

Final Determination
Air Resources Board Compliance Offset Investigation
Compliance Offset Protocol for Livestock Projects

I. Introduction

The California Air Resources Board (ARB) has investigated whether ARB compliance offset credits (ARBOCs) issued for two projects¹ involving livestock methane destruction at the Bos Dairy LLC facility in Fair Oaks, Indiana (Facility) may have been generated while the Facility was not in compliance with provisions of the Indiana Administrative Code pertaining to air quality permits. Under section 95985(c)(2) of the Cap-and-Trade Regulation (Regulation), ARB can investigate and invalidate issued ARBOCs if the offset project activity and implementation of the offset project were not in accordance with all local, state, or national environmental and health and safety regulations during the Reporting Period for which the ARBOCs were issued.

Section 95985 of the Regulation establishes a process for ARB to investigate and invalidate issued ARBOCs. ARB has concluded that all of the greenhouse gas (GHG) emission reductions represented by the ARBOCs at issue here are real, quantified, and verified. However, on September 29, 2015, ARB made an initial determination that these ARBOCs may be subject to invalidation pursuant to section 95985. The initial determination was informed by information received subsequent to the issuance of offset credits. In accordance with section 95985(d), ARB blocked transfers of the potentially invalid ARBOCs until its investigation could be completed and a final determination on whether to invalidate any of the ARBOCs could be made by ARB's Executive Officer.

Pursuant to section 95985(d), ARB has reviewed information submitted to it by notified stakeholders, issued investigatory subpoenas for documents, made staff available to stakeholders and their counsel who wished to provide information or discuss the investigation during an initial 25-day comment period, and conferred with the Indiana Department of Environmental Management (IDEM).

¹ These projects are listed in ARB's program as projects CALS0048 and CALS5044. See http://www.arb.ca.gov/cc/capandtrade/offsets/issuance/arb_offset_credit_issuance_table.pdf.

II. General Statement of Legal Principles and Statutory Framework

A. Offset Program Requirements for Compliance with Local, State, and National Regulatory Requirements

The regulatory requirements that govern the eligibility, implementation, and issuance of ARBOCs for the destruction of livestock methane are contained within the Regulation and the Livestock Projects Compliance Offset Protocol adopted October 20, 2011 (Livestock Protocol).

Section 95985(c)(2) of the Regulation states that ARB may determine that an ARBOC is invalid for several different reasons, including when:

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.²

Additionally, Section 3.5, Regulatory Compliance of the Livestock Protocol states, in part:

As stated in the Regulation, an Offset Project Operator or Authorized Project Designee must fulfill all applicable local, regional and national requirements on environment impact assessments that apply based on the offset project location. Offset projects must also fulfill all local, regional, and national regulatory requirements that apply based on the offset project location. Offset projects are not eligible to receive ARB or registry offset credits for GHG reductions or GHG removal enhancements that are not in compliance with regulatory requirements.

The Cap-and-Trade Regulation and Livestock Protocol are complementary regulatory documents that must be read in harmony with each other. ARB interprets the invalidation provision of “in accordance with all local, state, or national environmental and health and safety regulations” to mean, in this context: (1) all requirements that have a bearing on the integrity of the generated offsets; and (2) all environmental and health and safety requirements associated with the installation and operation of the biogas control system that captures and destroys the methane. Project related activities begin at waste collection and end at onsite biogas usage and the disposal of associated digester effluents.³

² Title 17, California Code of Regulations section 95985(c)(2).

³ See http://www.arb.ca.gov/cc/capandtrade/offsets/arboc_guide_regul_conform_invalidation.pdf at p. 6.

B. Indiana State Legal Requirements

Per the Indiana Administrative Code, prior to constructing or operating a new source with a potential to emit above certain thresholds, construction and operating permits must be obtained.⁴ Based on information ARB has gathered from IDEM, the Facility was one of several livestock production operations (including dairies) that had been operating without an air quality permit for some time, despite having potential emissions that exceeded one or more state air permit thresholds. IDEM noted widespread confusion and uncertainty surrounding the applicability of Indiana's air permitting regulations to livestock production operations.

In late 2014, IDEM began developing a guidance and policy document that sought to inform the public regarding the permit requirements' applicability to such operations. This effort resulted in IDEM's February 13, 2015 Agency Nonrule Policy Document Regarding Permitting of Activities Located at Livestock Production Operations Including Concentrated Animal Feeding Operations ("2015 Policy Document").⁵

III. Findings of Fact

The Facility's operations include a combustion source consisting of an anaerobic manure digester and digester gas fired electrical generation equipment. The combustion source at issue was installed during 2003-2004. The three Reporting Periods at issue are January 1, 2011 to December 31, 2011; January 1, 2012 to December 31, 2012; and January 1, 2013 to December 31, 2013.⁶ On January 9, 2015, the Facility obtained its construction and operation air quality permit. On February 13, 2015, IDEM issued the 2015 Policy Document explaining IDEM's policy view regarding the applicability of the Indiana air quality permit requirements to agricultural operations. On March 4, 2015, IDEM sent the Facility a "violation" letter, while noting that IDEM would not take any legal action.

⁴ 326 Indiana Admin. Code (IAC) §§ 2-5.1-3, 2-6.1-2. The Indiana Administrative Code defines "new source" as "a source for which construction commences on or after December 25, 1998, that will be constructed; (A) on undeveloped land; or (B) at a location for which a valid permit has not been issued." (326 IAC 2-1.1-1, Sec. 1(7).)

⁵ This document is available at <http://www.in.gov/idem/files/npd-air-038.pdf>. This document's stated purpose is to "provide guidance to owners/operators of livestock production operations...and their consultants about what activities associated with livestock production and CAFOs may require permits from the Office of Air Quality." (February 2015 Policy Document § 1.0.)

⁶ ARB issued ARB Offset Credits (ARBOCs) for these three Reporting Periods in two issuances. On June 10, 2014, ARB issued 4,077 ARBOCs for Project CALS0048 (2 reporting periods). On April 7, 2015, ARB issued 10,993 ARBOCs for Project CALS5044 (1 reporting period).

The Facility's potential to emit⁷ exceeds the state air quality permitting threshold for NOx emissions.⁸ Therefore, ARB must determine whether the fact that the Facility did not possess air quality permits until January 9, 2015 renders the Facility "not in accordance with all local, state, or national environmental and health and safety regulations."

During ARB's investigation, IDEM submitted two letters to ARB that provide helpful explanations regarding the Facility's regulatory compliance over the time periods at issue. These letters are included as Attachments 1 and 2 to this Final Determination. As explained in these letters and in discussions with IDEM, IDEM's 2015 Policy Document was drafted to address widespread confusion regarding the applicability of Indiana's air permit regulations to agricultural operations. Once the 2015 Policy Document issued, IDEM then sent "violation letters" to all agricultural operations that it determined were subject to the Indiana air permit requirements, under the terms of the 2015 Policy Document. Notably, by the time both the 2015 Policy Document was issued, and the date the Facility received its violation letter, the Facility had already obtained its air permit from IDEM.

IDEM informed ARB that the violation letters it issued to dairies in early 2015, including the one sent to the Facility, were not considered formal enforcement actions. IDEM further explained that its violation letters were simply meant to notify farming operations of the need for a permit given the decision to develop new non-rule policy documents clarifying the applicability of the regulations, and IDEM did not intend to pursue legal action. IDEM ultimately has taken the position that the Facility was not in violation of IDEM's state environmental regulations and that its operations were in accordance with those regulations.

IV. Final Determination

As described above, IDEM has determined that the Facility was in accordance with the air quality permit regulations which IDEM administers. Given the circumstances in this case, ARB believes it is appropriate to defer to the judgment of the expert state agency responsible for interpreting and implementing the relevant regulations. Therefore, given the considerations discussed above, ARB's Executive Officer concludes that the offset projects at issue here (CAL50048 and CAL5044) were in accordance with Indiana's air quality permitting requirements during the Reporting Periods for which the ARBOCs were issued, and that the ARBOCs at issue will not be invalidated. Based on this final

⁷ "Potential to emit" means "the maximum capacity of a stationary source or emissions unit to emit any air pollutant under its physical and operational design." (326 IAC § 2-1.1-1.)

⁸ Per the Technical Support Document accompanying the permit issued January 9, 2015, the Facility's potential to emit for NOx is 63.96 tons per year. The permitting threshold for NOx is 25 tons per year. (326 IAC § 2-5.1-3(a)(1)(E).)

determination, the Executive Officer considers this investigation to be complete and final, and will unblock transfers of these ARBOCs.

ATTACHMENT 1

**November 2, 2015 Letter from Carol S. Comer (IDEM) to Richard W. Corey (ARB)
Regarding Bos Dairy Offset Credits**



INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

We Protect Hoosiers and Our Environment.

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Michael R. Pence
Governor

Carol S. Comer
Commissioner

November 2, 2015

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

Dear Mr. Corey:

Re: Bos Dairy Offset Credits

I understand that the Air Resources Board (“ARB”) is investigating the validity of compliance-offset credits generated by Bos Dairy, LLC (“Bos Dairy”), located in Fair Oaks, Indiana. It appears that the ARB’s investigation of Bos Dairy was prompted by the March 4, 2015, letter from Janusz Johnson, Section Chief, Office of Air Quality, Indiana Department of Environmental Management (“IDEM”) to Tony Bos, Member, Bos Dairy, LLC, in which IDEM alleged that Bos Dairy violated Indiana’s air permitting rules by failing to obtain the appropriate permits prior to constructing and operating emission units. Because this letter has been influential in your investigation, I want to provide some additional, contextual information for you to consider during your investigation.

In late 2012, it became apparent to IDEM that confusion existed regarding the extent to which Indiana’s air permitting regulations are applicable to farms. Due to this confusion, IDEM began developing non-rule policies for the air permitting of farming operations in Indiana. This process culminated in the February 13, 2015, promulgation of two non-rule policy documents, Air-038-NPD and Air-039-NPD (available at <http://www.in.gov/idem/4694.htm>), which clarify how Indiana’s air permitting regulations apply to farming operations in Indiana.

Subsequent to promulgating these non-rule policy documents, IDEM issued violation letters to those farming operations, including Bos Dairy, that had not obtained permits prior to constructing or operating emission units that emitted above Indiana air permitting thresholds. Violation letters are not considered formal enforcement actions. In these violation letters, IDEM alleged that these farming operations violated Indiana’s air permitting regulations, but informed the operators that IDEM did not intend to pursue legal action. Given the prior confusion surrounding the applicability of Indiana’s air permitting regulations to farming operations, IDEM did not find it appropriate to pursue legal action against farming operations that cooperated with IDEM and acquired all required air permits. Bos Dairy had already received air permit approval from IDEM on January 9, 2015, prior to the issuance of the informal violation letter; therefore, any air permitting issues had been resolved by the time the violation letter was issued.

Bos Dairy has cooperated with IDEM in acquiring the necessary air permits for its facility. Given the context of the violation letter issued by IDEM, and given the lack of doubt regarding the fact that the offsets generated by Bos Dairy are real, we recommend that the ARB does not invalidate the compliance offset credits generated by Bos Dairy.

I appreciate your consideration of the information presented in this letter. If you have any further questions, please feel free to contact Bruno Pigott, my Chief of Staff, at 317-233-2550 or at bpigott@idem.in.gov.

Sincerely,



Carol S. Comer
Commissioner
Indiana Department of Environmental Management

ATTACHMENT 2

**December 30, 2015 Letter from Carol S. Comer (IDEM) to Richard W. Corey (ARB)
Regarding Bos Dairy Offset Credits**



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Michael R. Pence
Governor

Carol S. Comer
Commissioner

December 30, 2015

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

Dear Mr. Corey:

Re: Bos Dairy Offset Credits

I am writing to provide more information to the Air Resources Board (“ARB”) for its investigation regarding the validity of compliance-offset credits generated by Bos Dairy, LLC (“Bos Dairy”), located in Fair Oaks, Indiana. Although I previously sent a letter explaining Indiana’s position on this matter, I think it is worthwhile to provide further clarification.

As I mentioned previously, internal confusion existed regarding the extent to which Indiana’s air permitting regulations are applicable to farms. When IDEM realized the need for clarification, we began developing non-rule policies for the air permitting of farming operations in Indiana. This process culminated in the February 13, 2015 promulgation of two non-rule policy documents, Air-038-NPD and Air-039-NPD (available at <http://www.in.gov/idem/4694.htm>), which clarify how Indiana’s air permitting regulations apply to farming operations in Indiana.

IDEM’s position is that these operations and their offset operations were in accordance with all local, state and national environmental and health and safety regulations during the time the offset credits were issued, and Indiana did not find it appropriate to pursue legal action against farming operations that cooperated with IDEM to acquire all subsequently required air permits. Although IDEM issued violation letters to farming operations, including Bos Dairy, they are not considered formal enforcement actions. In this particular case, they were used to notify farming operations of the need for a permit given the decision to develop new non-rule policy documents, and IDEM did not intend to pursue legal action. In fact, when IDEM issued its letter, Bos Dairy had already received air permit approval from IDEM and therefore no air permitting violations existed.

IDEM does not believe that Bos Dairy was in violation of its state environmental regulations, and given the lack of doubt regarding the fact that the offsets generated by Bos Dairy are real, we recommend that the ARB does not invalidate the compliance offset credits generated by Bos Dairy. I appreciate your consideration of the information presented in this letter. Should you have further questions, feel free to contact Bruno Pigott, my Chief of Staff at 317-233-2550 or at bpigott@idem.in.gov.

Sincerely,

Carol S. Comer
Commissioner
Indiana Department of Environmental Management



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