

November 6, 2020

Gavin McCabe
Chair, Compliance Offset Task Force
California Air Resources Board

Re: Task Force scope and financial conflicts of interest

Dear Mr. McCabe and Task Force members,

Thank you for the opportunity to submit comments on the October 2020 Compliance Offsets Task Force Draft Report.¹ I am writing to you in my capacity as a member of the Independent Emissions Market Advisory Committee (IEMAC). Like the Task Force, the IEMAC was created pursuant to Assembly Bill 398 in 2017. Unlike the Task Force, however, state law requires that IEMAC members lack financial conflicts of interest with companies regulated under the cap-and-trade program.² Please note that I am speaking only for myself and not the IEMAC as a whole.

My comments today address two topics:

1. First, I seek clarification on the scope of the Task Force’s work because the Draft Report appears to contradict the Task Force’s own charter on this point. Despite a mandate from the Air Resources Board to focus exclusively on potential new offset protocols, the Draft Report creates the false appearance of an independent review of the existing program. In its final report, the Task Force should explicitly disclaim that it is not conducting such a review.
2. Second, I call on the Task Force to identify which of its members has a current or historical financial interest in the offsets industry. Because the Draft Report contains extensive proposals that appear designed to benefit specific companies — including those that have offset projects in development or regulatory review — the public has a right to know about the financial interests of Task Force members. Clarity on these issues is particularly important to my first comment because a financially conflicted advisory body has no business providing “independent” program review.

¹ Available at: <https://ww2.arb.ca.gov/our-work/programs/compliance-offset-program/compliance-offset-protocol-task-force>.

² California Health & Safety Code § 38591.2(b)(2)(B).

1. Task Force Scope

The Draft Report make several broad, conclusory findings about the historical performance of California's offsets program without any evidentiary basis and despite the financial self-interest of many of the Task Force's members. For example, the introductory chapter identifies the report's first "Major conclusion" as follows:

" With the dual benefits of generating GHG reductions in uncapped sectors and promoting environmental, social and economic co-benefits, the offset program has been a success story by almost all measures." (Page 13)

The Draft Report goes on to assert, without citing any evidence or analysis, that the existing offsets program has achieved all applicable statutory requirements:

" California offsets have proven to be reliable sources of real, additional, quantifiable, permanent, verifiable and enforceable GHG emission reductions." (Page 18)

This conclusory language is all the more striking because the Task Force was not constituted to evaluate the historical performance of the offsets program and has not engaged in any public efforts to collect financially disinterested input on this question. In Resolution 20-5,³ the Air Resources Board appointed Task Force members and established the Task Force charter, which limits the Task Force's input to new, forward-looking protocol recommendations:

" Information provided by the Task Force members shall be advisory only and limited to providing input on potential new Compliance Offset Protocols for the 2021-2030 compliance periods identified in AB 398." (Attachment B.)

It is critical that the Task Force clarify whether it is operating pursuant to its charter in Resolution 20-5, if for no other reason than questions about the Task Force's potentially broader scope have been used as a rationale to defer independent, financially disinterested evaluations of the offsets program in the recent past. For example, the IEMAC's 2018 Annual Report noted a number of potential concerns around the U.S. Forest Offset Protocol's choice of emissions leakage factors and the adequacy of the "buffer pool" designed to protect against the risk of fires, drought, and other reversals.⁴ At a public meeting on April 15, 2019, the IEMAC discussed conducting additional

³ As of this writing, the Air Resources Board no longer offers a copy of Resolution 20-5 from its website, which the Board unanimously approved on its consent calendar as Agenda Item 20-2-3 from January 23, 2020. I respectfully request that a copy of the final Resolution be made publicly available on the Air Resources Board website.

⁴ See Chapter 4 of the 2018 IEMAC Annual Report, available at: https://calepa.ca.gov/wp-content/uploads/sites/6/2018/10/Final_2018_IEMAC_Annual_Report_10-22-2018.pdf.

review of the forest offset program. There, former Deputy CalEPA Secretary Ashley Conrad-Saydah and IEMAC Vice Chair Ann Carlson argued that the IEMAC did not need to evaluate the quality of California’s forest offsets program because the Task Force would be conducting this work instead. Based in part on those representations, the IEMAC decided not to review the U.S. Forest Offset Protocol in its 2019 Annual Report.

A financially disinterested program review is warranted because the forest offset program has produced about 80% of the 205 million offset credits now in circulation in the cap-and-trade program — a quantity worth well over a billion dollars and nearly equal in size to the total emission reductions expected from the cap-and-trade program over the next decade.⁵ I appreciate that the majority of Task Force members are engaged in various profit-making aspects of the carbon offset industry and no doubt feel strongly about its performance, but it would be inappropriate to create the appearance of a formal, independent program review when none has taken place.

Recommendation: Consistent with Resolution 20-5, the Task Force should adopt language that clarifies that its final report does not constitute an independent evaluation of the historical performance or current quality of the offsets program.

If the Task Force decides to include statements about the current or historical performance of the offsets program in its final report, then I respectfully request that you, Mr. McCabe, provide an explanation of whether your professional obligations as an attorney prevent you from serving as the chair charged with overseeing a fair and even-handed program evaluation. As you know, the State Bar of California imposes on attorneys a duty of loyalty with respect to their former clients. Unless a former client has given prior written consent, a lawyer may not represent another person “in the same or a substantially related matter in which that person’s interests are materially adverse to the interests of the former client.”⁶

In connection with your previous employment at the California Department of Justice, you represented the Air Resources Board in litigation that challenged the legality of the California offsets program, including specifically whether offsets achieve the quality and performance standards set by Assembly Bill 32 — that is, whether offsets are “real, permanent, quantifiable,

⁵ For comparison, the Board’s 2017 Scoping Plan estimated that cap-and-trade would need to generate 236 million tons of greenhouse gas emission reductions from 2021 through 2030, which is the single largest contribution to the state’s 2030 climate target. The fact that the offsets program is nearly this large (205 million tons as of October 2020) makes it a prominent, not minor, aspect of the state’s cap-and-trade program and overall climate policy.

⁶ State Bar of California, Rules of Professional Conduct (2020), Rule 1.9(a), available at: <http://www.calbar.ca.gov/Portals/0/documents/rules/Rules-of-Professional-Conduct.pdf>.

verifiable, and enforceable” as well as additional, meaning that they reflect emission reductions that are “in addition to ... any other greenhouse gas emission reductions that would otherwise occur.”⁷

Earlier this year, you were appointed to represent the public on the Task Force, and if the Task Force’s final report is going to speak to whether or not the AB 32 standards are achieved, the public has an interest in a fair evaluation. However, because you represented the Air Resources Board in litigation where it asserted that its offset protocols achieve all applicable statutory standards, any findings to the contrary from the Task Force would be materially adverse to your former client’s interests. For this reason, the public might also question whether you are capable of being impartial about historical matters that are identical to the positions your former client took in court. As a result, your membership on the Task Force — not to mention your position as chair — could constitute an ethical problem if the Task Force’s final report addresses the same matters on which you represented the Air Resources Board in litigation.

Under the Task Force’s charter to provide exclusively forward-looking recommendations, I believe that your participation would not raise any concerns under the State Bar’s Rules of Professional Conduct because recommendations about future offset protocols are not substantially the same as the matters on which you represented the Air Resources Board in court. However, I respectfully suggest that your participation on the Task Force would create an ethical problem if the Task Force’s final report assesses current or historical offset program quality.

2. Financial conflicts of interest

Based on the Task Force members’ backgrounds and several comments made at public Task Force meetings, it appears that a significant majority of the members of the Task Force — if not most members — are involved in the carbon offsets industry, including project development, project finance, and offset verification services.

Transparency around actual financial conflicts of interest is particularly important because many of the Draft Report’s recommendations concern specific business practices that the offsets industry is already engaged in and will likely accelerate if the Task Force’s recommendations are adopted by the Air Resources Board. It is clear from the Draft Report that the Task Force consulted widely among industry participants to develop a detailed roadmap for generating more offset credits. In light of extensive industry outreach, the public has a right to know the extent to which Task Force members have a financial interest in the outcomes of the Task Force’s recommendations.

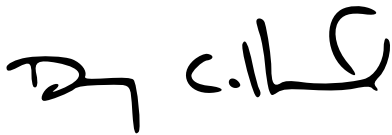
⁷ Our Children’s Earth Foundation v. State Air Resources Bd. (2015) 234 Cal.App.4th 870; California Health & Safety Code §§ 38562(d)(1), (d)(2).

Recommendation: The final Task Force report should identify whether each member has a financial interest in the carbon offsets industry — either directly or through an employer, as well as whether any such interest is current or historical.

Because the Task Force is comprised largely of members who have current or historical financial interests in the carbon offsets industry, and because the Task Force was specifically directed not to engage in a retrospective evaluation of offset quality, it is not an appropriate body to provide an independent analysis of California's carbon offsets program.

Thank you again for the opportunity to submit these comments.

Respectfully,

A handwritten signature in black ink, appearing to read 'Dann Cullenward'.

Dann Cullenward JD, PHD

Member, Independent Emissions Market Advisory Committee

Policy Director, CarbonPlan

Lecturer and Affiliate Fellow, Stanford Law School

cc: Independent Emissions Market Advisory Committee members
Lauren Sanchez, California Environmental Protection Agency
Alana Matthews, Joint Legislative Committee on Climate Change Policies