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Franz Litz, Esq.  
Chair of Regional Greenhouse Gas Initiative and  
Senior Attorney  
NYS Department of Environmental Conservation  
625 Broadway  
Albany, NY 12233

Dear Mr. Litz:

We would like to take this opportunity to submit comments on the proposed model rules for the Regional Greenhouse Gas Initiative, relating to offsets. We are submitting these comments on our own initiative, and do not represent any stakeholder or other party in connection with RGGI. We do represent clients in the development of energy projects, and especially renewable energy projects. However, our decision to comment is based upon our concern with encouraging the development of a program which will lead to the maximum environmental benefit to the region.

It first must be recognized that a cap and trade program for carbon emissions represents a significant technological difference from other cap and trade air pollution programs that currently function well. Most other pollution reduction programs involve pollutants whose emissions can be controlled. Scrubbers and other control mechanisms can be added to remove NO<sub>x</sub>, SO<sub>x</sub>, mercury, and other pollutants from flue gases. Those cap and trade systems allow companies to evaluate known costs of added equipment with the costs of credits to determine the most cost effective means for compliance.

Carbon dioxide is different. There is currently no physical piece of equipment that can be added to a generating plant to remove carbon dioxide. We understand that some processes are being tested that have shown promise, such as algae filtration, but at this time they cannot be counted on for compliance. Therefore, a plant which needs to reduce its carbon emissions for which credits are either not available or are too expensive, has only a couple of choices – it can reduce operations, or switch fuels. Switching fuels for many facilities will not be an option. Natural gas is expensive and biofuel may require a major permit modification or may not be technically feasible. Therefore, the availability of credits through offsets projects may in some cases be critical. Some have raised concerns that making offsets too liberally available may reduce the impact of the Initiative. I submit that there are risks of failing to encourage the broad development of offset projects.



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Our main concern relates to the additionality test imposed on offset projects. For reforestation projects, a proxy additionality test is proposed, which is that if land has been unforested for 10 years, it is assumed that the reforestation project is "real" and "surplus". We applaud the staff for creating a bright line rule for determining additionality in this case. We urge the staff to look for other similar bright line proxies so that projects do not face tremendous uncertainty during the planning and development stages. For example, landfills not subject to current gas captive requirements could be a bright line proxy standard.

"Additionality" also seems to include the notion of change in law risk. If a project is otherwise required by law, it would fail the additionality test, which is an acceptable compromise to ensure that there is not double counting. However, we would urge the staff to look at the Kyoto Protocol's Clean Development Mechanism (CDM) additionality test. Under CDM, legal requirements and the additionality test are examined at the start of the project. If the law subsequently changes, any carbon credits created remain. Under the proposed RGGI model rules, the change in law risk would continue, and for example, if regulations were imposed by a state on unregulated landfill emissions, an offset project which created carbon credits due to the capping and capture of these landfill emissions would lose these carbon credits from the date of the change in law.

We believe that this will greatly reduce the future value of carbon offset credits. The result will be that only projects which have a very short term payback will be undertaken. If a project's financing depends upon the creation of carbon credits spread out over a number of years, the fact that the law could change at any time and wipe out the total future value of these credits will mean that financial institutions will have to greatly, if not completely, discount their future value. The value of these credits in the trading market will also no doubt be impacted. Offset credits will only have their full value if buyers are comfortable that no proposed changes in federal or state rules are proposed which could eliminate their value. The added due diligence necessary to determine if a particular offset credit is at risk will tremendously burden offset credits, and will diminish their value.

It has been suggested that this problem can be dealt with through a contract. For example, if a project is undertaken to capture landfill gas emissions, the lost value of the credits, should the law change to now require such capture, can be recouped from the landfill owner by a repayment of the cost for installing the landfill capture system, since it is now required by law, and the landfill owner would have had to do it otherwise. However, this misses the fact that there may be a complete disconnect between the cost of complying with the legal requirements, and the cost of the offset project, and the value of the carbon credits created. Projects which depend solely on the value of future carbon credits are inherently risky projects that will not be able to tolerate the potential loss of all value. It is highly unlikely that the value of the landfill capture mechanism to the landfill owner will match the financing needs of the offset project developer. As a result, far fewer offset projects will be undertaken.



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Finally, we would be more concerned with failing to create incentives for the development of offset projects, which in and of themselves are beneficial to the environment, as opposed to being overly concerned that too many offsets might be developed if projects were allowed to benefit from both the RGGI offset credits and other subsidies such as the renewable energy credits. Forcing projects to choose which subsidy will be most valuable at the very beginning of the project's planning will be extremely difficult, especially in a completely undeveloped offset market. The fears of there being too many renewable energy projects or landfill gas projects in our mind pales in comparison to the fact that there are so few renewable energy projects in this region. Forcing projects to choose at the planning stage in order to avoid the potential that too many projects are developed seems destined to continue the low level of renewable energy projects in this region. We would suggest that at a minimum, flexibility be permitted, so that projects can seek approval, but do not have to choose the preferred subsidy program until the project credits are to be created.

Finally, we urge the staff to quickly develop these rules, and for the states to quickly enact regulations to implement these rules so that offset project developers know the rules and playing field and can plan accordingly.

In summary, we encourage the staff to endeavor to include more "bright line" proxies for additionality, that future change in low risk not be imposed on offset projects, and that flexibility be allowed in the timing of the choice of subsidy schemes.

Thank you for this opportunity to comment on these regulations.

Respectfully submitted,

BROWN BUDNICK BERLACK ISRAELS LLP

A handwritten signature in black ink, appearing to read "John W. Wadsworth".

John W. Wadsworth

JWW/mgb