

December 15, 2014

Chair Mary Nichols  
California Air Resources Board  
1001 I Street  
Sacramento, CA 95812

Re: Definition of regulatory compliance under the ARB Mine Methane Capture Protocol

Dear Chair Nichols,

Thank you for your continued leadership and commitment to develop a cap-and-trade program in California. As you well know, this program is a central element of California's Global Warming Solutions Act (AB 32) and a well-functioning offset program is a critical cost containment mechanism for the refineries, power plants, industrial facilities, and transportation fuels that are subject to the GHG emissions cap. We, the undersigned, represent the majority of companies located in California, as well as across the nation, that develop and provide support services to offset projects under the ARB Mine Methane Capture (MMC) protocol.

We are concerned that offset supply is constrained due to a lack of clarity in whether carbon offset projects meet the regulatory compliance requirements of the regulation, as this ambiguity renders the risk of invalidation unquantifiable and unmanageable. The recent final determination in the Clean Harbors offset invalidation investigation has introduced a great deal of uncertainty to the market as to how regulatory compliance will be applied to all project types, especially those that are required to have subsequent 12-month reporting periods. There have been multiple articles written to date citing the particular risks associated with MMC projects due to the number of mine citations and violations in any given year (i.e. over 200,000 issued across the country by the Mine Safety and Health Administration in 2012).

All US mining operators are challenged to comply with hundreds of regulatory standards each year. Under these conditions, even the most dedicated and responsible mine operators will frequently be cited for violations of one standard or another. As such, the MMC protocol will be unworkable unless specific guidance is presented by ARB to inform developers, investors, verifiers, and the broader market as to what standard or criteria will be used to determine regulatory compliance.

**The uncertainty associated with these perceived risks is preventing project development, discouraging capital investment, and negatively impacting the price of MMC offsets. We recommend that ARB include specific clarifications in the MMC protocol, the regulation and ARB guidance documents to address these issues. Our recommended clarifications are the following:**

- Direct Applicability: ARB’s clarification that the regulatory compliance requirement applies specifically to an offset project and definition of what activities constitute “the project,” would greatly diminish the universe of possible compliance issues that would lead to offset invalidation. A straightforward way to do this would be to require the project operator to demonstrate that any event which caused a regulatory non-compliance would have occurred in the absence of the offset project. This could be accomplished by using an “entity approach” in combination with an “activity approach.”
  - Many projects will operate under separate legal status from the mine and will need to obtain permits independent of mine operations. The “entity approach” would be to state that a violation would only trigger an invalidation proceeding as a result of a violation issued under a permit that applies to the project, not the mine.
  - Because there are cases where the project does not operate under separate legal status from the mine, the “activity approach” could also be used by explicitly including or excluding certain activities within the definitions of offset project activity or violation, which would clarify what violations would or would not be grounds for invalidation. As a start, pages 23-32 of the MMC protocol already provide the offset project boundaries and therefore indicate what activities directly impact the offsets themselves. While the activities on pages 23-32 are not a perfect corollary, they could provide grounds to delineate more robust “activity approach” boundaries for direct applicability.
  
- Timing of a Violation: A one-day violation that is immediately cured, for example, should not result in loss of all credits from an entire 12-month reporting period. Only the portion of credits generated during the violation period should be subject to invalidation for project types which are required to have subsequent 12-month reporting periods. This will likely require a small regulatory amendment to Section 95973(b) during a 15-day change package. Section 95973(b) states that 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. The potential loss of emission reduction credits for an entire reporting period is punitive and disproportionate to the severity of many violations, particularly those that occur over discrete time periods.
  
- Defining a Violation: Any violation should be substantive and directly associated with the offset project activity (i.e. restroom cleanliness should not trigger an invalidation investigation). ARB could acknowledge this by stating in guidance that prior to an invalidation investigation, ARB will conduct an evaluation of the severity of a violation and the subsequent enforcement action that was issued.
  
- Paper Violations: Certain citations or violations can be issued for an operator’s plan failing to conform to applicable laws, even when no action that would break a law has occurred. This “paper violation” only involves paperwork, plans, and anticipated actions as opposed to actions that have already occurred (one example of a “paper violation” is a missed deadline for submission of regulatory documents). Such violations should not be

grounds for invalidation since no violating action has in fact occurred. This could be addressed in a number of ways, but a simple way could be to specify that citations or violations that are not the result of actual operation or physical activity may not be grounds for invalidation.

We believe these clarifications on regulatory compliance will provide the certainty needed by carbon offset suppliers and buyers to invest in environmentally beneficial MMC projects. Conversely, without ARB providing more guidance on regulatory compliance, we fear that unmanageable invalidation risk could severely limit financing of good projects, thereby increasing the overall costs of the cap-and trade program. With additional certainty, more projects can provide increased local and regional air pollution benefits in the sectors of most interest to ARB.

Again, thank you for the opportunity to provide our recommendations on this vitally important issue. We will follow-up with your office this week in order to set up a meeting to further discuss this with you in more detail.

Sincerely,

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