

Comments Re: ODS Investigation Preliminary Determination

October 16, 2014

To whom it may concern,

Thank you for the opportunity to submit comments related to the ODS Investigation Preliminary Determination. Like many stakeholders involved in the Cap and Trade Program, Ag Methane Advisors has been eagerly awaiting the results of CARB's investigation and we appreciate the diligence that CARB has invested into this matter. Ag Methane Advisors is not directly or indirectly connected to any offsets involved in this investigation, and has no involvement in ODS projects whatsoever. Our interest is in how the results of this investigation inform potential future investigations for other projects (livestock in particular) based on the interpretations and decisions made by CARB. There are a couple points of particular interest in the ODS Preliminary Determination that raise questions about how an invalidation determination might impact a livestock project. These points are related to the language of the regulation, which states, "*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 focus of these comments is on the long duration of the "*entire Reporting Period*" for livestock projects as opposed to ODS projects, and the "*directly applicable*" nature of the ODS permitting violation which was downstream of the ODS project activities. Each of these points will be described further below with questions. Answers to the questions would provide helpful guidance from CARB.

These comments are described in the context of a permitting violation that is rare on dairy farms but can happen from time to time, a manure spill. The vast majority of large dairy farms in the U.S. manage their manure in anaerobic lagoons and throughout the growing season manure is removed from these lagoons and spread on crop fields as fertilizer. Most large farms are considered Confined Animal Feeding Operations (CAFOs) and are required to have a waste management plan (often doubling as a permit) on file with their state. Generally the states base the requirements of these permits/plans on U.S. EPA's National Pollution Discharge Elimination System (NPDES) program. These permits/plans encompass all manure management activities on the farm including

storage and land application. The biogas control system may be one component of this much larger plan and manure management system.

Regarding the “entire Reporting Period”: For ODS projects with offsets proposed for invalidation the reporting period is very short (i.e. <1 week). It seems that CARB followed the regulation closely in proposing to invalidate the offsets “during the entire reporting period.” However, if the reporting period for these projects were a year in length, like for a livestock project and the permitting violations only lasted 3 days, it seems it would be unfair to invalidate the offsets from the entire reporting period. We understand this is what the Regulation currently requires, but also understand that CARB has some flexibility in implementation of the regulation. This question is relevant to livestock projects in the context of a manure spill. Most large farms spread manure on many different fields. The rates of application vary, and there are many different truck and tractor loads required to move all the manure. From time to time due to human or mechanical error, manure from one load on one day may spill on the road in transit to a field, or may be spread at the wrong rate on a field, or too close to surface waters bordering a field. Dairy farms and custom haulers that contract to apply manure to fields are able to manage this process very well, but on rare occasions a spill can happen. When it does it is a discrete, non-chronic occurrence, in one specific location. In addition it does not always result in a permit violation or enforcement action. However, if there were an instance of non-conformance would CARB invalidate the offsets for the entire reporting period or just the day(s) when the non-conformance occurred?

Regarding the “direct applicability” to the project: All dairy farms have to land apply their manure at some point during the year whether they have a biogas control system/anaerobic digester (BCS/AD) or not. In both the baseline scenario (e.g. before installation of the BCS/AD) and the project scenario (when operating a BCS/AD), the farms land apply manure. CAFOs that do not have a BCS/AD are commonly required to have a NPDES permit, so a spill could result in a non-conformance whether there is a BCS/AD or not. In both the baseline and project scenarios a manure spill could occur, resulting in a violation, but in both situations the violation would not be caused by the operation of the BCS/AD. Therefore it seems such violations should be treated as NOT directly related to the project, despite the fact that in a BCS/AD scenario the land application occurs downstream of the system. In the case of the ODS projects, although the permitting violation was downstream of the project activity, because the violation was related to a by-product of the project activity it was considered related to the project. Does this mean that CARB would therefore consider a manure spill to be related to the project because the manure had passed through the AD system?



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Finally, the regulation states, “*The project is out of regulatory compliance if the project activities were **subject to enforcement action by a regulatory oversight body** during the Reporting Period*”. We would like to know if this definition of non-compliance, which appears in §95973(b), will be used to interpret the invalidation language in §95985(c)(2). There is lots of grey area in environmental permitting about what determines non-compliance, therefore we appreciate that the regulation defines what non-compliance means. However, in a recent phone conversation with CARB staff we asked for clarification about how this statement of the regulation would be implemented. CARB staff said we would have to wait for the outcome of the ODS investigation to get an answer. Based on the ODS case it seems CARB made its preliminary determination based on strict adherence to the regulation, namely that the projects were not considered out of compliance until enforcement action was taken. Does this mean that without any enforcement action a project is still considered in compliance for the purposes of the Regulation? We would also like to know what might happen if an enforcement action applies to events, which occurred during the Reporting Period, but is begun after the end of the Reporting Period and after the credits are issued. Would offsets from the Reporting Period be at risk of invalidation even if the OPO, APD and/or verifier had no notice of the violation as of the time of verification?

Again, we appreciate the opportunity to submit these comments and hope they can inform further guidance from CARB. In turn we hope that all project developers and stakeholders in the market, benefit from clear expectations about how the regulation will be interpreted and implemented and how invalidation investigations will proceed.

Sincerely,



Patrick Wood
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