



Pillsbury Winthrop Shaw Pittman LLP
Four Embarcadero Center, 22nd Floor | San Francisco, CA 94111-5998 | tel 415.983.1000 | fax 415.983.1200
MAILING ADDRESS: P. O. Box 2824 | San Francisco, CA 94126-2824

Margaret Rosegay
tel 415.983.1305
margaret.rosegay@pillsburylaw.com

October 17, 2014

Richard Corey
Executive Officer
California Air Resources Board
1001 I Street
Sacramento, CA 95814

Re: GHG Credit Investigation – Comments on Preliminary Determination
dated October 8, 2014

Dear Mr. Corey:

I. Introduction and Executive Summary

Clean Harbors El Dorado, LLC (“Clean Harbors”) hereby submits its comments on the California Air Resources Board’s (“ARB”) Preliminary Determination regarding the Air Resources Board Compliance Offset Investigation, Destruction of Ozone Depleting Substances, issued on October 8, 2014.

Clean Harbors believes that ARB has made significant errors of fact and law in its analysis, failed to adequately consider all relevant information, and failed to demonstrate an adequate legal basis for its preliminary determination. While Clean Harbors acknowledges that ARB is entitled to a level of discretion in the application of its own regulations, ARB has exceeded its authority under AB 32, failed to follow appropriate procedures, and acted in an arbitrary and capricious manner by issuing a preliminary determination that some of the credits should be invalidated. At issue are those credits generated during the time period February 2-3, 2012. ARB has determined that all of the remaining credits are valid.

Under section 95985(c)(2) of the Cap-and-Trade Regulation, ARB is given authority to investigate and invalidate issued compliance offset credits if the offset project activity and implementation of the offset project was not in accordance with all local, state, or national environmental and health and safety regulations during the Reporting Period for which the compliance offset credit was issued. In order to invalidate credits under this provision, it follows that ARB must meet two criteria.

First, ARB must demonstrate that a local, state, or national environmental health and safety regulation was violated. Second, ARB must demonstrate that the violation related to the offset project activity and implementation offset project. As explained below, ARB has not satisfied either of these criteria. Furthermore, ARB has exceeded the scope of its authority in conducting the investigation and failed to follow proper procedures. Therefore the preliminary determination that certain credits should be invalidated is improper and should be reversed.

As more fully described herein, ARB's reasoning for invalidating the credits is based on at least three faulty positions: (1) ARB incorrectly contends that the subject ozone depleting substances ("ODS") were RCRA hazardous wastes; (2) ARB is mistaken as to the timing of the destruction of the ODS material that resulted in credits that are subject to invalidation; and (3) ARB is incorrect that the opinions expressed in an EPA inspection report are conclusive evidence that a violation of law has occurred. In addition, ARB failed to conduct its investigation in accordance with long-established principles of administrative law, and has acted outside its legislative mandate.

We urge ARB to reconsider its preliminary decision and issue a final determination validating all of the credits. This outcome is both legally compelled in the circumstances and necessary to avoid significant uncertainty and associated disruption in the carbon credit market. We cannot identify any legal requirement or legitimate policy consideration that is achieved by invalidation of the credits as contemplated by ARB.

II. Background

A. The Facility

The Clean Harbors El Dorado, LLC incineration facility, located in El Dorado, Arkansas ("Facility"), has been permitted under the Resource Conservation and Recovery Act ("RCRA") since 1980, and has been destroying ODS pursuant to RCRA and the Montreal Protocol for over 20 years. The Facility has never been subject to an enforcement action related to these services. Clean Harbors is one of only a few facilities that are licensed to destroy ODS and is proud of its role in implementing the Montreal Protocol. The Facility began destroying ODS as part of offset projects under the California Cap-and-Trade program in February 2010.

The Facility consists of an incineration system with two rotary kilns and a shared secondary combustion chamber. Gases from the secondary combustion chamber are directed to a combination wet-process and dry-process air pollution control system. All processes at the Facility are permitted and approved by the Arkansas Department

of Environmental Quality (“ADEQ”) under Title V of the federal Clean Air Act (“CAA”) and RCRA Part B, relating to hazardous waste management.

Upon receipt at the Facility, all ODS is directly injected into the incinerator system where the ODS is destroyed at very high temperatures. Acid gases generated from the destruction of ODS compounds exit the incineration system and are removed from the gas stream in the air pollution control wet scrubbing systems as a liquid. The acid gas removal efficiency of the system has been demonstrated through two cycles of Maximum Achievable Control Technology compliance testing.¹ In order to satisfy this requirement, the Facility utilizes a three-stage wet process scrubbing system combined with lime neutralization, which converts the acid gases into a salt solution. The salt solution generated in the wet process is sent to the brine processing unit for further processing. Operation of the brine processing unit generates byproducts, including a calcium chloride brine byproduct (“byproduct”). A process flow diagram of the Brine Recovery Facility is provided in Attachment 1.

The flow diagram has been annotated to show the estimated period of time it takes the salt solution (i.e., the blowdown from the wet scrubbing system) to move through the process. Total processing time is a minimum of four and a half (4.5) days, from introduction of feed to the South Clarifier Tank (Tank 563A) to discharge of finished brine into the collection tank (Frac 4 or Tank 633). The significance of this “transit time” is discussed below. For more than two decades, this byproduct was recycled as a commercial chemical product, pursuant to a recycling exemption approved by ADEQ. End-users of the byproduct included the oil and gas exploration and development industry. As indicated on Attachment 1 and as ARB is aware, the product is now sent to a landfill for disposal.

As a threshold matter, ARB has made two critical factual/regulatory errors in its preliminary determination, both of which go to the heart of its decision. First, ARB contends that R-11 (CFC-11) and R-12 (CFC-12) are listed hazardous wastes (U121 and U075, respectively). ARB goes on to conclude that waste derived from the treatment of such listed hazardous wastes (presumably the brine byproduct) continues to carry the listings, is considered hazardous waste, and is required to be handled appropriately as such. This description, and the conclusions that flow from it, are inaccurate.

¹ Per 40 C.F.R. § 63.1207.

Second, ARB has wrongly assumed that the brine shipments that occurred on February 2-3, 2012 were derived from the destruction of ODS from two offset projects. Based on a review of its records, Clean Harbors has determined that both of those offset projects were initiated outside this two-day window and, further, that the brine associated with those two projects would not have been produced until after February 3, 2012. The significance of these facts is that the brine would have been directed to disposal rather than sale and reuse.

Each of these issues is discussed below.

1. Spent refrigerants (ODS) are not RCRA hazardous wastes

The incinerator at El Dorado is authorized under its Title V permit to burn wastes that are not subject to regulation under RCRA. The fact that the incinerator has a RCRA Part B permit for the destruction of hazardous waste does not mean that all wastes introduced into the unit are regulated under RCRA. ARB's preliminary determination incorrectly describes the ozone depleting substances destroyed under the ARB protocol as listed RCRA hazardous wastes U121 (CFC-11) and U075 (CFC-12). This is not correct.

These listed waste codes apply only to discarded commercial chemical products that have not been used or that were off-specification when manufactured (and hence not useable). The U listings do not apply to chemicals – such as the refrigerants in question – which have been used for their intended purpose and become “spent” as a consequence of such use. U.S. EPA's Office of Solid Waste has issued guidance, both nationally and to the California Department of Toxic Substances Control (“DTSC”) in particular, confirming that spent refrigerants are not considered listed wastes under RCRA, and are regulated under RCRA only if they exhibit a characteristic of hazardous waste as a result of contamination (which EPA believes would be atypical). A copy of EPA's July 28, 1989 Federal Register Notice clarifying the applicability of RCRA subtitle C regulations to CFC refrigerants (54 Fed. Reg. 31335) is provided in Attachment 2. A copy of EPA's August 2, 1989 guidance letter to DTSC is provided in Attachment 3.

The law in this regard is clear and has not changed. The shipments of ODS that were destroyed at Clean Harbors El Dorado incineration facility were not characteristically hazardous, and EPA never took the position that these materials were RCRA regulated wastes, characteristically or otherwise. These materials were shipped to the Facility on a Bill of Lading rather than on a hazardous waste manifest, and although they were destroyed in a RCRA permitted incinerator, they were never characterized or regulated as RCRA hazardous waste.

Consequently, the fundamental factual premise for ARB's preliminary determination — that the ODS were listed hazardous wastes — is simply incorrect. Irrespective of any other consideration, there can be no violation of RCRA, and hence no basis for invalidation of any of the credits, since the ODS at issue were not RCRA hazardous wastes in the first instance.

ARB goes on to state that because the ODS material is listed waste, any waste derived from the treatment of such listed hazardous waste continues to carry the applicable waste codes, and must be managed as a hazardous waste. ARB indicates that it has come to this conclusion based on discussions with U.S. EPA and DTSC. While ARB's restatement of the so-called "derived from" rule is generally correct, ARB's conclusion is nevertheless incorrect because the ODS were not listed wastes to begin with. Thus, the "derived from" rule has no application in the circumstances.

ARB's faulty analysis exemplifies the harm that can result when ARB staff seek to make complex regulatory determinations outside their areas of expertise, based on an incomplete understanding of applicable facts and law. Clean Harbors has no way of knowing what questions were posed to EPA or DTSC staff as part of ARB's investigation, and we can only conclude that ARB staff posed the wrong questions to those agencies, interviewed agency personnel who were not knowledgeable about the intricacies of the listings or familiar with relevant EPA guidance, or ARB staff simply misunderstood what they were being told (perhaps all of the above). In the face of EPA's Federal Register notice and its explicit guidance to DTSC that spent refrigerants are not listed hazardous wastes, ARB's assertion that it "confirmed the hazardous waste listing status of R-11 and R-12 through discussions with US EPA and the California Department of Toxic Substances Control" is not persuasive. EPA's approval of trans-boundary imports of spent refrigerants from Canada into the United States for destruction at El Dorado as nonhazardous wastes is conclusive evidence of ARB's erroneous determination in this regard.

2. Invalidation Window

Without much discussion, explanation or analysis, ARB appears to be basing its invalidation of the subject credits upon a two-day window when Clean Harbors received an inspection report from U.S. EPA questioning the validity of the brine byproduct recycling program (February 2, 2012), and Clean Harbors' voluntary discontinuance of that program the following day (February 3, 2012) ("Invalidation Window"). Even if one were to take the position that all destruction events occurring in the window of time between receipt of the EPA Inspection Report and the last shipment of brine were subject to invalidation (a position that Clean Harbors disputes), ARB incorrectly identified the two destruction projects as falling within the

Invalidation Window. Clean Harbors maintains very detailed records confirming the date and time particular shipments of ODS are introduced into the incinerator for destruction (this information is used by offset project verifiers to verify the amount and legitimacy of the credits). A review of these records and a more thorough analysis of the timing associated with these two offset projects reveals ARB's error.

On February 2, 2012, EPA Region 6 provided the Facility's Compliance Manager with the inspection report from the November 2011 inspection. The report was sent by email, was delivered to Clean Harbors at 4:13 p.m. (Central Time) and was reviewed by the Compliance Manager at 5:28 p.m. (Central Time). The last brine shipment was at 4:05 p.m. on February 3, 2012. The credits that are subject to invalidation under ARB's preliminary determination were associated with two separate offset projects. In the case of one of these projects, CAOD0006-C, the isotainer containing the ODS was connected to the incinerator at 7:00 p.m. on February 3, 2012, several hours after the last brine shipment left the Facility. Accordingly, even under ARB's own analysis, the entire project CAOD0006-C fell outside the Invalidation Window. Similarly, Project CAOD0018-A began at 6:00 a.m. on January 31, 2012, two days before the inspection report was received by the Facility.

Although it is not entirely clear, ARB appears to draw a nexus between the destruction of the subject ODS material and resulting residuals being present in the brine byproduct during the Invalidation Window. This, however, is not the case. In light of the timeline above, the earliest time and date that brine resulting from the CAOD0006-C destruction event could have appeared in the collection tank (Frac 4) would have been at 7:00 a.m. on February 8, 2012, assuming a 4.5 day transit time through the brine processing unit. In the case of the second project, CAOD0018-A, the isotainer was connected to the incinerator at 6:00 a.m. on January 31, 2012 and disconnected on February 3, 2012 at 3:00 p.m. Thus, the earliest time and date that brine resulting from that destruction event could have appeared in Frac 4 would have been 6 p.m. on February 4, 2012.

Thus, in both cases, brine associated with these two offset projects would not have been included in the brine shipments that departed the facility on February 2, 2012 (at 9:43 p.m.) and on February 3, 2012 (at 4:05 p.m.). In both cases, these brines would have been shipped from the facility after Clean Harbors voluntarily suspended its product sales and would have been sent to a landfill for disposal. Moreover, the entire CAOD0006-C destruction event and most of the CAOD0018-A destruction event occurred outside the Invalidation Window. Accordingly, there is no basis for invalidating the credits generated from either of these destruction events. ARB's flawed logic is not without consequence, as it adversely impacts the end purchasers who purchased credits on these calendar dates.

B. EPA Inspection Report

As discussed above, ARB appears to be basing its invalidation of the subject credits on Clean Harbors' actions between the date it received the EPA inspection report questioning the validity of the brine byproduct recycling program, and Clean Harbors' voluntary discontinuance of that program. Although Clean Harbors is left guessing as to ARB's exact rationale, it appears that ARB considers the inspection report to be conclusive evidence of a violation and Clean Harbors' discontinuance of the program to be an admission of a violation. Neither of these assumptions is correct, either factually or legally.

An inspection report is nothing more than a summary of observations and alleged or potential violations identified by an inspector – such a report cannot be the sole basis to establish that a violation has occurred. Similarly, Clean Harbors' voluntary discontinuance of the program, even before the parties initiated negotiations to reach a settlement of the dispute, cannot be used as an admission. Again, Clean Harbors is left questioning the precise rationale used by ARB, but it appears that ARB is saying that credits derived from destruction events that occurred after receipt of the inspection report, and before the last shipment of brine byproduct, should be invalidated.

Apart from the explanations provided above regarding the nonhazardous classification of the ODS, and the timing of the ODS destruction projects and associated brine shipments, the inspection report by itself cannot be used to establish a violation. Neither the inspection report, nor the correspondence accompanying the report, directed Clean Harbors to take any action with regard to the brine byproduct. In fact, the email from EPA accompanying the report states "Be advised that EPA will communicate with you regarding any concerns at a later date." EPA did not specify a timeframe for these later communications or elaborate on what its "concerns" might be.

EPA's e-mail to Clean Harbors must also be viewed against the backdrop of the Facility's operating history. Since at least 1996, ADEQ has expressly given its approval of the recycling of byproduct as a commercial chemical product. Accordingly, both the byproduct itself and the unit that generated the byproduct were considered by ADEQ and the Facility to be exempt from hazardous waste regulations. ADEQ most recently reaffirmed its endorsement of the byproduct recycling program when Clean Harbors acquired the El Dorado Facility in 2006.

It is also relevant that EPA was aware for years that Clean Harbors, as well as the prior owner of the Facility, was recycling the brine byproduct and never took any

action to enjoin that activity. Routine inspections of the Facility were conducted by EPA in 2009 and again in November 2011, before Clean Harbors received EPA's findings from the 2009 inspection. At the completion of both inspections, an exit interview was held where potential issues, including but not limited to management of brine, were discussed with Facility staff. Those discussions did not result in an order or recommendation to discontinue the byproduct recycling program.

After reviewing the inspection report that it eventually received on February 2, 2012, the Facility Compliance Manager circulated the report to Facility management, and a conference call was scheduled to discuss the report on February 3, 2012. Because Clean Harbors believed (and continues to believe) that EPA's position regarding the brine byproduct was incorrect, the Company contemplated continuing to sell the brine as a recycled byproduct until EPA took some form of formal enforcement action, such as issuance of a Notice of Violation or a Cease and Desist Order. Ultimately, however, Clean Harbors decided to temporarily cease brine sales on a voluntary basis in order to allow for good faith negotiation with EPA regarding this disagreement. As noted above, the last load of brine byproduct was shipped from the facility at 4:05 p.m. on February 3, 2012, in partial fulfillment of an existing purchase order. Remaining shipments associated with the purchase order scheduled for future dates were unfulfilled, and the brines were diverted to the landfill for disposal.

C. **The CAFO**

In the months following Clean Harbors' receipt of EPA's inspection report, the parties engaged in a series of discussions regarding the management of the brine byproduct. In preparation for these discussions, Clean Harbors met with representatives of ADEQ, and the Arkansas Governor's Office, who reaffirmed their position that the recycling of the brine byproduct was lawful. ARB's preliminary determination states that ADEQ did not disagree with EPA's report. ARB's basis for making this statement is not specified and, in any event, is inaccurate.

Although Clean Harbors disagreed with EPA's position regarding the byproduct recycling, Clean Harbors ultimately wished to avoid the expense and uncertainty of litigation, and therefore agreed to resolve the matter through

settlement.² Accordingly, on April 25, 2014, Clean Harbors entered into a Consent Agreement and Final Order (“CAFO”) with EPA regarding the RCRA violations alleged by EPA to have occurred at the Facility. In the CAFO, Clean Harbors agreed to pay a monetary penalty, and also agreed to obtain a RCRA permit for the brine unit.³

III. ARB’s Preliminary Determination Does Not Comport with Relevant Decision Criteria under the Cap-and-Trade Regulation

A. In Order to Invalidate Credits, ARB Must Demonstrate that the Offset Project Was Not Conducted in Accordance with Applicable Law

As discussed above, it appears that ARB has determined that the issuance of an inspection report amounts to conclusive evidence that a violation of law occurred. But even if ARB points to the CAFO to support its claim that a violation occurred, ARB’s position fails. In order to invalidate a GHG offset, ARB must demonstrate that the “offset project activity and implementation of the offset project was not in accordance with all local, state, or national environmental and health and safety regulations during the Reporting Period for which the ARB offset credit was issued.” 17 C.C.R. § 95985(c)(2).

For ARB to support its determination that an offset project was not in accordance with applicable environmental and health and safety laws, ARB must rely on one or more of the following: (i) a final determination by a government agency with authority to administer the statute in question in the particular jurisdiction (here, RCRA in the state of Arkansas); (ii) a final determination by a court of competent jurisdiction that the offset project violated an applicable statute or regulation; or (iii) an admission by the offset project operator or the generator of the offsets that the offset project was out of compliance with an applicable statute or regulation. As further explained herein, ARB cannot rely on the CAFO to support its determination of violation. According to the Federal and California Rules of Evidence, a settlement

² Clean Harbors disagreed with nearly every aspect of EPA’s position including, but not limited to, the factual basis for its findings, the gravity of the alleged violations, the duration of the alleged violations, and EPA’s jurisdiction over a process that had been approved by ADEQ.

³ Prior to entering into the CAFO, the brine unit was operating pursuant to ADEQ’s approval and was not classified as a hazardous waste unit in the Facility’s RCRA permit. Because of EPA’s position regarding the byproduct, EPA alleged that the brine unit should be a RCRA permitted unit.

cannot be used as a basis to find liability.⁴ It is of no consequence that the settlement is with the United States government rather than a private party.⁵ In addition, ARB is prohibited from using the CAFO even though it was not a party to that settlement.⁶

1. The CAFO is a Settlement Document and is not a Finding of Liability

The CAFO's terms make it clear that it is a settlement document, and is not a finding of liability.⁷ As discussed between Clean Harbors and ARB, the alleged violations in the CAFO related primarily to the management of a commercial byproduct produced at the Facility. ADEQ, which has final authorization from the U.S. EPA to implement and enforce RCRA in Arkansas, was aware of and had approved Clean Harbors' sale of the byproduct for commercial use, and this practice had persisted for many years. EPA retains oversight authority in RCRA-authorized states and exercised this authority when it conducted inspections at the El Dorado Facility in 2009 and 2011. These inspections resulted in allegations by EPA that the brine processing unit required a RCRA permit and that application of the calcium chloride byproduct to land violated land disposal restrictions. Significantly, EPA's concern was not predicated on the destruction of ODS in the incinerator and had nothing to do with the offset projects. Clean Harbors (as well as ADEQ) vigorously disputed those allegations, and the dispute was ultimately resolved by settlement, as documented by the CAFO.

⁴ Fed. Rules Evid. § 408; Cal. Evid. Code § 1152.

⁵ See, e.g., *Iorio v. Allianz Life Ins. Co. of N. Am.*, 2008 U.S. Dist. LEXIS 118344, *13 (S.D. Cal. 2008) (granting motion to exclude evidence because Rule 408 “applies to civil consent decrees executed with government agencies.”); *Ga.-Pac. Corp. v. Cal. Coastal Comm’n*, 132 Cal. App. 3d 678, 693 (Cal. Ct. App. 1982) (applying Cal. Evid. Code § 1152 to statements made during administrative proceedings with the California Coastal Commission).

⁶ *Green v. Baca*, 226 F.R.D. 624, 640 (C.D. Cal. 2005) (explaining that Rule 408 “extends to evidence of completed settlements in other cases where the evidence is offered against the compromiser”); *Lennar Mare Island, LLC v. Steadfast Ins. Co.*, 2014 U.S. Dist. LEXIS 67163, *11–12 (E.D. Cal. 2014) (holding that “evidence of either settlement negotiations or terms is not admissible to prove liability...” and that Rule 408 precludes “evidence of settlements of other claims when the evidence is offered against the compromiser”).

⁷ CAFO § IV (“Terms of Settlement”).

2. *The CAFO is a Settlement Document and is not an Admission of Liability*

The CAFO also expressly states that it is not an admission of liability by Clean Harbors, and it is in no way a conclusive determination or finding that any violation occurred. When entering into the CAFO, Clean Harbors specifically did not admit or deny any of the factual allegations contained therein.⁸ The parties expressly state that “the Respondent neither admits nor denies the specific factual allegations contained in this CAFO”. A settlement document with such qualification language cannot be used as an admission of liability.⁹

These evidence rules are in place because a settlement is often motivated by a number of considerations other than culpability.¹⁰ Because of the policy justifications involved, ARB has already recognized that these evidentiary principles should apply in an administrative setting.¹¹ In contradiction to these well settled principles of California and Federal law, ARB has impermissibly relied on the CAFO as evidence that the Facility was in violation of RCRA.

⁸ CAFO § I.3 (“the Respondent neither admits nor denies the specific factual allegations contained in this CAFO.”).

⁹ See, e.g., *Acme Fill Corp. v. Althin CD Med., Inc.*, 1995 U.S. Dist. LEXIS 22197, *11 (N.D. Cal. 1995) (“As a practical matter, a settlement ordinarily would not and does not contain an admission of liability.”); *Kramas v. Sec. Gas & Oil, Inc.*, 672 F.2d 766, 772 (9th Cir. 1982) (denying admission of a consent decree that “contained a recitation that it did not constitute evidence of wrongdoing.”).

¹⁰ See, e.g., *Isaacson v. Cal. Ins. Guarantee Assn.*, 44 Cal. 3d 775, 794 n.14 (Cal. 1988) (“To hold that the settlement created a presumption that plaintiffs were liable for malpractice would also run counter to other legal and public policy considerations. Such a treatment would disregard the general rule that a settlement does not act as an admission of liability ... It would conflict also with Evidence Code section 1152, subdivision (a), which provides that evidence of settlement or compromise is inadmissible to prove the liability of the settling party. A party may reasonably wish to settle a claim even though he believes he is not liable; indeed, a major advantage of settling is that one may terminate a lawsuit without admitting liability.”).

¹¹ See, e.g., 17 C.C.R. § 60055.24(f) (outlining procedures for ARB administrative hearings to review executive officer decisions and stating that “settlement offers or offers of compromise shall also not be made part of the record of the proceedings.”); 17 C.C.R. § 60065.25(f) (outlining procedures for ARB administrative hearings to review complaints and stating that “settlement discussions or offers of compromise shall also not be made part of the record of the proceedings.”). See also *Wright v. Gates*, 2011 U.S. Dist. LEXIS 7508, *11 (E.D. Cal. 2011) (reasoning that settlement communications between the parties and an administrative law judge are “inadmissible to prove liability”).

3. *ARB Does Not Have Authority in this Case to Determine that the Offset Project Was Not Conducted in Accordance with Applicable Law*

In addition to its impermissible reliance on the CAFO as evidence that the offset project was not conducted in accordance with applicable law, ARB has also impermissibly decided for itself that the offset project was not conducted in accordance with applicable law.

Throughout the investigation process, ARB has attempted to gather information to support this determination, through the issuance of an extremely broad Subpoena Duces Tecum, as well as multiple conversations with EPA staff. Clean Harbors has clearly articulated its position that ARB staff lack the authority or expertise to make a determination that the Facility was not in compliance with RCRA. When Clean Harbors expressed these concerns to ARB, ARB indicated that it did not intend to determine independently whether a violation of RCRA occurred, but instead was attempting to determine whether any third parties had information about Clean Harbors' disagreement with EPA and whether they may have used this information to "manipulate" the carbon credit market.¹²

Despite these assurances, ARB's Preliminary Determination states that "the ARB Executive Officer has determined the Clean Harbors Facility was not operating 'in accordance with all local, state or national environmental and health and safety regulations' from the time the Facility received Report 2 on February 2, 2012 and the time the final tanker filled with brine left the Clean Harbors Facility on February 3, 2012." In making this statement, ARB has done exactly what it assured Clean Harbors it would not do, i.e., make an independent determination of whether the Facility was in compliance with applicable law. Furthermore, ARB has come to its own conclusion regarding the duration of this supposed non-compliance, and used this conclusion as a basis for invalidating a portion of the credits under investigation.

ARB's unilateral determination of non-compliance has no support in the law. Nothing in AB 32 or any other California law provides ARB with authority to make its own independent determination as to Clean Harbors' compliance with RCRA or any other

¹² In an August 1, 2014 telephone conversation with ARB's legal counsel in this matter, Clean Harbors was assured that ARB had no intention of second-guessing or trying to determine independently whether a RCRA violation had occurred. Yet this is exactly what has transpired.

law that ARB does not administer. Aside from the fact that ARB staff lack familiarity and experience with the highly complex federal hazardous waste laws and regulations, ARB has no legal authority to implement any aspect of RCRA in California or elsewhere. The lack of such authority means that the apparent attempt by ARB to do so is *ultra vires*, and void. *See, Water Replenishment Dist. of S. Cal. v. Cerritos*, 202 Cal. App. 4th 1063, 1072 (Cal. Ct. App. 2012) (an “agency that exceeds the scope of its statutory authority acts *ultra vires* and the act is void”).

During the course of its investigation, ARB also asked to review communications between EPA and Clean Harbors regarding the CAFO.¹³ It is axiomatic that a settlement agreement and any related communications may not be relied upon as a basis for finding that a violation occurred. *See, e.g.*, Fed. Rules Evid. § 408; Cal. Evid. Code, § 1152. ARB’s own regulations acknowledge this basic legal principle. *See*, 17 C.C.R. § 60055.24(f); 17 C.C.R. § 60065.25(f). It is also highly inappropriate for ARB staff to inquire into the substance of settlement negotiations that were conducted on a confidential basis between Clean Harbors and EPA. The fact that settlement was ultimately reached does not negate the confidentiality of those negotiations, or entitle ARB to probe into the details of those discussions.

The substantive disagreement between ADEQ and EPA as to the validity of EPA’s allegations only underscores that ARB is not technically qualified to make an independent determination regarding the Facility’s RCRA compliance status. Clearly, if the two agencies that have authority to make RCRA compliance determinations for facilities in Arkansas cannot see eye-to-eye on the complex regulatory issues relating to recycling exemptions under RCRA, the notion that ARB has the ability to resolve this dispute is not plausible. At a minimum, ARB’s intrusion into a domain that belongs to other agencies violates well-established jurisdictional boundaries and runs counter to basic principles of administrative comity and deference.

B. Credits May Be Invalidated Only for Noncompliance with Regulatory Requirements Directly Applicable to an Offset Project

Even if ARB incorrectly concludes, based on the CAFO or its own investigation, that Clean Harbors violated RCRA, it still must demonstrate that the violation was directly applicable to the offset project. It has failed to do so in this case. ARB’s basis for

¹³ ARB’s legal counsel also assured Clean Harbors during the August 1, 2014 telephone conversation that ARB was not seeking any information that Clean Harbors considered confidential, including the content of confidential settlement negotiations with EPA.

invalidating the credits is its determination that Clean Harbors' ODS offset projects were not in compliance with RCRA when the offsets in question were created. Based on ARB's regulatory provisions, there can be no doubt that ARB's investigation must be limited to the compliance status of the offset project, i.e., the incinerator that is used to destroy ODS and that generates the offset credits. This is the only equipment at the Facility that removes greenhouse gasses from the atmosphere. No other equipment or activity at the Facility is related to or impacts greenhouse gas reductions achieved by destruction of ODS in the incinerator. Accordingly, all other equipment and activities at the Facility, including the brine processing unit and the brine byproduct that is generated by the unit, are outside the offset project boundary, and are not relevant to the compliance status of the offset project.

The administrative history of Section 95985(c)(2) confirms ARB's intent to invalidate credits only for noncompliance with regulations directly applicable to an offset project. In the Final Statement of Reasons for the adoption of Section 95985(c)(2), ARB responded to a number of comments arguing that the text was overly broad and could be interpreted to mean that credits could be invalidated for noncompliance with regulations immaterial to an offset project. ARB disagreed, and responded as follows:

We ... believe that the text is clear in its intent. We do not want to issue offset credits for projects that are not in conformance with applicable regulations. We will continue to coordinate with stakeholders to identify further refinements and criteria as part of a future rulemaking.¹⁴ (emphasis added)

If there were any remaining doubt, it was resolved by recent amendments to the Cap-and-Trade regulations themselves which provide that an offset project must "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." 17 C.C.R. § 95973(b) (effective July 1, 2014) (emphasis added).

It is thus clear that offset credits may be invalidated only when an *offset project* is not in conformance with *directly applicable* regulations. The term "offset project" is defined as "all equipment, materials, items, or actions that are directly related to or have an impact upon GHG reductions, project emissions, or GHG removal

¹⁴ California's Cap-and-Trade Program Final Statement of Reasons (Oct. 2011) ("FSOR"), <http://www.arb.ca.gov/regact/2010/capandtrade10/fsor.pdf>, at 2256–2259.

enhancements within the offset project boundary.”¹⁵ As described above, the “offset project” at issue here is the destruction of ODS in the rotary kiln incineration system at the Facility. The brine system and byproduct recycling are not “directly related to” nor do they “have an impact on” ODS destruction and the resulting GHG emission reductions that are credited to customers of Clean Harbors as GHG offsets. The compliance status of other parts of the Facility is not relevant to the validity of credits from the offset project.

This interpretation of the regulations is also consistent with the ODS Protocol which states that:

Offset projects are not eligible to receive ARB or registry offset credits for GHG reductions that occur as the result of collection or destruction activities that are not in compliance with regulatory requirements. The regulatory compliance requirement extends to the operation of destruction facilities where the ODS is destroyed.

(Emphasis added.) There is no basis either in the language of the regulation or the Protocol which supports ARB’s *de novo* assertion that these provisions must be interpreted “to require that both the project activities associated with the destruction of ODS as well as other activities at the facility in question must be in ‘accordance with all local, state, or national environmental and health and safety regulations’.” (Emphasis added.) We also strongly disagree that there is any legitimate basis for ARB unilaterally to broaden the definition of “destruction facility” to include equipment that is unrelated to the destruction of ODS. At a very minimum, ARB must implement any such changes through formal notice and comment rulemaking, not through an administrative investigation.

In addition, no other offset or credit programs require compliance with other laws that apply to a facility in a broad sense and that are unrelated to an offset project.¹⁶ To the

¹⁵ 17 C.C.R. § 95802(a)(175) (emphasis added).

¹⁶ For example, facilities participating in the Regional Greenhouse Gas Initiative must demonstrate compliance with “applicable federal, state, and/or local requirements ... that may be required to implement and operate the facilities or equipment *related to an offset project*.” See Offset Handbook for RGGI, *available at* http://www.rggi.org/docs/Offset_Handbook_Version_1_0_May_2010.pdf. Similarly, to participate in the Clean Air Act’s market-based program for controlling acid rain, the statute requires compliance with all provisions in the CAA itself, but does not refer to other environmental

(... continued)

extent Sections 95973 and 95985 require compliance with environmental laws applicable to a facility where offset credits are created, those provisions should be interpreted in a narrow manner, relative to the purpose of the cap and trade program. In other words, they should be interpreted to apply only to the offset project itself, and not to other, unrelated activities at a facility. To say the least, it would be ironic for ARB to invalidate credits because some unrelated area of a facility was alleged to be out of compliance with environmental regulations when ARB did not require such sweeping compliance obligations at the time it originally issued the offsets.

Clean Harbors acknowledges that ARB is directed by law to determine – and therefore may appropriately investigate – whether noncompliance with environmental and health and safety laws and regulations have a direct nexus with the offset project, such that a potential basis for invalidation of the credits may exist. In this case, we understand that ARB’s sole basis for initiating the investigation is alleged violations of RCRA, as set forth in an April 25, 2014 CAFO between EPA Region 6 and Clean Harbors. In addition to the fact that the CAFO does not contain any adjudicated resolution of allegations made by EPA, it is clear, based on the four corners of that document, that the alleged RCRA violations are wholly unrelated to the incinerator and its destruction of ODS. As has been discussed, the alleged violations related to the management of a commercial byproduct produced as a result of non-ODS incineration activities at the Facility and to the compliance status of certain hazardous waste storage tanks that were not used for storage of ODS. The CAFO does not contain a single allegation relating to the operation or compliance status of the incinerator. Since the only allegations of noncompliance pertain to equipment and activities that are outside the boundaries of the offset project, ARB should have been able to conclude solely on the basis of the CAFO that the offset credits issued for ODS destruction activities at the Facility are valid.

C. ARB Does Not Have Authority to Require Compliance with Laws Beyond Its Jurisdiction

(... continued)

regulations. *See* 42 U.S.C. §§ 7651, *et seq.* In California’s air districts, New Source Review includes emissions offsets rules, and compliance with “all applicable state and federal *emission limitations and standards*” is required, but there is no mention of environmental laws unrelated to emissions (such as RCRA). *See, e.g.,* BAAQMD Rule 2-2-307.

The Commerce Clause of the U.S. Constitution prohibits states from imposing extraterritorial regulation of commercial activities in other states.¹⁷ ARB's requirement that offset projects comply with all federal, state and local environmental and health and safety laws, or suffer invalidation of the resulting offsets, we believe, is such a proscribed extraterritorial regulation, and therefore is unenforceable.

Therefore, we contend that ARB is not authorized to require compliance with laws that it does not administer, and in states other than California. AB 32, which provides the statutory basis for the Cap-and-Trade regulations, directed ARB to "adopt rules ... to achieve the maximum technologically feasible and cost-effective greenhouse gas emissions reductions ..."¹⁸ Similarly, the legislature authorized ARB to establish "a system of market-based declining annual aggregate emission limits for sources or categories of sources that emit greenhouse gas emissions..."¹⁹ Through Section 95985(c)(2), ARB is attempting to regulate aspects of facilities and offset projects that are not germane to the reduction of greenhouse gasses. Such regulation is beyond what is contemplated by the statute. AB 32 only grants ARB authority to administer programs directly related to greenhouse gas emissions.

In determining whether an agency's regulation is improper, California courts will "consider whether the challenged provisions are consistent and not in conflict with the enabling statute" and whether they are "reasonably necessary to effectuate [the enabling statute's] purpose."²⁰ In enacting its cap-and-trade rules, ARB must reasonably interpret the legislature's mandates in AB 32.²¹ A regulation that is beyond an agency's statutory authority is *ultra vires* and void.²²

¹⁷ See, e.g., *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989) ("the Commerce Clause precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State").

¹⁸ Cal. Health & Safety Code § 38560.

¹⁹ Cal. Health & Safety Code § 38562(c).

²⁰ See *Masonite Corp. v. Cnty. of Mendocino Air Quality Mgmt. Dist.*, 42 Cal. App. 4th 436, 447 (Cal. Ct. App. 1996).

²¹ *Id.*

²² See *Turlock Irrigation Dist. v. Hetrick*, 71 Cal. App. 4th 948, 951 (Cal. Ct. App. 1999) (finding that irrigation district could not regulate natural gas where enabling statute granted authority over the provision of water and electricity). See also *Water Replenishment Dist. of S. Cal. v. Cerritos*, 202 Cal. App. 4th 1063, 1072 (Cal. Ct. App. 2012) (citing *Turlock* in stating that an "agency that exceeds the scope of its statutory authority acts *ultra vires* and the act is void").

Here, AB 32 authorized ARB to regulate greenhouse gas emissions and to create a market-based credit system for that purpose. Requiring compliance with RCRA as to aspects of facility operation that do not impact greenhouse gas emissions is not reasonably necessary to effectuate the intent of the legislature and therefore, we believe, beyond ARB's authority.

D. ARB has Denied Clean Harbors and Other Affected Parties Due Process in Failing to Conduct a Formal Adjudicatory Hearing on the Record Before Issuing a Preliminary Determination to Invalidate the GHG Credits

In issuing its preliminary determination, ARB has indicated that it has completed its administrative investigation, and has made preliminary findings available to the public. ARB has further indicated that it intends to review comments, and issue a final determination within thirty days. In California, statutorily conferred benefits are entitled to the protections of procedural due process, whether the benefits can be described as traditional property interests or something else.²³ In this case, Clean Harbors has a statutorily conferred right, subject to applicable requirements, to provide ODS destruction services to its customers for the purpose of creating credits for sale to the public under the cap-and-trade program. The public has a right to purchase those credits and a right to rely on the viability of those credits that were purchased for valuable consideration. The amount and type of process that is due is determined by considering the benefit at stake, the risk of erroneous deprivation, and the value added from further process.²⁴

Here, the interests at stake are significant — not just for Clean Harbors but for all participants in ARB's cap-and-trade program. If the credits at issue are invalidated, as indicated in ARB's preliminary determination, Clean Harbors and certain of its customers will suffer significant economic loss. Furthermore, and despite the fact that ARB is proposing to invalidate only a small portion of the credits that were being investigated, the risks of participating in ARB's cap-and-trade program as an offset project operator are now more apparent than ever. ARB's preliminary determination will only encourage Clean Harbors and other entities to seriously reconsider their involvement in the program. Ultimately, the preliminary determination, if finalized,

²³ See, e.g., *Conejo Wellness Ctr., Inc. v. Agoura Hills*, 214 Cal. App. 4th 1534, 1562 (Cal. Ct. App. 2013).

²⁴ See, e.g., *Today's Fresh Start, Inc. v. L.A. Cnty. Office of Educ.*, 57 Cal. 4th 197, 213 (Cal. 2013).

could have the serious unintended consequence of placing the entire cap-and-trade program in jeopardy.

The risk of erroneous deprivation is also high. First, there has been no adjudicated finding of any violation of RCRA by EPA or ADEQ, and ARB lacks the authority and the expertise to determine independently whether Clean Harbors violated RCRA. Any attempt to do so is *ultra vires* and void as a matter of law. Second, the recycling activity that EPA questioned is clearly unrelated to the offset projects conducted at the Facility and therefore cannot provide a basis for invalidating the credits. ARB should have promptly issued a final determination reaffirming the validity of the credits on this basis alone. To our knowledge, all comments ARB received during the investigation argued persuasively that the offset credits should not be invalidated. However, ARB's preliminary determination indicates that it has placed improper emphasis on irrelevant factors — namely, Clean Harbors' operating practices that have no bearing on the offset projects or those projects' destruction of materials constituting potential greenhouse emissions.

At minimum, due process requires that ARB provide Clean Harbors and other affected parties with a meaningful opportunity to be heard prior to making a final decision to invalidate the credits. As recently as last year, the California Supreme Court reaffirmed that “[t]he essence of due process is the requirement that a person in jeopardy of serious loss be given notice of the case against him and opportunity to meet it.” *Today's Fresh Start, Inc. v. LA. Cnty. Office of Educ.*, 57 Cal. 4th 197, 212 (Cal. 2013). ARB commonly holds hearings when comparable (and even less important) interests are at issue.²⁵ In this case, the request for comments on the preliminary determination is insufficient. A formal hearing before an impartial decision maker should be held, with clearly articulated grounds for the decision, and an opportunity for all affected parties to submit evidence and be heard.

IV. Impacts of ARB's Decision on Cap-and-Trade Program

As noted above, ARB's investigation and subsequent preliminary determination has led Clean Harbors to seriously reconsider its involvement in the cap-and-trade program. While Clean Harbors will defer to cap-and-trade experts to explain the obvious chilling effect ARB's action has had on this particular market, the actions of

²⁵ See, e.g., 17 CCR § 60040(a) (stating that hearings may be held for vehicle or engine recalls, and to consider revocations and suspensions of licenses for vehicle emissions test laboratories).

ARB have given the company great pause. Decades before the cap-and-trade program existed, Clean Harbors was doing the important work of destroying ODS material. Despite this long and unblemished record of success in an important environmental program, Clean Harbors' reputation has been unfairly maligned in ARB's process. Clean Harbors respectfully requests that ARB consider Clean Harbors' important role in the program. Because offset credits created through destruction services provided by Clean Harbors constitute a large portion of the existing offsets market (approximately 40%), the effectiveness of offsets as a cost-containment mechanism, and thus the entire cap-and-trade program, are in jeopardy. It is Clean Harbors' belief that the proposed invalidation of the credits would arbitrarily harm the purchasers of those credits through no fault of their own, and will greatly impact destruction facilities' willingness to participate in the program. It is hard to imagine the invalidation having anything other than a detrimental effect on the market.

V. Conclusion

ARB has the burden of demonstrating noncompliance under Section 95985(c)(2) by a preponderance of the evidence.²⁶ For the reasons set forth herein, ARB has not met that burden, and therefore, the findings in its preliminary determination must be reversed and all of the credits at issue must be confirmed as valid.

Very truly yours,

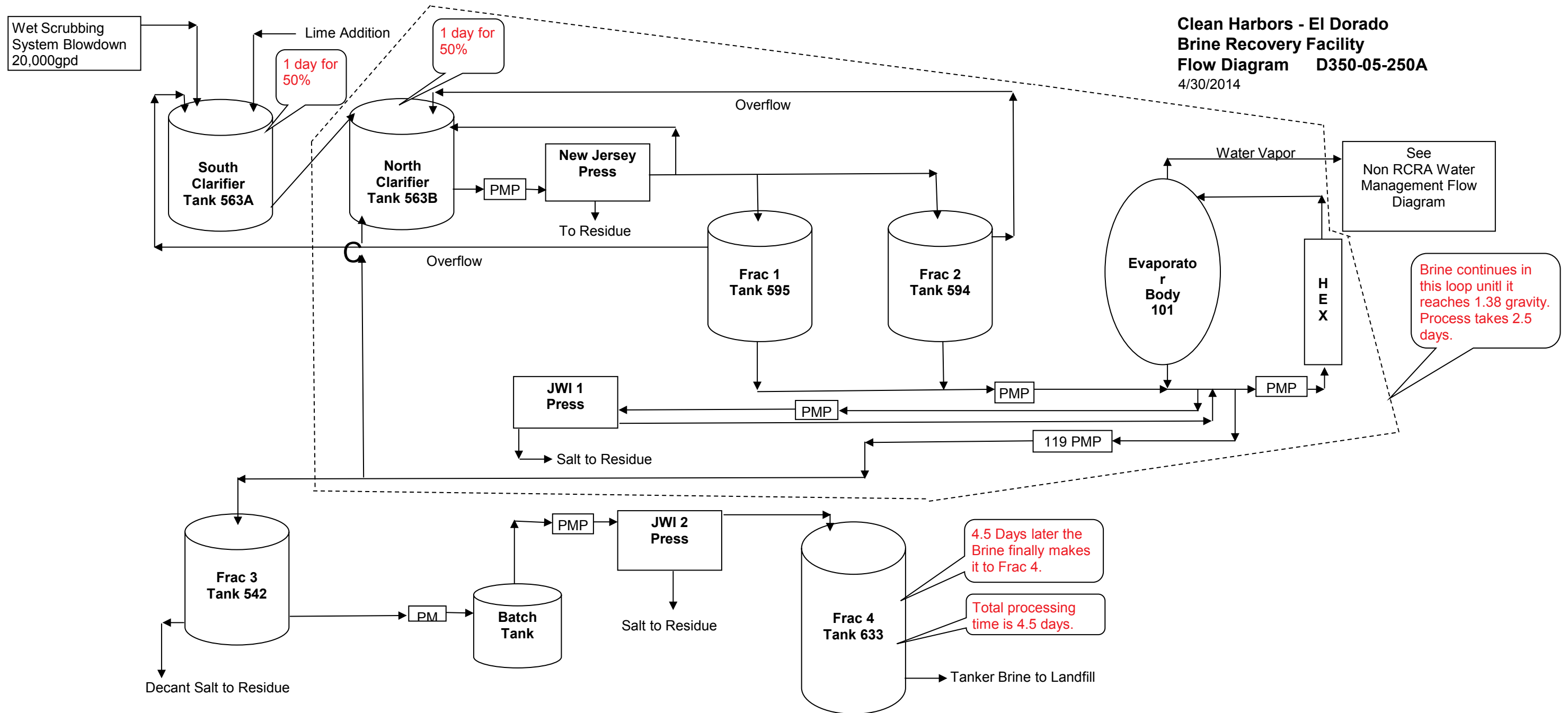


Margaret Rosegay

Attachments (3)

Cc: Michael McDonald, Esq.
Timmery Fitzpatrick, Esq.
Phillip G. Retallick

²⁶ See Cal. Civ. Proc. Code § 1094.5.



32 CFR Part 242**[DoD Directive 6010.7]****Admission Policies and Procedures for the School of Medicine, Uniformed Services University of the Health Sciences****AGENCY:** Department of Defense.**ACTION:** Final rule.

SUMMARY: This amendment makes administrative changes to 32 CFR Part 242. It also raises the age from 32 to 34 years old for a Uniformed Services University of the Health Sciences student who have served on active duty in the Armed Forces that he or she may exceed the normal age limitation (age 28) by a period equal to the time served on active duty provided he or she does not become age 34 by June 30 of the year of admission.

EFFECTIVE DATE: June 6, 1989.

FOR FURTHER INFORMATION CONTACT: Mr. Charles Mannix, Uniformed Services University of the Health Sciences, 4301 Jones Bridge Road, Bethesda, MD 20814, telephone (703) 295-3028.

List of Subjects in 32 CFR Part 242

Medical and dental schools; Military personnel.

Accordingly, 32 CFR Part 242 is amended as follows:

PART 242—[AMENDED]

1. The authority citation continues to read as follows:

Authority: 10 U.S.C. 2112.

2. Section 242.4 is amended by revising paragraph (a)(2) and amending paragraph (a)(5)(ii) by changing "5210.9" to 5200.2".

§ 242.4 Policies.

* * * * *

(a) * * *

(2) Are at least 18 years old at the time of matriculation, but have not become 28 years old as of June 30 in the year of admission. However, any student who has served on active duty in the Armed Forces may exceed the age limitation by a period equal to the time served on active duty provided that student has not become 34 years old by June 30 in the year of admission.

* * * * *

§§ 242.4, 242.5 and 242.7 [Amended]

3. Paragraphs 242.4(c), 242.5(d), and 242.7(c) are amended by changing "(Health and Environmental)" to "(Health Affairs)".

§ 242.10 [Amended]

4. Paragraph 242.10 is amended by changing "(Comptroller)" to "(Health Affairs)".

L.M. Bynum,
Alternate OSD Federal Register Liaison
Officer, Department of Defense.
July 24, 1989.

[FR Doc. 89-17612 Filed 7-27-89; 8:45 am]

BILLING CODE 3810-10-M

ENVIRONMENTAL PROTECTION AGENCY**40 CFR Part 261****[SWH-FRL-3620-3]****Hazardous Waste Management System; Identification and Listing of Hazardous Waste**

AGENCY: Environmental Protection Agency (EPA).

ACTION: Availability of data pertaining to the hazardous characteristics of CFC refrigerants and clarification of the applicability of RCRA subtitle C regulations to CFC refrigerants.

SUMMARY: EPA's Office of Air and Radiation has been undertaking efforts to encourage the recycling of chlorofluorocarbons (CFCs) used as refrigerants. In conducting these efforts, it has become evident that many people in the regulated community hold misconceptions regarding the applicability of Subtitle C of the Resource Conservation and Recovery Act (RCRA) to CFCs when used as refrigerants. The resulting confusion has often served to hinder the implementation of recycling schemes designed to mitigate the adverse impacts of CFCs on the environment, in particular, the depletion of the ozone layer. Therefore, EPA's Office of Solid Waste and Emergency Response is publishing today's Notice to clarify the applicability of RCRA Subtitle C to CFC refrigerants. In addition, today's Notice announces data which will greatly simplify the burden that the generator of any solid waste must undertake to determine whether the solid waste is hazardous by demonstrating that CFC refrigerants will not exhibit a characteristic of a hazardous waste under normal operating conditions.

EFFECTIVE DATE: July 28, 1989.

ADDRESS: The data announced in this Notice are in the administrative record identified as Docket Number F-89-CFCA-FFFFF and is located in the EPA RCRA Docket (located in Room M2427) 401 M Street SW., Washington, DC 20460. The docket is open from 9:00 am

to 4:00 pm, Monday through Friday, except for public holidays. To review docket materials, the public must make an appointment by calling (202) 475-9327. The public may make copies of the docket materials at a cost of \$.15 per page.

FOR FURTHER INFORMATION CONTACT:

For general information regarding the applicability of RCRA to CFCs or regarding the data announced in this Notice, contact Mitch Kidwell, Office of Solid Waste (OS-332), U.S. Environmental Protection Agency, 401 M Street SW., Washington, DC 20460, (202) 475-8551. For information regarding the recycling of CFC refrigerants, contact Jean Lupinacci, Office of Air and Radiation, Global Change Division (ANR-445), U.S. Environmental Protection Agency, 401 M Street SW., Washington, DC 20460, (202) 382-7750.

SUPPLEMENTARY INFORMATION:**Background**

On May 19, 1980, the Environmental Protection Agency (EPA) promulgated a final rule pursuant to section 3001 of the Resource Conservation and Recovery Act of 1976, as amended (RCRA). This rule (45 FR 33084) specifically listed 85 process wastes as hazardous wastes and approximately 400 chemicals as hazardous wastes if they are, or are intended to be, discarded. It also identified four characteristics of hazardous wastes to be used by persons handling a solid waste in determining whether that waste is a hazardous waste (see 40 CFR Part 261 Subpart C).

The list of hazardous wastes (see 40 CFR 261.31-261.33) includes certain chlorofluorocarbons (CFCs). These CFCs are listed as certain spent halogenated solvents from non-specific sources (i.e., F001 and F002, found at 40 CFR 261.31) and two CFCs are listed as commercial chemical products (i.e., dichlorodifluoromethane (CFC-12) and trichloromonofluoromethane (CFC-11), U075 and U121, respectively, found at 40 CFR 261.33(f).

Note: F001 includes all chlorofluorocarbons used in degreasing; F002 includes only limited chlorofluorocarbons, including trichlorofluoromethane.

The applicability of RCRA Subtitle C regulations to CFCs is limited to three basic scenarios: (1) Where CFCs are used as solvents and the wastes containing the CFCs meet the F001 and F002 listing descriptions, (2) where either dichlorodifluoromethane (CFC-12) or trichloromonofluoromethane (CFC-11) is an unused commercial chemical product, off-specification commercial chemical product, inner liner or

container residue, or spill residue that is (or is intended to be) discarded, or (3) where CFCs are solid wastes that exhibit a characteristic of hazardous waste. However, through efforts by EPA's Office of Air and Radiation to promote the recycling of CFC refrigerants, it has become evident that some confusion exists in the regulated community regarding the RCRA regulatory status of CFC refrigerants. Today's Notice of Data Availability will clarify this status.

Clarification of the RCRA Regulatory Status of CFCs Used as Refrigerants

By way of clarifying the regulatory status of recycled CFC refrigerants, the Agency will discuss the first two scenarios listed above, and announce data that applies to the third scenario (i.e., whether CFC refrigerants exhibit a characteristic of hazardous waste). First, the spent solvent listings found at 40 CFR 261.31 (specifically, CFCs listed under F001 and F002) apply solely to wastes containing listed solvents when they are used for their solvent properties. CFCs used as refrigerants are not typically subject to the spent solvent listings because, as refrigerants, the CFCs are not used as solvents. Second, the U-listings found at 40 CFR 261.33(f) apply to commercially pure grades of listed chemicals, technical grades, and formulations in which the listed chemical is the sole active ingredient. The U-list does not include chemical mixtures where the listed chemical is not the sole active ingredient, and does not apply to chemicals that have been used for their intended purpose. Thus, CFC refrigerants that are removed from a refrigeration system and are reclaimed would not be classified as "commercial products," but rather would be classified as "spent materials." If the CFC refrigerants were not used for their solvent properties, they could not be F001 or F002 wastes, and thus, these spent materials could only be hazardous wastes under the characteristics of 40 CFR 261.21-261.24.

As a spent material, a CFC refrigerant is a solid waste. It is therefore the generator's responsibility to test the waste or apply knowledge of the waste to determine whether the waste exhibits a characteristic of a hazardous waste (see 40 CFR 261.5(f)(1), 261.5(g)(1) and 262.11(c)). The characteristics of a hazardous waste (i.e., ignitability, corrosivity, reactivity, or EP toxicity) are found at 40 CFR 261.21-261.24. The "generator" includes each person, by site, whose act or process produces a hazardous waste, or whose act first causes the waste to become subject to regulation. In most cases, the generator

would be the owner of the refrigeration equipment, as well as the service person or company who, in servicing the equipment, collects the material for reclamation (i.e., there may be "co-generator" situations (see 45 FR a 72026)). This Notice announces the availability of data that relate to a generator's application of knowledge of the waste in addressing the possible hazardous characteristic of corrosivity (see 40 CFR 261.22).

The Agency has previously determined that CFC refrigerants are not likely to exhibit a characteristic of a hazardous waste; however, the Agency maintained reservations regarding the characteristic of corrosivity (see the July 21, 1988 letter from Sylvia K. Lowrance, Director of EPA's Office of Solid Waste to Mr. Marshall R. Turner, Vice President of Racon Refrigerants, included in the docket for this Notice). EPA was concerned about the possible formation of hydrochloric acid due to the breakdown of the CFCs at high compressor temperatures. EPA has since received data (included in the docket for this Notice) demonstrating that the conditions under which CFC refrigerants would break down and form hydrochloric acid, while theoretically possible, are not a practical possibility during normal use. Generators of CFC refrigerants that are reclaimed are not required to test their wastes to determine that their CFCs are not hazardous wastes. Of course, the generator is required to know if the CFC is a hazardous waste. Therefore, in circumstances where something outside the realm of normal practice may cause a CFC refrigerant to exhibit a characteristic (e.g., a CFC refrigerant is inadvertently mixed with an acid material), generators may need to determine, using testing or knowledge, whether the waste is hazardous. Even if the material is a hazardous waste, full Subtitle C management standards may not apply. Exemptions for household hazardous waste or waste from small quantity generators may apply to some of these wastes (see 40 CFR 261.4(b)(1); 40 CFR 261.5).

The Agency notes, however, that the preceding discussions pertain to Federal regulations. While EPA strongly encourages State regulatory agencies to adopt similar regulations to facilitate the recycling of CFC refrigerants, States can and do have their own regulations which may be more stringent than Federal regulations. The regulated community is advised to consult the appropriate State regulatory agency to determine the State regulatory status of CFC refrigerants that are recycled.

List of Docket Materials

1. July 21, 1988 letter from Sylvia K. Lowrance, Director of EPA Office of Solid Waste, to Marshall R. Turner of Racon Refrigerants.
2. August 3, 1988 letter from Stephen O. Andersen and Jean Lupinacci of EPA Office of Air and Radiation to David J. Stirpe of the Air-Conditioning and Refrigeration Institute.
3. October 11, 1988 letter from David J. Stirpe of the Air-Conditioning and Refrigeration Institute to Stephen O. Andersen and Jean Lupinacci of EPA Office of Air and Radiation.
4. August 8, 1988 letter from David J. Bateman of E.I. du Pont de Nemours and Company to Stephen O. Andersen of EPA Office of Air and Radiation.
5. September 5, 1988 letter from R.E. Boberg of Allied-Signal Inc. to David J. Stirpe of the Air-Conditioning and Refrigeration Institute.
6. September 28, 1988 letter from L. Denise Pope of Racon Inc. to David Stirpe of the Air-Conditioning and Refrigeration Institute, and attachment entitled "Development of Worst Case Scenario."
7. August 25, 1988 EPA internal memorandum from N. Dean Smith of the Industrial Processes Branch to Steve Andersen of the Program Development Division, and attachment (an excerpt from "Test Methods for Evaluating Solid Wastes" (SW-846)).
8. November 8, 1988 letter from J.E. Cox of American Society of Heating, Refrigerating and Air-Conditioning Engineers, Inc. to Jean Lupinacci of EPA Office of Air and Radiation, and two enclosures: "Rates of Thermal Decomposition of CHCLF₂ and CF₂CL₂" by Frances J. Norton (1957) and "Reactions of Chlorofluorocarbons with Metals" by B.J. Eiseman (1963).
9. June 10, 1988 letter from Harold J. Lamb of Racon Inc. to Joseph M. McGuire of the Air-Conditioning and Refrigeration Institute.
10. September 14, 1987 letter from L. Denise Pope of Racon Inc. to John P. Goetz of the Kansas Department of Health and Environment.
11. October 5, 1987 letter from John S. Ramsey of the Kansas Department of Health and Environment to L. Denise Pope of Racon Inc.
12. October 21, 1987 letter from L. Denise Pope of Racon Inc. to John S. Ramsey of the Kansas Department of Health and Environment.
13. October 30, 1987 letter from John S. Ramsey of the Kansas Department of Health and Environment to L. Denise Pope of Racon Inc.

14. January 22, 1988 Racon Inc.
internal memorandum from L. Denise
Pope to the File.

15. February 1, 1988 letter from
Marshall R. Turner of Racon
Refrigerants to Lee Thomas,
Administrator of EPA.

16. March 21, 1988 letter from
Matthew A. Straus of EPA
Characterization and Assessment
Division to Marshall R. Turner of Racon
Inc.

17. May 20, 1988 internal Racon Inc.
memorandum from L. Denise Pope to the
File.

Date: July 14, 1989.

Robert Duprey,

Acting Assistant Administrator.

[FR Doc. 89-17383 Filed 7-27-89; 8:45 am]

BILLING CODE 6560-50-M

9441.1989(40)

OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE

AUG 2 1989

James T. Allen, Ph. D.
Chief
Alternative Technology Section
Toxic Substances Control Division
Department of Health Services
714/744 P Street
P.O. Box 942732
Sacramento, California 94234-7320

Dear Mr. Allen:

This letter responds to your February 6, 1989, correspondence requesting written confirmation of the regulatory status of chlorofluorocarbons (CFCs) used as refrigerants under the Resources Conservation and Recovery Act (RCRA).

As a spent material being reclaimed for reuse, the spent CFCs meet the definition of solid waste under Federal regulations (see 40 CFR 261.2). However, to meet the definition of hazardous waste and, thus, be subject to Subtitle C of RCRA, the spent CFCs must either be specifically listed as a hazardous waste, or must exhibit one or more of the characteristics of a hazardous waste

Certain CFCs that are used for their solvent properties are listed as hazardous wastes when spent (see EPA Hazardous Waste Nos. F001 and F002 at 40 CFR 261.31). Also, certain CFCs that are unused commercial chemical products are listed hazardous wastes when discarded (see 40 CFR 261.33). However, CFCs used as refrigerants, do not meet any of the hazardous waste listings. Thus, a used CFC refrigerant is a hazardous waste only if it exhibits one or more of the characteristics of a hazardous waste.

On July 28, 1989, published a Federal Register notice (54 FR 31335) that clarified the applicability of RCRA Subtitle C regulations to CFC refrigerants (see enclosure). This notice also announced the availability of data relating to whether CFC refrigerants exhibit the characteristic of a hazardous waste. In determining whether the CFC refrigerant to be recycled is a hazardous waste because it exhibits a characteristic of a hazardous waste, a generator may cite the Federal Register notice to demonstrate that such materials do not exhibit a hazardous characteristic under normal operating conditions.

-2-

Should you have any further questions regarding the applicability of RCRA Subtitle C regulation to the recycling of CFC refrigerants, you may contact Mitch Kidwell, of my staff, at (202) 475-8551.

Enclosure

Sincerely,

Original Document signed

Michael J. Petruska
Acting Chief
Waste Characterization Branch