

WILLIAMSON LAW + POLICY

WILLIAMSON LAW + POLICY, PLLC
DAVID M. (MAX) WILLIAMSON
Tel: (202) 256-6155 Fax: (703) 519-0076
maxwilliamson@williamsonlawpolicy.com

October 17, 2014

VIA ELECTRONIC SUBMISSION

California Air Resources Board
Attn.: Executive Officer
1001 I Street
Sacramento, CA 95814

Re: In re October 8, 2014 Preliminary Determination ODS Destruction Clean Harbors Incineration Facility – Comments of First Environment of California, Inc.

Dear Sir/Madam:

On behalf of First Environment of California, Inc. (“First Environment”), we appreciate the opportunity to submit these comments pertaining to the California Air Resources Board’s October 8, 2014 preliminary determination concerning the potential invalidation of ODS offset credits generated as a result of incineration of ODS at the Clean Harbors El Dorado facility.

First Environment is concerned about the scope of the proposed determination and its potential adverse impacts on the ARB cap-and-trade offset program, the verification process, and obligations of accredited verifiers. Accordingly, First Environment offers the following comments for the purpose of advocating greater clarity and predictability in the offset certification process.

First Environment’s knowledge, experience, and expertise in greenhouse gas management is broadly recognized and acknowledged. First Environment was the first company approved to provide greenhouse gas report certification services to members of the California Climate Action Registry (“CCAR”). The firm was also one of the original companies to be recognized as a Technical Assistance provider for CCAR participants. First Environment is accredited as a Validation/Verification Body (“VVB”) by the American National Standards Institute (“ANSI”) and is approved to perform verifications under the Verified Carbon Standard, Climate Action Reserve, Chicago Climate Exchange, and the American Carbon Registry. First Environment is also a recognized Climate Action Reserve and California Air Resources Board verification body for multiple project types. The firm has provided either verification or consulting services for more than half of the ODS projects

registered under the Climate Action Reserve in addition to verification services for a number of newly registered projects under the ARB program.

In addition to being an accredited verifier under the ARB cap-and-trade program, First Environment has provided environmental, health and safety (“EHS”) compliance auditing services to hundreds of industrial facilities. It is commonly understood within the audit community that large facilities such as the Clean Harbors incineration complex at issue can be subject to myriad EHS regulations, and accordingly, non-compliance situations can occur at any time at any place within a large industrial facility, many of these being relatively inconsequential paperwork or minor regulatory discrepancies. Consistent with the professional standard of care for the environmental consulting industry, it is virtually impossible for an auditor, much less a verifier of offset project activities with a narrower scope, to guarantee the absence of non-compliance situations at any point in time, particularly those that are outside the scope of the verification services. A determination by the Executive Officer in this matter that does not recognize the practical realities and limitations of the verification process with regard to fixing a point in time wherein environmental compliance is fully accomplished would undermine the workability of the cap-and-trade program and would be inconsistent with the offset program rules.

In the context of the ARB verification process, ARB’s cap-and-trade regulations and the ODS Protocol require the verifier to review the processes that relate to generation of offset credits. That is, the verifier examines the offset project activity. The determination under section 95985 whether an offset project is in accordance with all local, state, or national environmental, health and safety regulations is necessarily focused on, and limited to, activities that are material to the creation of the offset credit and within the scope of the offset project activity. This is reflected in section 95973(b) which provides that “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.” (Emphasis added).

Violations at a facility owned by a third-party service provider such as the incineration facility at issue, and particularly inspection reports, alleged violations, or inchoate enforcement actions, that do not have a proximate nexus with the offset project should not be considered for purposes of verification or ARB invalidation review for several reasons. First, it is not practical for a verifier to determine whether a non-compliance situation has occurred at other times, places or processes within the facility of a third-party service provider. Second, verifiers should not be placed in the position of verifying conditions which are not within the scope of the offset project itself and are unknown or unable to be discovered through reasonable diligence associated with the offset protocols. Third, ARB’s authority to invalidate offset credits under section 95985(c)(2) is similarly limited to examination of the offset project activity.

First Environment expresses no position on the merits of the factual circumstances of the Clean Harbors El Dorado matter and has no involvement with the projects subject to potential invalidation. However, in the context of ARB policy, it does not appear that the Clean Harbors facility’s handling of byproducts from the incineration process (saturator

sludge), whether in fact in compliance or non-compliance with RCRA waste handling requirements, has any proximate connection to the offset project activities. The goal of the ODS offset project is to destroy the subject greenhouse gas by chemically converting ODS into non-greenhouse gas products. The ODS Protocol at section 3.5 applies by its terms to “collection or destruction activities.” Certainly, the destruction and incineration process itself is within the offset project scope. However, there is nothing currently in the cap-and-trade regulation or ODS Protocol specifying that verification or invalidation extends to byproduct handling that occurs subsequent to and separate from the incineration process. The only pertinent language in the ODS Protocol refers to “exceedances of permitted emissions limits,” which terminology relates to air emissions regulation. There does not appear to be any question in this matter that the incinerator was operating properly and in compliance with laws, nor any question that the ODS was actually destroyed. Indeed ARB notes that the offsets generated were in fact “real, quantified and verified reductions.” It is important for ARB to consider that the brine produced at the El Dorado facility is a quenching fluid and is not a chemical byproduct of the dissociation of ODS compounds. According to the record, the spent brine was reclaimed for subsequent sale for Clean Harbor’s benefit and not as a necessary step in the ODS destruction process. The brine or saturator sludge handling process or facility in question would not be considered part of the “destruction facility” within the meaning of section 3.5 of the ODS Protocol for purposes of verification.

First Environment is concerned with the breadth of language used in the October 8, 2014 Preliminary Determination. ARB’s proposed expansion of the rule language to “other activities at the facility” is unnecessarily broad and inconsistent with the cap-and-trade rules as currently written. The possible practical consequence of ARB’s proposed interpretation for ODS project verification would be that project operators would have to commission a full EHS audit of the entire incineration facility on a cradle-to-grave basis as part of the verification process in order to comply with ARB’s demands. Even then, given the dynamics of the environmental regulatory arena, full environmental compliance cannot be necessarily guaranteed or even temporally linked to the time when the verification is conducted.

As an analogy, it would not be warranted under the cap-and-trade rules if ARB were to attempt to invalidate a forestry offset credit where a third-party mechanic were to illegally dispose of oil from trucks used in forest operations, or if offset credits from a livestock methane project were invalidated because of some legal violation elsewhere on the farm such as improperly applying pesticides. Any such violations associated with ancillary activities should of course be corrected and would be subject to enforcement by jurisdictional officials, but these activities are not part of the verification process or within ARB’s invalidation authority.

The offset verification process should be confined to ensuring that the ODS material was accurately accounted for, actually destroyed, properly documented and that the incineration equipment was operating properly to ensure destruction within required parameters. If this is done, the environmental integrity of the offset credit is assured. Although it is important that any byproducts are properly handled, the regulation of other activities is appropriately the responsibility of state regulatory officials and relevant enforcement processes. The verification process cannot extend beyond the offset project scope.

Nor should verifiers be put in a position of second-guessing regulatory positions asserted by relevant state or local regulatory authorities. This is particularly of concern in situations such as the Clean Harbors matter, where reportedly facility operations were condoned by the state regulatory authority and no final determination of violation was extant during the relevant time period of the offset project activities. Moreover, because out-of-state facilities participate in the ARB offsets program, straying outside the offset project scope would raise potential jurisdictional and possibly constitutional issues. For example, from the standpoint of interstate comity, it would be inappropriate for California to attempt to impose some legal consequence for alleged violations of waste handling rules in another state, particularly where at the time of the verified activities in question such allegations had not been confirmed through due process.

At a minimum, even if ARB were to expand the scope of project verification, no invalidation of credits should occur due to rule violations unless the credits were generated after the relevant facility or operator's receipt of a formal notice of violation or similar official action from the relevant regulatory authority. Verifiers should not be asked to take into account potential non-compliance situations unless such notice was disclosed by the facility or otherwise became known to the verifier or project operator. ARB's rules should at least provide project operators the opportunity to protect themselves contractually by requiring prompt notice from the service provider of any known or alleged non-compliance, which they can do only if there is clarity regarding the project scope.

Finally, if ARB proceeds to expand the scope of verification and invalidation liability as intimated in the Preliminary Determination, such requirements should be applied only prospectively. ARB's regulations at section 95985(c)(4)(A) provide that "[a]n update to a Compliance Offset Protocol will not result in an invalidation of ARB offset credits issued under a previous version of the Compliance Offset Protocol." Moreover, as a matter of California administrative law, a change in ARB's interpretation that results in additional substantive obligations on verifiers or project operators must be the subject of rulemaking procedures where, as here, the interpretation would materially alter the current offset program.

Again, First Environment greatly appreciates the opportunity to submit these comments on ARB's proposed action and is available to discuss any of these issues at your convenience.

Respectfully submitted on behalf of First
Environment of California, Inc.

A handwritten signature in black ink, appearing to read 'David M. Williamson', with a large, stylized initial 'D'.

David M. (Max) Williamson

cc: Dr. Tod Delaney, President, First Environment of California, Inc.