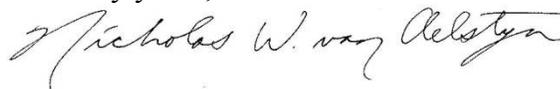
Resolution 14-31 at 5 (Sept. 18, 2014); *see also* Initial Statement of Reasons (“ISOR”) for the 45-Day Changes to CTR at 11 (July 29, 2014) (while noting that certain changes to the Offset Protocols were “considered a regulatory update [and] subject to the full regulatory development process pursuant to the APA,” the ISOR was silent on the specific modifications to the ODS Protocol). Absent any language in the ISOR, the transcript of the Sept. 18 Board meeting or the Resolution 14-31, one is left only with the 45-day changes themselves. The currently proposed 15-day changes clearly exceed the scope of those changes.

ARB’s proposed 15-day modification to section 3.8 of the ODS Protocol would extend the regulatory compliance requirement to the disposal of post-destruction wastes. This is effectively a reversal of position with respect to the 45-day rulemaking change to section 3.8 that was adopted on September 18. That change amended the prior 2011 version of the ODS Protocol to clarify that the “regulatory compliance requirements” apply only to “the collection, recovery, storage, transportation, mixing and destruction of ODS” and no longer “extend[] to the operation of destruction facilities where the ODS is destroyed,” as the 2011 version of the ODS Protocol did. *Compare* section 3.5 of the 2011 ODS Protocol *with* section 3.8 of the Sept. 18, 2014 ODS Protocol. Thus, the proposed 15-day change exceeds ARB’s authority to make “nonsubstantial or solely grammatical” changes to the Protocol

This proposed amendment represents a substantive change in the policy that the Board adopted on September 18. As such, it is the type of amendment that is appropriate only after a 45-day notice period. Should ARB adopt the proposed 15-day changes to section 3.8 of the ODS Protocol, it would be in direct violation of Government Code sections 11346.4(a) and 11346.8(c).

ECC therefore respectfully requests that the Executive Officer and the Board not adopt the proposed 15-day changes to section 3.8 of the ODS Protocol.

Sincerely yours,



Nicholas W. van Aelstyn