Placer County
AIR POLLUTION CONTROL DISTRICT

110 Maple Street, Auburn, CA 95603 • (530) 745-2330 • Fax (530) 745-2373 • www.placer.ca.gov/apcd

Thomas J. Christofk, Air Pollution Control Officer

April 13, 2012

Ms. Ellen Peter, Chief Counsel
California Air Resources Board
1001 "I" Street
P.O. Box 2815
Sacramento, CA 95812

Dear Ms. Peter:

The Placer County Air Pollution Control District (District) is filing this comment on the rulemaking for amendment to the Cap and Trade Regulation proposed on March 30, 2012. While the primary focus of the current rulemaking process relates to Canadian markets, the CARB has an opportunity to consider how the new Cap and Trade Regulations[1] work in relation to California Environmental Quality Act (CEQA)[2]. The District again files this comment primarily to assist CARB staff who are responsible for relaying information about this issue to the public.

The Cap and Trade Regulation should articulate how CEQA and the Regulation will work with one another, and explicitly clarify the relationship between the California Cap and Trade Law and CEQA. When a stationary source that qualifies as a covered entity under Cap and Trade Law is constructed or modified (or the entity needs a permit renewal) it is likely that such action will be reviewed under CEQA. Any compliance grade offset credits (also called 'compliance instruments') obtained during the CEQA process should satisfy a project's obligations under the Cap and Trade Law. State law and standard CEQA review practice support this conclusion. CARB should make it clear that offset credits can be recognized through the CEQA process before they are retired by CARB under Cap and Trade Regulation.

Language similar to that below could be used to clarify this important issue:

"The reliance by a lead agency on a compliance instrument within a project's CEQA process (as a part of a project's baseline or mitigation) does not invalidate the use of such instrument by that covered entity under this Article."

Below is the legal analysis to support this recommendation.

<u>There is significant legal authority for assertion that CARB should acknowledge the use of offset credits within the CEQA process; CARB should articulate that such use would not affect their applicability as Compliance Instruments under Cap and Trade Law.</u>

1 Subchapter 10 Climate Change, Article 5, Sections 95800-96022, Title 17, California Code of Regulations.
2 Section 21000 et seq. of the California Public Resources Code

A stationary source is any building, structure, facility, or emissions unit that emits, or may emit, any regulated pollutant directly or as fugitive emissions.[3] When constructing, expanding or renewing permits associated with stationary sources, CEQA review is required by either a local government or air district, or the CEC if the project is an electric power project *over 50* MWh in size.[4] Certain stationary source projects may also be required to participate in the new Cap and Trade Regulation if they trigger certain emissions thresholds.[5]

During the CEQA process, lead agencies often rely on the regulations of other agencies to determine the baseline conditions of a project, or they use those regulatory requirements as a part of the mitigation strategy for a project. One place where CEQA explicitly recognizes the applicability of other agency's requirements is Section 21081.6, which describes that CEQA mitigation monitoring program, should include information from other agencies that have responsibility or jurisdiction.[6]

It is common practice that lead agencies rely on the requirements of other agencies when assessing CEQA compliance. The lead agency, however, must be cautious that such requirements are real and enforceable.[7] Speculative mitigation requirements are not acceptable.[8] Developers usually know of other permit requirements they will have to comply with at later stages of the development process, and incorporate such action into their project from the outset. Satisfaction of the CARB green house gas emissions reductions requirements within CEQA review for stationary source projects should be no different.

Of course, if the project's actions under CEQA do not meet with CARB's requirements completely and thoroughly, that project will have to do additional work to achieve compliance for the State. But a project that will be a covered entity under Cap and Trade Law should not be penalized for satisfying its state climate change obligations within its CEQA process.

The new CARB Cap and Trade Regulation rightly requires that GHG emission reduction credits (also called 'compliance instruments') be real, additional, quantifiable, permanent, verifiable and enforceable.[9] There may be some confusion concerning the additionality requirement related to CEQA. CEQA is not a mandatory compliance program. CEQA is a public disclosure process by which lead agencies determine the environmental effects of projects. CEQA does not confer any independent authority to regulate.[10] As stated in the legislative history of that section,

> CEQA "confer(s) no such independent authority. Rather, the provisions of that division are intended to be used in conjunction with discretionary powers granted to a public agency by other law in order to achieve the objective of mitigating or avoiding significant

---

3 42 U.S.C. §7401 et seq. (1970)
4 State Energy Resources Conservation and Development Act, Division 15 of the Public Resources Code
5 Subchapter 10 Climate Change, Article 5, Sections 95811, 95812, and Subarticle 7, Title 17, California Code of Regulations.
6 Cal. Pub. Resources Code 21081.6 (a)(1) and (c).
7 Federation of Hillside & Canyon Associations v. City of Los Angeles, (2d Dist. 2000) 83 Cal. App. 4th 1252.
8 Id., Sundstrum v. County of Mendocino, (1st Dist. 1998) 202 Cal. App. 3d 296.
9 Proposed regulation section 95970(a)(1)
10 Cal. Public Resources Code 21004.

> effects on the environment when it is feasible to do so. Compliance with [CEQA] identifies the manner in which significant effects of a project can be mitigated or avoided..."[11]

A lead agency may or may not conclude that reductions achieved by a stationary source's compliance with the CARB Cap and Trade Regulation will satisfy its own requirements, and unreasoned reliance on such would not be consistent with CEQA.[12] CEQA requires that impacts be mitigated; by 'who' is not important. As long as the offset credits are compliant with the Cap and Trade Law, CARB should honor these credits regardless of their use within a CEQA process.

The recognition of compliance instruments within the CEQA process cannot change a project's "covered entity" status under the Cap and Trade Law.

Some could argue that a project could avoid becoming a 'covered entity' by reducing its GHG emissions, through the purchase of carbon offset credits, to an emissions level below the threshold that moves a project into 'covered entity' status. This argument is flawed, because CARB must be able to determine whether those credits are compliant with its own requirements *before* the credits could be applied for compliance with Cap and Trade Law. Even if the project built in carbon offsets within its project description and used the reduced emission numbers as a part of its CEQA baseline, CARB would need to consider the project's pre-offset emissions rates so that it could then analyze the validity of the offsets. Otherwise, the CEQA process would undermine the Cap and Trade Law. The Courts do not favor legislative interpretations that would undermine statutory validity.[13]

Conclusion

Both CEQA and the CARB regulations serve important roles in the protection of the environment in California. In order for these laws to play the roles for which they were intended, it is imperative that the State acknowledge the relationship between the two. Based on the current version of the Cap and Trade Regulation, we would recommend placement of the section under Subsection 85821 (f) or in the alternative, Subsection 95822 could be created with the title "Use of Compliance Instrument within CEQA Process". A third suggestion would be placing it in Subsection 95970 (c).

As California leads the nation on Cap and Trade, it should not shirk away from issues that could be the basis for future litigation. CARB should assertively show that California environmental laws can work harmoniously and fairly for all Californians.

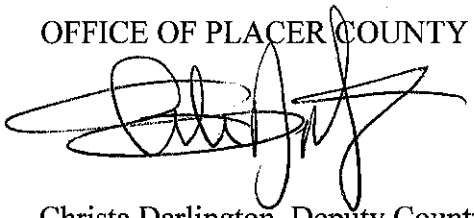
---

11 Id.
12 Protect Historic Amador Waterways v. Amador Water Agency, (3d Dist.2004) 116 Cal.App. 4th 1099.
13 Two well-established canons of statutory interpretation:. First, courts must ascertain the intent of the Legislature to effectuate the purpose of the law (DuBois v. Workers' Comp. Appeals Bd. (1993) 5 Cal.4th 382, 387); Second, they must adopt an interpretation that avoids an absurd result the Legislature did not intend. (Bruce v. Gregory (1967) 65 Cal.2d 666, 673.)

Thank you for your consideration on this matter.

Very truly yours,

OFFICE OF PLACER COUNTY COUNSEL



Christa Darlington, Deputy County Counsel
Counsel for Placer County Air Pollution Control District

CD/kf