



December 12, 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 covers major sources of GHG emissions in the State, such as refineries, power plants, industrial facilities, and transportation fuels. Oxbow Mining, LLC is an interested party as well as a partner in an offset project that has been developed under the ARB Mine Methane Capture (MMC) protocol.

Unfortunately, a lack of clarity in whether carbon offset projects meet the regulatory compliance requirements of the regulation is impacting the supply of offsets to the cap and trade system. The recent final decision of the Clean Harbors 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 mine projects given their proclivity for citations and violations (i.e. over 200,000 from MSHA 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 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 are 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 that would be helpful to address these issues. Our recommended clarifications are the following:**

- Direct Applicability: If ARB could clarify that the regulatory compliance requirement applies specifically to an offset project and what activities constitute "the project," the universe of possible compliance issues is greatly diminished. 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. A line could be drawn as to what violations would or would not be grounds for invalidation. As a starting place, pages 23-32 of the protocol already show 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. While there is some logic to the notion that an ODS violation would apply to the entire reporting period, which are typically much shorter, it is not a rational approach for all project types. 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.
- Defining a Violation: Any violation that would trigger an invalidation proceeding should be substantive and associated with the project (i.e. restroom cleanliness should not trigger an invalidation investigation). ARB could acknowledge this by stating that prior to an invalidation investigation, ARB shall conduct an evaluation of the severity of a violation and the subsequent enforcement action that was issued. Also, before a citation triggers an invalidation proceeding, it should be a violation that in its final settlement is written as “reckless disregard”, and is a violation that was knowingly and willful as a result of the operator of the project that directly affects the carbon offsets. Here again, a presentation of items that would not trigger invalidation proceedings, based on violations commonly received by mines, would be very helpful for project participants.
- 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. 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 will provide more certainty for carbon offset suppliers and buyers to invest in environmentally worthwhile projects and provide more certainty on regulatory compliance. Conversely, without ARB providing more guidance on regulatory compliance, we

fear less financing will be invested in good projects, which could increase the overall costs of the cap-and trade program. With more certainty, more projects can provide local and regional air pollution benefits in the sectors of most interest to ARB. The end goal of the regulations should be to create an environment conducive to projects which eliminate or reduce the amount of GHG emissions.

Again, thank you again for the opportunity to provide you with our recommendations on this vitally important issue.

Sincerely,



FOR: Michael W. Ludlow  
President  
Oxbow Mining, LLC

cc:

Richard Corey (via email) ([rcorey@arb.ca.gov](mailto:rcorey@arb.ca.gov))

Virgil Welch (via email) ([vwelch@arb.ca.gov](mailto:vwelch@arb.ca.gov))

Rajinder Sahota (via email) ([rsahota@arb.ca.gov](mailto:rsahota@arb.ca.gov))

Greg Mayeur (via email) ([greg.mayeur@arb.ca.gov](mailto:greg.mayeur@arb.ca.gov))

Ellen M. Peter (via email) ([epeter@arb.ca.gov](mailto:epeter@arb.ca.gov))