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DEPARTMENT OF JUSTICE



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October 10, 2011

VIA EMAIL AND U.S. MAIL
leonard.scandura@valleyair.org

Leonard Scandura
Permit Services Manager
San Joaquin Valley Air Pollution Control District
34946 Flyover Court
Bakersfield, CA 93308

RE: Proposed Amendments to Rule 2301 (Emission Reduction Credit Banking)

Dear Mr. Scandura:

We are writing to express our concerns with the San Joaquin Valley Air Pollution Control District's proposal to amend its Rule 2301 to allow the District to issue credits for greenhouse gas (GHG) emissions reductions.¹ The primary purpose of these credits would be to allow proponents of future projects to purchase and retire the credits as mitigation for any significant GHG emission in order to comply with the California Environmental Quality Act (CEQA). The District will issue credits for GHG emissions reductions that are not "additional," meaning that they would have occurred even without the District's program, for example, as a result of compliance with regulatory requirements. For the reasons set forth below, credits that are the result of regulatory requirements cannot legally be used for CEQA mitigation. Furthermore, the District's proposed method of calculating GHG reductions risks issuing credits that reflect only paper reductions; use of such credits as mitigation would contravene CEQA.

The CEQA Guidelines recognize that in appropriate situations, offsite mitigation, which may include purchased offsets, may be used as mitigation for GHG emissions. Offsets used in mitigation cannot, however, be based on reductions that were legally required, even if the requirement that resulted in the reduction was not directly aimed at GHG. Specifically, section 15126.4, subdivision (c)(3), of the CEQA Guidelines states that measures to mitigate the

¹ The Attorney General submits these comments pursuant to her independent power and duty to protect the environment and natural resources of the State from pollution, impairment, or destruction, and in furtherance of the public interest. (See Cal. Const., art. V, § 13; Gov. Code, §§ 12511, 12600-12612; *D'Amico v. Bd. of Medical Examiners* (1974) 11 Cal.3d 1, 14-15.) These comments do not constitute an exhaustive review of the District's proposed rule.

significant effects of GHG emissions may include “[o]ff-site measures, including offsets that are not otherwise required, to mitigate a project’s emissions” (emphasis added).² The District’s proposed GHG emissions credits do not meet that test.

The Resources Agency explained in its Final Statement of Reasons that it inserted into the CEQA Guidelines the language limiting allowable GHG offsets to those “that are not otherwise required” in response to public comments to clarify that such offsets must be “additional.”³ In response to comments, the Resources Agency noted that lead agencies could “create, or rely on the creation of, a mechanism, such as an offset bank, created prospectively in anticipation of future projects that will later rely on offsets created by those emissions reductions[,]” but also noted that in any such program, “[e]missions reductions that occur as a result of a regulation requiring such reduction . . . would not constitute mitigation.”⁴ The Resources Agency further explained that GHG reductions that are otherwise required by law are part of a CEQA project’s “baseline” against which future impacts should be measured.⁵ Thus, in adopting the CEQA Guidelines on GHG mitigation, the Resources Agency intentionally excluded as mitigation the sort of credit that the District is proposing to issue.⁶

The District’s own technical workgroup of industry, environmental, agricultural, and local government interests, formed to study the feasibility and need for a District GHG reduction credit system, had the same understanding that credits issued by the District would have to be based on reductions that were “additional.” As the workgroup explained, “[i]n general, for an emission reduction to be additional it must not be due to (either directly or indirectly) a routine replacement of equipment or due (either directly or indirectly) to any regulatory requirement.” The workgroup added that “[i]f the [District credit] program did not require that GHG emission

² This provision of the CEQA Guidelines took effect on March 18, 2010.

³ California Natural Resources Agency, Final Statement of Reasons for Regulatory Action: Amendments to the State CEQA Guidelines Addressing Analysis and Mitigation of Greenhouse Gas Emissions Pursuant to SB 97 (FSOR) (Dec. 2009) p.48 (available at http://ceres.ca.gov/ceqa/docs/Final_Statement_of_Reasons.pdf).

⁴ California Resources Agency, Response to Comments, SB 97 Proposed CEQA Guidelines Amendments for GHG - Rulemaking Comments, Response 71-13 (available at http://ceres.ca.gov/ceqa/docs/summaries_and_responses_to_public_comments_july-august/Letter_71_-_Center_for_Biological_Diversity_et_al_-_Response.pdf).

⁵ FSOR, *supra*, at p.88.

⁶ There are, however, approaches the District could use to allow GHG impacts to be mitigated in a way that does comply with the CEQA Guidelines. For example, a lead agency could allow a project proponent to mitigate GHG emissions by purchasing credits from a reliable credit issuer (such as the Climate Action Reserve) or could require the project proponent to pay into a fund that the agency would use to implement its own GHG reduction measures (such as providing energy upgrades to local low-income housing).

reductions be additional, more emission reductions would qualify for registration, but the integrity of the [District credit] program would suffer.”⁷

In addition, we are also concerned, as the Air Resources Board (ARB) pointed out to the District in 2009, that the District’s plan for measuring reductions by a credit applicant risks data manipulation that could magnify average historical emissions to the point that credits generated could be inflated and not representative of actual emissions.⁸ The District is proposing to base the size of a GHG emissions reduction credit on the difference between a credit applicant’s post-reduction expected emissions and its highest 24-month emissions occurring during the 60-month period prior to the reduction. This allows a credit applicant to strategically choose a high level of emissions as its pre-reduction baseline, regardless of whether that high emissions level was representative of normal operations or had any likelihood of continuing into the future. Where the size of the pre-reduction emissions is artificially inflated in this way, the GHG credit issued will be larger than any GHG emissions reduction that actually occurred.⁹ This would result in paper GHG reductions, which do not constitute mitigation under CEQA because they fail to “compensat[e] for the impact” of new projects – specifically, their contribution to climate change. (See Cal. Code Regs., tit. 14, § 15370, subd. (e) [definition of “mitigation”].)

In order to stabilize the climate and avoid the most catastrophic outcomes of climate change, California must reduce its total statewide greenhouse gas emissions to the level they were in 1990 as an interim step to reducing statewide emission levels, by 2050, to 80 percent below 1990 levels. (AB 32, Health & Saf. Code, § 38550; Executive Order S-03-05 (2005).) The emissions reductions required to reach our statewide climate objective are substantial. In the longer term, we must reduce our total GHG emissions by approximately four percent per year between 2020 and 2030, and our per capita emissions by slightly less than five percent per year during the 2020 to 2030 period, with continued reductions required through midcentury.¹⁰

Because the effects of climate change will disproportionately affect certain San Joaquin Valley residents, it is even more critical that the District’s GHG emissions reductions be

⁷ San Joaquin Valley Air Pollution Control District, Report to the APCO Regarding Development of the San Joaquin Valley Carbon Exchange (March 16, 2009), pp.8-9 (available at <http://www.valleyair.org/Programs/CCAP/SJVCE%20program%20final%20report%20to%20APCO%203-16-09.pdf>).

⁸ FDSR 2011, *supra*, at p.B-2.

⁹ Creating a system to accurately measure and account for real GHG reductions is a complicated and very technical task. The Climate Action Registry, for instance, creates detailed protocols for specific types of GHG reduction measures to ensure that any credits are in fact additional and have been measured accurately. In contrast, the District’s proposed rule does not appear to include measures to prevent distortion of the size of the credit and does not even apply the same standards to GHG emission reductions that it uses to measure reductions in non-GHG pollutants.

¹⁰ See Air Resources Board, Climate Change Scoping Plan (Dec. 2008), p.118 (available at http://www.arb.ca.gov/cc/scopingplan/document/adopted_scoping_plan.pdf).

meaningful. For example, lower-income residents who cannot afford air conditioning units or higher energy bills from increased air conditioning use, and farm workers who must work outdoors, will be particularly affected by longer and more intense heat waves.¹¹ These groups are well represented in the region. Moreover, climate change's effect on atmospheric processes is "expected to promote the formation of pollutants, such as ozone and particulate matter" which "may increase the incidence of cardiovascular, pulmonary and other diseases, especially in highly impacted urban areas."¹² If future projects are not required to mitigate actual GHG emissions, but can instead rely on inflated credits, it will be even more difficult for California to meet its GHG objectives.¹³

In addition, because the proposed rule will reduce the incentives under CEQA for new projects to actually mitigate their GHG emissions, it will also inhibit the reduction of harmful co-pollutants that generally accompany GHG emissions, such as particulate matter and smog-causing chemicals. The San Joaquin Valley already suffers from some of the worst air pollution in the nation.¹⁴ Economic analysis of these effects has found that in the San Joaquin Valley overall the cost of air pollution is more than \$1,600 per person per year due to increased health care costs and emergency room visits, missed work and school days, and even premature deaths.¹⁵ By reducing the incentive for project proponents to provide meaningful mitigation, the District's proposed rule could inadvertently make it even harder to address current and future public health problems caused by localized air pollution.

¹¹ See Office of Environmental Health Hazard Assessment, Indicators of Climate Change in California: Environmental Justice Impacts (Dec. 2010) at p. 34 (available at <http://oehha.ca.gov/multimedia/epic/epic123110.html>).

¹² *Id.* at p.4.

¹³ The Final Draft Staff Report asserts that GHG emissions from facilities subject to ARB's cap-and-trade regulation would automatically have less than a significant cumulative impact on global climate change. (FDSR 2011, *supra*, at p.5.) We are aware of no legal basis for the District to make such a categorical exclusion from the lead agency's obligation under CEQA to determine the significance of a project's environmental impact.

¹⁴ According to the American Lung Association, among the eight counties within the District are the counties that rank numbers 1, 2, 5, 6, and 12 in the entire nation for worst particle pollution and numbers 3, 4, 6, 8, and 16 in the nation for worst ozone pollution. (American Lung Association, *State of the Air 2011*, at pp.15-16 [available at <http://www.stateoftheair.org/2011/assets/SOTA2011.pdf>]). All eight of these counties have asthma rates above the California average. (California Department of Public Health [available at <http://www.californiabreathing.org/asthma-data/county-comparisons/active-asthma-prevalence>].)

¹⁵ Jane V. Hall & Victor Brajer, Institute for Economic and Environmental Studies, California State University Fullerton (Nov. 2008), at p.5 (available at http://business.fullerton.edu/centers/iees/reports/Benefits_of_Meeting_Clean_Air_Standards_11-13-08.pdf).

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Please contact me if you would like to discuss these comments further.

Sincerely,

/s/

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Deputy Attorney General

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Attorney General

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