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MEMORANDUM

To: Climate Action Reserve
From: Jeremy Weinstein
Re: Comments on Landfill Project Protocol Public Review Draft Version 4.0
Date: June 3, 2011

Thank you for the opportunity to comment on the Landfill Project Protocol Public Review Draft Version 4.0 dated May 6, 2011 ("Review Draft").

1. Introduction.

Revisions proposed in the Review Draft seek to prohibit landfill gas to energy projects that sell renewable energy certificates ("RECs") from qualifying under the Protocol.

These proposed revisions contradict the California Public Utilities Code and currently applicable regulations and Decisions of the California Public Utilities Commission ("CPUC") under the California Renewable Portfolio Standard ("RPS") and other applicable law.

The proposed revisions also add to the Protocol a new "financial additionality" test differing from the prevailing formulation of financial additionality, and then apply that new test: (a) selectively against a single disfavored group and (b) making subjective assumptions without objective measurement and verification. These infirmities would create legal issues requiring review by the California Air Resources Board ("CARB") should CARB wish to use the Protocol in connection with the California Global Warming Solutions Act of 2006 ("AB32").

This new test should not be added to the Protocol. No provisions that contradict current California law and regulation should be added to the Protocol. Additionally, no test should be added to the Protocol that is discriminatory, subjective and cannot be applied without being measurable and verifiable.

The Review Draft proposes to add the following Section 3.4.1(C):

> (C) **Renewable Energy Certificate/Green Power Exclusion (LFGE Projects Only)**. CRTs may not be earned for destruction of landfill gas if renewable energy certificates (RECs) are issued for energy produced from destruction of that landfill gas (e.g. using an engine, turbine, microturbine, fuel cell or boiler), or if the power generated from that landfill gas is delivered under a green power contract. CRTs may still be earned for gas that could not otherwise be destroyed by the REC project or for the green power contract. The REC exclusion must be applied each time a project is verified.

And the following A.3:

> **A.3 New Performance Standard Criterion #1: RECs Exclusion for LFGE Projects**

> Although a majority of LFGE projects at non-NSPS/EG landfills do not receive revenue from GHG offsets, this does not necessarily mean that *all* such projects are viable based only on energy sales. In many areas of the country, LFGE projects are eligible to receive additional revenue in the form of green power contracts or the sale of renewable energy certificates (RECs). The market for RECs has grown and matured such that in many cases the incentive provided by RECs rivals that provided by GHG offsets. One possibility is that the LFGE projects that are not generating GHG offsets are instead obtaining additional revenue through REC sales. … One option for an additionality threshold, therefore, is to exclude LFGE projects that sell RECs. …
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> One risk, however, is that by excluding projects that generate RECs we might also exclude some truly additional projects, i.e. those that require both GHG offset and REC revenues to be viable. … The high percentages of projects that are only receiving one stream of additional revenue, RECs or GHG offsets, suggest that most projects do not need both streams of environmental incentives in order to be financially feasible. …

2. Prohibiting Sale of RECs from LFGE Projects contradicts the Public Utilities Code and CPUC Rulings and Decisions.

California Public Utilities Code Section 399.12(h)(2) provides:

> "Renewable energy credit" includes all renewable and environmental attributes associated with the production of electricity from the eligible renewable energy resource, except for an emissions reduction credit issued pursuant to Section 40709 of the Health and Safety Code and any credits or payments associated with the reduction of solid waste and treatment benefits created by the utilization of biomass or biogas fuels.

The CPUC ruled in Resolution G-3410, mailed June 16, 2008,[1] responding to PG&E Advice Letter 2846-G/3075-E:[2]

> [W]e have determined that the capture and combustion of methane through the development and operation of the manure management projects PG&E seeks to fund herein constitutes one form of "treatment benefit" envisioned by this section of the P.U. Code, and as such is not included in a REC. In light of this, double-counting of the emission reduction benefits attributable to the manure management projects PG&E seeks to support with ClimateSmart funds will not occur if that methane is used to produce electricity or biogas that is subsequently sold into the California RPS program.

In other words, the CPUC has found that (a) RECs and (b) offsets from methane capture are separate and receipt of both does not represent double counting.

Following this Ruling by the CPUC, CPUC Rulemaking 06-02-012, Decision on Definition and Attributes of Renewable Energy Credits for Compliance with the California

[1] Available at http://docs.cpuc.ca.gov/published/Final_resolution/84228.htm.

[2] Available at http://www.pge.com/nots/rates/tariffs/tm2/pdf/GAS_2846-G.pdf.

Renewable Portfolio Standard, was issued August 21, 2008,[3] and it requires that all RPS procurement contracts subject to the jurisdiction of the CPUC contain the following provisions:

> If the Project is a biomass or landfill gas facility and Seller receives any tradable Green Attributes based on the greenhouse gas reduction benefits or other emission offsets attributed to its fuel usage, it shall provide Buyer with sufficient Green Attributes to ensure that there are zero net emissions associated with the production of electricity from the Project.[4]
>
> Green Attributes include but are not limited to: … any avoided emissions of carbon dioxide (CO2), methane (CH4), nitrous oxide, hydrofluorocarbons, perfluorocarbons, sulfur hexafluoride and other greenhouse gases (GHGs) that have been determined by the United Nations Intergovernmental Panel on Climate Change, or otherwise by law, to contribute to the actual or potential threat of altering the Earth's climate by trapping heat in the atmosphere … .[5]

In other words, not only has the CPUC ruled that a project can receive both RECs and GHG offset credits, the CPUC contemplates the issuance of tradable GHG offset credits for avoided emissions of methane, a sufficient quantity of which they must be provided to the buyer of renewable energy to ensure zero net emissions for RPS purposes. Credits are to be issued for the methane capture, and a portion of those credits, that portion necessary "to ensure that there are zero net emissions associated with the production of electricity from the Project" are to be delivered by the Project to the purchaser of that RPS renewable energy or REC. This is reinforced by California Energy Commission ("CEC") regulations under the RPS prohibiting a different disposition of such credits.[6]

For the CAR to now turn around and deny the issuance of those CRTs would deprive the RPS renewable energy buyer of the portion of those CRTs that the legislature and the CPUC have determined are to go to it.

Therefore, the above-referenced provisions of the Review Draft are contrary to the RPS as embodied in currently applicable California statute, CPUC Rulemaking, and CPUC Decisions. The proposed revisions in the Review Draft also contradict a number of other provisions in the RPS statute and applicable CPUC Decisions and rulemakings not referenced above. For example, there are serious implications for Qualifying Facility (QF) contracts with respect to which the RPS statute requires purchasing utilities to obtain and retire RECs through the Western Renewable Energy Information System (WREGIS) if "Green Attributes" are truncated.

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[3] Available at http://docs.cpuc.ca.gov/PUBLISHED/FINAL_DECISION/86954.htm.

[4] CPUC Rulemaking 06-02-012, Decision on Definition and Attributes of Renewable Energy Credits for Compliance with the California Renewable Portfolio Standard, issued August 21, 2008, Appendix A-2 at p. 2.

[5] Id., Appendix B at p. 1.

[6] See California Energy Commission, Renewable Portfolio Standard Eligibility Commission Guidebook, 4th ed., CEC-300-2010-007-CMF pp. 18-19, available at http://www.energy.ca.gov/2010publications/CEC-300-2010-007/CEC-300-2010-007-CMF.PDF.

3. The Review Draft Newly Introduces into the Protocol a Subjective and Discriminatory "Financial Additionality" Test

Section 9 of the existing Protocol and the Review Draft each define Additionality as:

> Landfill management practices that are above and beyond business-as-usual operation, exceed the baseline characterization, and are not mandated by regulation.

Additionality means that an action should not be given the bonus value of a GHG offset if the activity would have occurred anyway, either because the activity was required by law, for example a law requiring all landfills to capture methane emissions, or because it was economically compelled, for example replacing an old appliance or smokestack.[7] Additionality is perhaps the most fundamental, core concept for assuring GHG market legitimacy. Additionality makes an offset "real." There are several types of "additionality" in the climate change literature.[8] One is the "regulatory additionality" currently in the Protocol. Another and different concept of additionality that is not in the Protocol is "financial additionality."

The Center for Resource Solutions defines "financial additionality" as "sellers of offsets must show that an underlying project would not have been built without anticipated revenue from said offsets."[9] Financial additionality has been in the literature on climate change mitigation projects from before the formation of the Climate Action Reserve and its predecessor the California Climate Action Registry, and yet not adopted in the Protocol. The Review Draft does not say why financial additionality should be added to the Protocol on any basis. The Review Draft does not say why it is appropriate to add it as a test solely with respect to REC-selling projects only.[10] Finally, the Review Draft does not state why financial additionality should be applied on a "class" basis- a class of resources are automatically not financially additional- rather than on a measured and verified basis. The Review Draft instead simply

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[7] "Additionality, then, is a tool used to separate the genuine from the opportunistic." Reynolds, *Do we need financial additionality*, Environmental Finance, March 2008 at 36, available at http://www.environmentalmarkets.org/galleries/default-file/EF0308_Marketview.pdf.

[8] A good example of the variety of uses to which the term "additionality" has been put in the course of negotiations concerning implement the United Nations Framework Convention on Climate Change Conferences of the Parties following the Kyoto Protocol is Ertel and Egelstrom, *COP 6 – big decisions or big disappointment*, Environmental Finance, June 2000 at 26, available at http://www.emissions.org/publications/member_articles/ef6ema26.pdf.

[9] Comments of the Center for Resource Solution to the Federal Trade Commission, Green Guide Regulatory Review; Project No. P954501, 2/11/08, available at http://www.ftc.gov/os/comments/greengudesregreview/533431-00061.pdf (recommending against the application of financial additionality tests). A useful discussion of financial additionality concepts in the Kyoto Protocol flexible mechanisms at Dutschke and Michaelowa, *Development Aid and the CDM – How to Interpret "Financial Additionality",* Hamburg Institute of International Economics Discussion Paper 228, available at http://ageconsearch.umn.edu/bitstream/26243/1/dp030228.pdf.

[10] Appendices A-4 and A-5 of the Review Draft propose disqualifying landfills above a certain size because they are not "additional," but there is no material presented in the Review Draft indicating the nature of the allegedly absent "additionality" that large projects lack, or why a project above a certain size is any more or less additional because it is in a "dry" or "wet" county.

assumes, without setting forth any measurement test or other criteria, that a project will have enough money from selling RECs such that it need not also be allowed to sell CRTs.

Introducing into the Protocol subjective and doctrinal criteria establishes a slippery slope. Why is only one project output assumed to provide- without being examined for- profitability and revenue and not others? Why not automatically disqualify projects surviving a major natural disaster because they can be assumed to be sufficiently profitable due to lack of competition? Why this test of private sales instead of examining government subsidies, which is closer to what is in the financial additionality literature? Should production tax credits or local real estate tax breaks disqualify a project as not financially additional? Why not disqualify all projects owned by subsidiaries of big oil companies, because big oil companies "already make enough money"? Once the Protocol departs from the core principles of objective measurement and verification that have been the strength of it and other CAR protocols into subjective criteria, there is no logical stopping place before Protocol credibility is irretrievably harmed.

Additionally, the application of the criteria newly proposed in the Review Draft create issues of state and federal Constitutional and other law that would need to be reviewed, analyzed and addressed by the California Air Resources Board ("CARB") should the CARB wish to adopt the Protocol in connection with its authority under AB32 and the executive orders and regulations thereunder.

4. The Correct and Lawful Approach.

To be consistent with what the legislature and the CPUC have set forth in the RPS legislation and rulemakings thereunder, any revisions respecting RECs should not disqualify the project, but rather divide the achievements that are based on capture from those that are based on generation displacement, not credit as capture achievements the generation displacement achievements (illustrated in the above-referenced PG&E Advice letter[11]) and then provide the information that the CPUC and CEC need under the RPS to determine how many methane capture CRTs are "sufficient Green Attributes to ensure that there are zero net emissions associated with the production of electricity from the Project" that must surrendered by the Project to the purchaser of the RPS energy.

[11] Chart on page 3; available at http://www.pge.com/nots/rates/tariffs/tm2/pdf/GAS_2846-G.pdf.