



January 11, 2010

**Via: web submission at [http://www.arb.ca.gov/lispub/comm2/bcsubform.php?listname=dec-14-pdr-ws&comm\\_period=1](http://www.arb.ca.gov/lispub/comm2/bcsubform.php?listname=dec-14-pdr-ws&comm_period=1)**

California Air Resources Board  
1001 I Street  
Sacramento, California

Re: Comments on Preliminary Draft Regulation for a California Cap-and-Trade Program

Dear California Air Resources Board:

These comments are submitted on behalf of the Center for Biological Diversity in regard to the Preliminary Draft Regulation (PDR) for a California cap-and-trade program proposed by the California Air Resources Board. The Center for Biological Diversity is a non-profit, public-interest conservation organization dedicated to the protection of native species and their habitats through science, policy, and environmental law. This comment letter focuses on our concerns related to integrating into the compliance system the quantification methodologies that were previously adopted exclusively for use in voluntary actions.

Proposed section 96260(a)(1) would require offset projects registered under the AB 32 cap and trade program to “use an offset quantification methodology” previously adopted by the Board.<sup>1</sup> A note explaining the “concept” behind this requirement states that “beginning in 2007 the Board began adopting offset quantification methodologies according to a top-down approval process. ARB believes that the quantification methods for calculating emission reductions in the Board approved offset quantification methodologies are of the highest quality and *should be integrated into the compliance system.*”<sup>2</sup>

The PRD thus proposes to incorporate the “offset quantification methodologies” from previously adopted protocols into the AB 32 cap and trade regulation without change. This proposal raises at least three major concerns.

First, as stated by the Center for Biological Diversity in a letter to ARB dated November 9, 2009, these methodologies—in particular the Forest Project Protocol developed by the Climate Action Reserve—were adopted by ARB in the absence of any attempt to comply with the California Environmental Quality Act (CEQA). As that letter explained, ARB has a legal obligation under CEQA to disclose, analyze, and mitigate or avoid the environmental impacts of adopting “offset quantification methodologies” *before* committing itself to any particular

---

<sup>1</sup> PDR at 66.

<sup>2</sup> PDR at 67 (emphasis added).

approach. Belated consideration of the environmental impacts of adopting these methodologies (for example, in the context of adopting the final cap and trade regulation) would not satisfy CEQA, and would amount to post hoc rationalization for action already taken. The Supreme Court has explicitly condemned such an approach to CEQA compliance. *Laurel Heights Improvement Ass'n v. Regents of Univ. of Cal.*, 47 Cal. 3d 376, 394 (1988). ARB's failure to investigate the environmental implications of particular methodologies prior to adoption has deprived both decision-makers and the public of information necessary to evaluate the consequences of the offset component of the proposed cap and trade program. CEQA was designed precisely to remedy this type of informational deficiency.

Second, ARB failed to evaluate these offset methodologies for consistency with AB 32. In the case of the Forest Project Protocol, ARB adopted a methodology that relaxed environmental standards in comparison to its previously adopted protocol, a decision that had readily foreseeable negative environmental consequences. This rendered the Protocol inconsistent with AB 32's requirement that any market-based compliance mechanism must maximize—not reduce—environmental co-benefits. *See* Health & Saf. Code § 38570(b)(3). A number of the other methodologies currently in use for voluntary actions similarly were adopted in the absence of any attempt to comply with either CEQA or the co-benefits requirements of AB 32. ARB may not avoid its responsibilities under either law by relying on methodologies developed by non-governmental organizations like the Climate Action Reserve.

Finally, the approach proposed in the PDR would deprive ARB members and the public of a promised opportunity to improve these methodologies. During ARB's September 24, 2009 discussion of the Forest Project Protocol, ARB Deputy Executive Office Lynn Terry clearly stated, in response to concerns and direct questions from Board members, that the methodologies adopted for voluntary actions were "restricted to that arena" and that additional criteria would be considered before incorporating those methodologies into the cap and trade rule.<sup>3</sup> The proposed section 96260(a)(1) of the PRD, and the associated Discussion of Concept appears to directly contradict that statement.

---

<sup>3</sup> ARB board member D'Adamo: So my question to staff is -- maybe you could help me with this, Ms. Terry. You're saying these protocols are all founded on the establishment or recognition of an existing regulatory framework. And so is this the end of the story for us? Or can we at a later point after we adopt cap and trade or part of our adoption of cap and trade insist on a higher standard for forestry or whatever industry the protocols apply to?

ARB Deputy Executive Officer Terry: Good question. And we wanted to be very clear that this is protocol for voluntary actions and that the Board's approval today is restricted to that arena and that for purposes of cap and trade, the Board will consider the rules of the game in terms of offsets that may be brought into the system. And so, yes, those kinds of criteria will be developed going forward as part of the cap and trade rule development process.

In sum, before adopting any “offset quantification methodology” intended to become part of a cap and trade program, ARB must both fully comply with CEQA and ensure that proposed methodologies maximize environmental co-benefits as required by AB 32. ARB has not fulfilled either responsibility. As a result, automatic integration of ARB’s previously adopted “offset quantification methodologies,” or the offsets generated under these methodologies under voluntary actions, into the cap and trade program would be inconsistent with both CEQA and AB 32.

Thank you very much for your consideration of these comments. Please do not hesitate to contact us if you have any questions.

Sincerely,



Kevin P. Bundy  
Senior Attorney  
(415) 436-9682 x 313



Brian Nowicki  
California Climate Policy Director  
(916) 201-6938