

**FILED**  
San Francisco County Superior Court

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SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

DEPARTMENT NO. 613

CITIZENS CLIMATE LOBBY and OUR  
CHILDREN'S EARTH FOUNDATION,

Petitioners and Plaintiffs,

vs.

CALIFORNIA AIR RESOURCES BOARD,

Respondent and Defendant.

And

CLIMATE ACTION RESERVE,

Intervenor-Respondent,

ENVIRONMENTAL DEFENSE FUND,

Intervenor-Respondent,

SOUTHERN CALIFORNIA EDISON  
COMPANY, PG&E CORPORATION, SAN  
DIEGO GAS & ELECTRIC COMPANY,  
SOUTHERN CALIFORNIA GAS COMPANY,  
CE2 CARBON CAPITAL, LLC, NRG ENERGY,  
INC., WORLD OIL CORP., THE COALITION  
FOR EMISSION REDUCTION POLICY, THE  
INTERNATIONAL EMISSIONS TRADING  
ASSOCIATION, THE CARBON OFFSET  
PROVIDERS COALITION, AND THE VERIFIED  
CARBON STANDARD ASSOCIATION,

Intervenors-Respondents.

Case No. CGC-12-519554

**STATEMENT OF DECISION RE:  
PETITION FOR WRIT OF MANDATE**

Hon. Ernest H. Goldsmith

1 On December 7, 2012, this Petition for Writ of Mandate came on regularly for hearing in  
2 Department 613 of the Superior Court of the State of California, County of San Francisco, the  
3 Honorable Ernest H. Goldsmith presiding. George E. Hays, Michael A. Costa, and Naomi K.  
4 Melver appeared on behalf of petitioners and plaintiffs Citizen Climate Lobby and Our Children's  
5 Earth Foundation. Gavin G. McCabe and Christopher S. Crook of the Office of the Attorney  
6 General appeared on behalf of respondent California Air Resources Board. Patrick W. Dennis  
7 and Krista L. Hernandez of Gibson, Dunn & Crutcher appeared on behalf of Intervenor-  
8 Respondent Climate Action Reserve. Robert A. Wyman of Latham & Watkins appeared on  
9 behalf of Intervenor-Respondents Southern California Edison Company, PG&E Corporation,  
10 San Diego Gas & Electric Company, Southern California Gas Company, DE2 Carbon Capital,  
11 LLC, NRG Energy, Inc., World Oil Corp., The Coalition for Emission Reduction Policy, The  
12 International Emissions Trading Association, The Carbon Offset Providers Coalition, and the  
13 Verified Carbon Standard Association. Timothy J. O'Connor of the Environmental Defense Fund  
14 and Sean H. Donahue of Donahue & Goldberg appeared on behalf of Intervenor-Respondent  
15 Environmental Defense Fund. Thomas M. Donnelly and Sarah E. Rauh of Jones Day appeared  
16 on behalf of The Nature Conservancy, which filed an Amicus Curiae brief.

17 Having considered all of the pleadings, supporting evidence, argument by counsel, and  
18 good cause appearing therefore, the Court hereby DENIES the Petition for Writ of Mandate.

### 19 INTRODUCTION

20 Citizens Climate Lobby and Our Children's Earth Foundation (collectively "Petitioners")  
21 challenge the use of standardized additionality mechanisms in the offset component of the cap-  
22 and-trade program promulgated by California Air Resources Board<sup>1</sup> ("Respondent") pursuant to  
23 the Global Warming Solutions Act of 2006 (the "Act"). The Act aims to improve California's  
24 economy while decreasing emissions of greenhouse gases ("GHG"). Respondent created a cap-  
25 and-trade scheme as part of the regulations to achieve this goal. This is a market-based program  
26 that caps the amount of GHG an entity can emit and issues or auctions allowances to pollute up to

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28 <sup>1</sup> The California Air Resources Board is a department within the cabinet-level California Environmental Protection Agency.

1 the cap. An entity must acquire allowances sufficient to cover its GHG emissions for a given  
2 compliance period. As a cost control measure, Respondent included offset credits in the program.  
3 Offset credits are similar to allowances, but they represent voluntary reductions in GHG  
4 emissions by a source not regulated by the cap-and-trade program. In order to realize offset  
5 credits' cost-controlling features while preserving environmental integrity, all offset reductions  
6 must be additional. Additionality refers to reductions which would only occur due to the  
7 financial incentive provided by offset credits. Conversely, reductions that would occur without  
8 this incentive are non-additional. The financial incentive results from selling offset credits on the  
9 carbon market. If reductions are not additional, reductions that would have occurred anyway  
10 replace actual reductions and offset credits become windfall gains for the reducing entity.

11 Petitioners focus their challenge solely on Respondent's use of a standards-based  
12 approach to determine additionality. The standards-based approach creates additionality  
13 thresholds for particular categories of projects instead of determining additionality individually  
14 for each project. This Court must determine whether the Legislature foreclosed Respondent's use  
15 of these mechanisms because they permit non-additional reductions to receive credit. Petitioners  
16 demand a perfect additionality determination that precisely delineates between additional and  
17 non-additional reductions. Respondent contends that additionality is inherently uncertain and it is  
18 impossible to design a perfect additionality mechanism. Central to this case is interpreting Health  
19 and Safety Code section 38562, subdivision (d)(2)<sup>2</sup> to determine if it forecloses Respondent from  
20 using standardized additionality mechanisms.

## 21 **BACKGROUND**

### 22 **A. The Global Warming Solutions Act of 2006**

23 The Legislature passed the California Global Warming Solutions Act of 2006, in response  
24 to the "serious threat" global warming poses to the "economic well-being, public health, natural  
25 resources, and the environment of California." (Health & Safety Code § 38501, subd. (a)<sup>3</sup>.)

26 \_\_\_\_\_  
27 <sup>2</sup> "For regulations pursuant to Part 5 [about Market-Based Compliance Mechanisms], the reduction is in addition to  
any greenhouse gas emission reduction otherwise required by law or regulation, and any other greenhouse gas  
emission reduction that otherwise would occur." (Health & Saf. Code, § 38562, subd. (d)(2).)

28 <sup>3</sup> All further statutory references are to the Health and Safety Code, unless otherwise indicated.

1 Global warning threatens California’s environment and citizens by increasing air quality  
2 problems, decreasing water supply, raising the sea level, damaging marine ecosystems and the  
3 natural environment, and increasing the incidences of infectious diseases, asthma, and other  
4 human health-related problems. (*Ibid.*) Climate change also threatens “California’s largest  
5 industries, including agriculture, wine, tourism, skiing, recreational and commercial fishing, and  
6 forestry.” (§ 38501, subd. (b).)

7 The Legislature responded to this impending crisis by using California’s position as “a  
8 national and international leader on energy conservation and environmental stewardship efforts  
9 [to place itself] at the forefront of national and international efforts to reduce emissions of  
10 greenhouse gases.” (§ 38501, subd. (c).) California will use its global leadership role to  
11 encourage other states, the federal government, and other countries to act and “position its  
12 economy, technology centers, financial institutions, and businesses to benefit from national and  
13 international efforts to reduce emissions of greenhouse gases.” (§ 38501, subds. (d) & (e).)

14 To this end, the Legislature directed Respondent to develop and implement regulations  
15 designed to reduce GHG emissions to 1990 levels by 2020. (§ 38550.) These emission reduction  
16 measures must, *inter alia*, minimize costs and maximize benefits for California’s economy as  
17 well as maximize additional environmental and economic co-benefits for California. (§38501  
18 subd. (h).) The Legislature directed Respondent to “adopt rules and regulations in an open public  
19 process,” (§ 38560) in coordination with state agencies and consultation with the environmental  
20 justice community, industry sectors, business groups, academic institutions, environmental  
21 organizations, and other stakeholders. (§ 38501, subd. (f).) Before designing and implementing  
22 the measures required by the Act, Respondent must create “a list of discrete early action  
23 greenhouse gas emission reduction measures that can be implemented prior to the measure and  
24 limits adopted pursuant to [the Act].” (§ 38560.5.)

25 While the Legislature required Respondent to “adopt [GHG] limits and emission reduction  
26 measures by regulation,” it did not specify which measures should be adopted. (§ 38562.)  
27 Instead it provided Respondent with nine policy goals to consider when designing the regulations.  
28 (§ 38562, subd. (b).) These include minimizing costs and maximizing benefits to California,

1 encouraging and crediting early voluntary action to reduce GHG emissions, taking into account a  
2 regulation's cost-effectiveness, considering the overall societal benefits and other benefits to the  
3 economy, environment, and public health, and minimizing the administrative burden. (*Ibid.*)  
4 Respondent designed several GHG emission reduction measures, including a cap-and-trade  
5 program, standards for cleaner vehicles, low-carbon fuels, renewable electricity, and energy  
6 efficiency. Instant petition only addresses the cap-and-trade program.

7 **B. Cap-and-Trade Program**

8 The Act gives Respondent the option to use "market-based compliance mechanisms to  
9 comply with the regulations." (§ 38570.) Respondent exercised this option and designed a  
10 market-based compliance mechanism commonly known as a cap-and-trade program. The  
11 program imposes an enforceable emissions cap on certain sources of GHG emissions ("covered  
12 sources") that steadily declines over time. (R10-44.) These include a variety of production and  
13 manufacturing facilities, electricity generating facilities, suppliers of natural gas, suppliers of a  
14 variety of fuels, including gasoline, distillate fuel oil, liquefied petroleum gas, and certain blended  
15 fuels, and suppliers of carbon dioxide. (Cal. Code Regs. tit. 17, § 95811.) Respondent distributes  
16 allowances, which are tradable permits, equal to the amount of carbon each covered source is  
17 allowed to emit in a year, the cap. (*Ibid.*) Each allowance permits its holder to emit the  
18 equivalent of one metric ton of carbon dioxide, abbreviated CO<sub>2</sub>e.<sup>4</sup> (R10-45.) At the end of a  
19 compliance period, covered sources must submit allowances or offset credits equal to their GHG  
20 emissions during the period. (R10-44.) Covered sources that aggressively cut GHG emissions  
21 can sell their surplus allowances or bank them for later use. (R10-45.) Sources that do not reduce  
22 their emissions below the cap must purchase additional allowances or offset credits.

23 An offset credit represents a reduction of GHG emissions from an approved uncapped  
24 source. (R10-45.) Each offset credit represents an emission reduction of one CO<sub>2</sub>e. (R10-44.)  
25 An uncapped source is an entity that is not regulated by the cap-and-trade program. Not every  
26 reduction is eligible for offset credit. Credits are only awarded to GHG emission reductions

27 <sup>4</sup> This measurement equates the differing impacts various gases have on the environment. (R10-45.) Some gases are  
28 more effective at trapping heat than carbon dioxide. (*Ibid.*) For instance, methane has a CO<sub>2</sub>e of 21. This means one  
ton of methane traps the same amount of heat of 21 tons of carbon dioxide. (R22-1050.)

1 carried out pursuant to one of four Protocols promulgated by Respondent. (R10-48.) These  
2 Protocols are the focus of instant petition.

3 Carbon offsets reduce the cost of emission reductions because uncapped sources can  
4 reduce their GHG emissions at a lower cost than the covered source making the same reduction.  
5 (R22-1046.) Offsets also incentivize innovation and bring about GHG emission reductions in  
6 sectors of the economy that are difficult or impossible to directly regulate. (R10-1580 to 1581.)  
7 These cost savings advantages are matched by “significant challenges and risks in the practical  
8 implementation of an offsets provision.” (R10-1581.) Additionality is at the heart of these  
9 challenges. Instant petition contends Respondent’s offset program lacks environmental integrity  
10 because it cannot ensure reductions eligible for offset credits are additional.

11 The heart of the controversy is the concern that the amount of offset credits available on  
12 the carbon market will become so large that the price will plummet. This would result in  
13 incentive for capped industries to buy credits rather than undergo the expense of converting their  
14 facilities to emit less GHG. This would result in illusory reductions and defeat the purpose of the  
15 Act, to reduce GHG emissions.

16 **C. Additionality**

17 Additionality is the linchpin of an offset program. A reduction is additional if it would not  
18 have occurred without the financial incentive provided by the offset credit. Additionality is  
19 essential to the environmental integrity of an offset program because if reductions are not  
20 additional, then the cap-and-trade program will not reduce GHG emissions beyond what would  
21 occurred anyway. (R22-1285.) Instead, entities already planning on reducing their GHG  
22 emissions will merely receive windfall gains for their reductions. This undercuts the cap-and-  
23 trade program because it substitutes illusory reductions, those that would have occurred anyway,  
24 for real reductions that the capped sources should have undertaken. At the most extreme case,  
25 non-additional credits will completely displace all additional credits and the greenhouse gas  
26 emission reductions will only occur on paper.<sup>5</sup>

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28 <sup>5</sup> This exact scenario cannot occur here because the use of offsets is limited so that only 85% of all potential  
reductions can come from offsets.

1 **i. Measuring Additionality**

2 It is essential to determine whether a project is additional, but this determination is  
3 exceedingly difficult and inherently uncertain. The regulatory agency must determine both the  
4 level of emissions that would have occurred in the absence of each project and whether the  
5 project would have occurred in a counterfactual scenario where offset credits were not available.  
6 (R22-1045, 1051 to 1052.) The fundamental challenge is that additionality is based on  
7 hypotheticals and counter-factuals and can never be shown with absolute certainty. (R24-4-7.)  
8 Approaches for demonstrating additionality are a policy balance between the level of free-riders  
9 (crediting non-additional reductions) and lost opportunities (not crediting additional reductions)  
10 for offset projects. (R24-4-8.) Three types of approaches are used to determine additionality:  
11 project-by-project, standardized, and hybrid.

12 Project-by-project approaches focus on each project's unique location and circumstances.  
13 (R24-9-6.) A baseline scenario representing what would happen in a business-as-usual  
14 environment is selected from the project's plausible alternatives. (*Ibid.*) This typically entails  
15 analysis of implementation barriers, potential leakage,<sup>6</sup> and the benefits of the project and its  
16 various alternatives. (*Ibid.*) The project is considered additional if it achieves reductions beyond  
17 the baseline scenario. (R24-9-7.)

18 Project-by-project approaches are theoretically the most rigorous and precise way to  
19 determine additionality and quantify emission reductions from offset projects. (R24-9-7.)  
20 However, this process is more subjective, opaque, and expensive than a standards-based approach  
21 as new baselines must be created for each project and the scenarios are almost always based on  
22 difficult to quantify assumptions about future actions and economic conditions. (*Ibid.*) The  
23 implementation of the Clean Development Mechanism ("CDM"), discussed below, exemplifies  
24 the shortcomings of project-by-project approaches.

25 A standards-based approach relies on information about categories of projects, instead of  
26 site-specific data and parameters. (R24-9-7.) Instead of creating a unique baseline for each

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28 <sup>6</sup> Leakage occurs when carbon emitters transfer GHG emitting activities outside the project's boundaries. The GHG emission reductions occurring on the project site are counteracted by increased emissions elsewhere.

1 project, a single baseline is created for a category of projects. (R24-9-8.) The baseline can be  
2 linked to the use of particular technologies, common practices within the industry, or other  
3 variables that bear on the particular project type. (*Ibid.*) This method simplifies initial crediting  
4 as additionality is based on objective criteria. (R24-9-9.) This objectivity leads to lower  
5 transaction and administrative costs, increased certainty for project-developers, and a more  
6 transparent verification process. (*Ibid.*) However, standardization can lead to systematic  
7 inaccuracy, either including projects that are not additional or excluding ones that are. (*Ibid.*) It  
8 is of the utmost importance that the standard is appropriately calibrated. If the standard is too  
9 lax, non-additional projects will be eligible for offset credits. Conservatively setting the standard  
10 is how this concern is usually addressed.

11 Hybrid mechanisms combine aspects of both project-by-project and a standardized  
12 approaches. Instant protocols use this type of mechanism. Additionality is initially based on  
13 standardized assumptions for an entire class of projects. These assumptions are later refined and  
14 verified through project specific data.

15 **ii. The Kyoto Protocol's Clean Development Mechanism ("CDM")**

16 There are several offset schemes currently in operation throughout the country and world.  
17 The CDM, developed under the Kyoto Protocols, is the most mature offset scheme, and  
18 dominates the overall offset supply in the carbon market. (R24-384-60.) The CDM has been a  
19 great success in developing a new market for GHG emission reduction projects. (R24-4-5.)  
20 However, the CDM has been heavily criticized for not delivering on its environmental objectives  
21 and exemplifies the difficulty of determining additionality. (*Ibid.*)

22 A CDM project is additional if "GHG emissions are reduced below those that would have  
23 occurred in the absence of the registered CDM project activity." (*Ibid.*) Three elements generally  
24 comprise the CDM's additionality mechanism: a barrier analysis that demonstrates barriers  
25 prevent the proposed project; an investment analysis that demonstrates the proposed project  
26 activity is economically less attractive than another alternative; and a common practice analysis  
27 that assesses the extent that the proposed project type has already been deployed. (R24-4-8; R24-  
28 384-38.) In order to be found additional, a project must pass either the investment or the barrier



1 test and the common practice test.

2 The barriers used to demonstrate additionality under the barrier test are often not very  
3 credible. (R24-4-8.) Many projects use general financial or policy risks, such as the “risk of  
4 currency exchange rate” or the “risk of possible future decrease of feed-in tariff.” (*Ibid.*) Often  
5 barriers are very subjective. (*Ibid.*) In some projects the management itself is declared unable to  
6 manage a project; others merely state that the “project would go bankrupt without [offset  
7 credits].” (*Ibid.*) Many projects use “costs” as a barrier, sometimes without indicating the  
8 magnitude of the costs or ignoring revenues from the project. (*Ibid.*) For other barriers, it is  
9 rather unclear why they are considered barriers at all (e.g. “the region is underdeveloped and  
10 needs high investments”). (*Ibid.*)

11 A survey of 93 randomly selected CDM projects found that nearly half of the analyzed  
12 projects claimed that either the project is the “first of its kind” (14%) or that “prevailing practice”  
13 (30%) is a barrier. (R24-4-8.) However, sometimes the project technology is defined so  
14 narrowly that the project is declared to be the “first of its kind” although many similar plants have  
15 already been constructed. (*Ibid.*) Similar problems are observed with regard to the common  
16 practice analysis for which only a few methodologies specify when a project should be  
17 considered common practice. (*Ibid.*) Another problem with the barrier analysis is the lack of  
18 evidence: 43% of analyzed projects using the barrier analysis do not provide or mention evidence  
19 of the key barriers. (*Ibid.*) Overall, this makes the barrier analysis highly subjective, vague, and  
20 difficult to validate in an objective and transparent manner. (*Ibid.*) Practically all investments  
21 face some barriers so this analysis is not suited to distinguishing additional from non-additional  
22 projects. (*Ibid.*)

23 The same survey also found the effectiveness of the investment analysis is varied. (R24-  
24 4-8.) This approach is criticized as “intention-based” and subjective, because it is based on the  
25 project developer’s motivation. (*Ibid.*) Investment decisions are complex and the choices,  
26 chances, risks, barriers, and motivations for investments are difficult to compare and balance in  
27 an objective manner. (*Ibid.*) Additionally, while some projects provide a transparent and detailed  
28 calculation, about 30% of the projects use a black-box approach where key information is lacking

1 and only the calculation's result is provided. It has been reported that even if figures are  
2 included, they are not always correct. (R24-4-8 to 9.)

3 This survey suggests the additionality of a significant number of projects seems unlikely  
4 or questionable.<sup>7</sup> (R24-4-9.) Based on an assessment of the likelihood of additionality for  
5 different project categories, the survey estimated that additionality is unlikely or questionable for  
6 roughly 40% of the registered projects. (*Ibid.*) These projects are expected to generate about  
7 20% of the offset credits for the measured period. (*Ibid.*)

8 Several other sources support this conclusion. (R24-4-9.) For example, a survey of  
9 Indian projects found that 71% of the participants agreed with the statement that "many CDM  
10 projects would also be implemented without registration under the CDM" and 86% of the  
11 participants affirmed that "in many cases, carbon revenues are the icing on the cake, but are not  
12 decisive for the investment decision." (*Ibid.*) It is the widely held belief among CDM and  
13 renewable energy professionals in India that many if not most CDM projects are non-additional  
14 and that the CDM is having little effect on renewable energy development in the country. (R22-  
15 1223.)

16 The CDM additionality mechanism has not only been criticized for being inaccurate it is  
17 also considered expensive and slow. The initiation of a project costs between \$80,000 and  
18 \$230,000 with an annual cost of \$20,000 to \$35,000 in the first year and \$15,000 to \$25,000 in  
19 subsequent years. (R22-1055.) High transaction costs are especially problematic because they  
20 are incurred up front and offset credit revenue is only realized if the project is approved and after  
21 registration of the project and issuance of the credits. (R24-384-63.) It can take between two and  
22 two-and-a-half years to issue the first credit after commencing a project. (R22-1055; R22-1134.)  
23 These bottlenecks and delays are caused by the inability of the CDM's administrative structure to  
24 handle the high number of proposed projects due to the length and complexity of the  
25 administrative process, as well as the shortage of available emission verifiers. (R22-1060.)

26 \_\_\_\_\_  
27 <sup>7</sup> This survey only addresses the average performance of projects from 2004 to 2007 and does not account for later  
28 improvements in the CDM. (R24-4-18.) This detailed examination of the CDM is provided herein to present the  
tenor of the scientific literature on determining additionality when CAR began work on the Early Action Projects that  
formed the basis of the Protocols.

1 A number of improvements have been suggested to solve these shortcomings. Many of  
2 these involve replacing the current subjective determinations with objective criteria. Ambitious  
3 dynamic benchmarks could replace the assessment of additionality in some industries. (R24-4-9.)  
4 For instance, the performance of the top 20% of plants in an industry could be used as the basis  
5 for establishing benchmarks. (*Ibid.*) Barriers that are highly subjective or company-specific  
6 should not be used to demonstrate additionality since an objective validation is very difficult. In  
7 order to make the common practice analysis more objective, quantitative thresholds could be  
8 introduced for some sectors. (*Ibid.*)

9 One suggestion is to replace the current additionality mechanism with a sectoral approach.  
10 Under a sectoral CDM, a baseline is established for a whole sector and emission reductions below  
11 the baseline are credited. (R24-4-12.) The most important advantage of the sectoral CDM is that  
12 it avoids the counter-factual and hypothetical assessment of the motivation of private entities to  
13 demonstrate additionality. (*Ibid.*)

14 The Court finds the factors which have rendered the CDM problematic in terms of  
15 administrative complexity, delay, and cost, to be highly persuasive in concluding that  
16 Respondent's rejection of the CDM project-by-project approach was justified programmatically  
17 and consistent with its legislative grant of discretion.

18 The earliest national and international cap-and-trade systems were created a decade ago  
19 and were not fully implemented until years later. (R24-384-19 to 21.) The history is short and  
20 practical experience limited. The Legislature delegates authority to agencies to promulgate  
21 regulations using their best judgment based on the currently available information. Respondent's  
22 legislatively assigned task is no different. Respondent has used its experience, expertise, and  
23 judgment in arriving at the appropriate methodology to determine additionality within the cap-  
24 and-trade program. It is not within the ambit of the Court to decide that one methodology trumps  
25 another when decisions are made based on extensive research, stakeholder input, public input,  
26 and fact-based analysis.

27 **D. Additionality under the Act**

28 The Act requires that reductions are "in addition to ... any other [GHG] emission

1 reduction that would otherwise occur.”<sup>8</sup> (§35862, subd. (d)(2).) This is the only definition of  
2 additionality in the Act. Respondent refined this definition to mean reductions are additional if  
3 they “exceed any [GHG] reductions or removals that would otherwise occur in a conservative  
4 business-as-usual scenario.” (Cal. Code Regs. tit. 17, § 95802, subd. (a)(4).) A business-as-usual  
5 scenario is, “the set of conditions reasonably expected to occur within the offset project boundary  
6 in the absence of the financial incentives provided by offset credits, taking into account all current  
7 laws and regulations, as well as current economic and technological trends.” (Cal. Code Regs. tit.  
8 17, § 95802, subd. (a)(34).) “Conservative means, in the context of offsets, utilizing project  
9 baseline assumptions, emission factors, and methodologies that are more likely than not to  
10 understate net GHG reductions or GHG removal enhancements for an offset project to address  
11 uncertainties affecting the calculation or measurement of GHG reductions or GHG removal  
12 enhancements.” (Cal. Code Regs. tit. 17, § 95802, subd. (a)(58).) Petitioners do not challenge  
13 these definitions, instead they contend that Respondent’s four Compliance Offset Protocols  
14 (“Protocols”) do not ensure reductions will be additional under these definitions.

15 Respondent has promulgated several additionality standards using a variety of approaches.  
16 Almost all of the Protocols use a standardized threshold to initially determine an individual  
17 project’s additionality. Once a project’s additionality is determined, each protocol employs  
18 project-by-project mechanisms to quantify and verify actual reductions. Each Protocol began as  
19 an Early Action Project created by CAR. These were then adopted by Respondent and became  
20 the four Protocols at issue here. Each Protocol applies to a particular type of project: Livestock  
21 Projects, Ozone Depleting Substances (“ODS”) Projects, Urban Forest Projects, and U.S. Forest  
22 Projects. These standards were included in the regulations by reference. (Cal. Code Regs. tit. 17,  
23 § 95973(a)(2)(C).

24 **i. Livestock Protocol**

25 The Livestock Protocol awards offset credits for trapping methane emitted from manure  
26 stored in anaerobic conditions on dairy and swine farms. (R-272.) The methane is trapped by  
27 anaerobic digesters and then destroyed through flaring or used to create heat and electricity.

28 <sup>8</sup> This subsection also contains a legal additionality requirement, but that requirement is not at issue.

1 (R22-495 to 500.) Methane is a powerful greenhouse gas with a CO<sub>2</sub>e of 21. Approximately  
2 eight percent of methane emitted into the atmosphere comes from agricultural sources.

3 Work on the Livestock Protocol began in 2006 when Intervenor-Respondent Climate  
4 Action Reserve (“CAR”) commissioned Science Applications International Corporation  
5 (“SAIC”) and independent consultant Kathryn Goldman to undertake analysis to establish a  
6 performance standard for this protocol.<sup>9</sup> (R24-700J-73.) The report determined that 0.07% of all  
7 dairy farms and 0.02% of all swine farms in the United States use anaerobic digesters to dispose  
8 of manure. (R24-700J-75.) An October 2010 report from the US EPA found that digesters are  
9 installed in 1.9% of dairy and swine farms where it is technically feasible to install them. (R22-  
10 909 to 910.) Both reports found that cost was a main barrier to installation of more digesters.  
11 (R22-909; R24-700J-78.)

12 The SAIC report recommended setting a technology-specific additionality threshold such  
13 that the installation of an anaerobic digester demonstrates the project’s additionality. (R24-700J-  
14 78.) This threshold was recommended because anaerobic digesters were not being installed  
15 despite other conditions favoring installation. (*Ibid.*) Use of digesters was found to be above and  
16 beyond common practice as installation of a digester showed a farmer is managing waste at the  
17 99<sup>th</sup> percentile (98<sup>th</sup> percentile if the EPA’s report is used). (R22-909 to 910; R24-700J-78.) The  
18 report’s recommendation was adopted and became the additionality threshold for Respondent’s  
19 Livestock Protocol. (R-273.)

20 **ii. Ozone Depleting Substances Protocol**

21 Ozone depleting substances (“ODS”) are chemicals known to destroy the stratospheric  
22 ozone layer when released into the atmosphere. (R-328.) ODS is also a potent GHG, with a  
23 CO<sub>2</sub>e ranging from the hundreds to the thousands, depending on the substance. (*Ibid.*) ODS is  
24 used in a wide variety of applications including refrigerants, foam blowing agents, solvents, and  
25 fire suppressants. (*Ibid.*) The production of ODS was phased-out and banned by the Montreal  
26 Protocol and its subsequent strengthening. (R24-700G-62.) The use of ODS has not been

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28 <sup>9</sup> The actual report written by SAIC and Goldman is not in the record. Instead, it has been summarized in an  
appendix attached to CAR’s Early Action Program. (R24-700J-73 to 79.)

1 banned, and current stocks are recycled into new appliances, presenting the risk of ODS leaking  
2 into the atmosphere. (R24-700G-64.) Respondent created two standards, one for ODS derived  
3 from refrigerant sources and one for ODS derived from foam sources. (R-329.) CAR began  
4 development of the ODS protocol in 2009. (R10-3012.)

5 The destruction of ODS from refrigerant sources is only eligible for offset credit if it was  
6 produced prior to the U.S. production phase-out, and could legally be sold into the U.S.  
7 refrigerant market. (R-329.) The ODS must originate from domestic U.S. supplies; imported  
8 refrigerant is not eligible under this protocol. (*Ibid.*) CAR surveyed the amount of applicable  
9 ODS that was destroyed in the United States in 2003 and 2004, to determine what was currently  
10 the common practice for ODS destruction. (R24-700G-65.) These years were used because they  
11 represent common practice after the phase-out of ODS production and before the initiation of  
12 carbon offset projects in the United States. (*Ibid.*) CAR found that between 0.19% and 1.4% of  
13 offset credit eligible ODS available for destruction was destroyed. (R24-700G-67.) Due to the  
14 very low percentage, CAR concluded that the destruction of refrigerant ODS without incentive  
15 from the carbon market is not common practice. (*Ibid.*)

16 The destruction of ODS blowing agent entrained in foam sources is eligible for offset  
17 credit if it would have been released into the atmosphere at the end-of-life. (R-330.) CAR found  
18 that foam used in building insulation is currently not being recovered and destroyed. (R24-700G-  
19 68.) CAR also found that foam-blowing agent is either recovered for reuse or destroyed in 1.5%  
20 of destroyed appliances. (*Ibid.*) Because recovery of foam from buildings or appliances was very  
21 low, it is not considered a common practice. (*Ibid.*)

22 The destruction of ODS by the U.S. government is common practice and considered  
23 business-as-usual. (R-331.) Therefore it is ineligible for offset credits. (*Ibid.*)

### 24 **iii. Urban Forest Protocol**

25 Trees reduce GHG emissions by absorbing CO<sub>2</sub> from the atmosphere during  
26 photosynthesis and sequestering the carbon in their trunks, roots, branches, and leaves. (R4-444;  
27 R10-3169.) Trees emit this carbon when fire, disease, pests, or harvest kills the trees. (R4-443.)  
28 Consequently, preservation and proper management of forestland is a component of combating

1 climate change.

2 The Urban Forest Protocol encourages planting trees in urban settings and CAR began  
3 work on this Protocol in 2006. Three types of entities are eligible for offset credit: municipalities,  
4 educational campuses, and utilities. (R-381.) This Protocol contains two standardized  
5 additionality thresholds. One applies to municipalities and educational campuses, and the other to  
6 utilities. (R-383 to 384.) Trees planted by municipalities and on educational campuses are  
7 additional if their annual net tree gain is greater than zero. Net tree gain is calculated by “the  
8 annual number of trees planted by a municipality or educational campus minus the annual number  
9 of trees removed by a municipality or educational campus.” (R-383.) The utility additionality  
10 threshold exempts utilities from the net tree gain requirement and awards offset credit for any tree  
11 planted by a utility. These thresholds are based on a survey by CAR of 18 cities across the  
12 United States. (R24-700H-11.)

13 One-third of the municipalities surveyed had a negative net tree gain and many entities  
14 only had a small percentage net tree gain. (R24-700H-96 to 97.) CAR initially set the  
15 additionality threshold at the median value of the surveyed cities, 0.72% net tree growth per year.  
16 (R24-700H-97.) Several public comments suggested that a threshold at the 50th percentile was  
17 too high and well beyond a level that is consistent with average performance. (*Ibid.*) This level  
18 was considered too high because high-performing cities were surveyed. (*Ibid.*) A threshold at the  
19 25th percentile was suggested, which would make the threshold -0.12%. As net tree loss is not  
20 the best practice, the threshold was set at zero. (*Ibid.*) Any net tree gain is considered additional.  
21 (R-383.)

22 CAR exempted utilities from the net tree gain requirement because “most utilities do not  
23 have tree planting programs that go beyond replacing trees removed during line clearance  
24 operations.” (R-384.) While some utilities have programs “aimed at storing carbon and  
25 conserving energy in residential households,” CAR found that “utilities are planting fewer than  
26 400 trees annually in these types of programs.” (*Ibid.*) These trees are considered additional  
27 because it is not common practice for utilities to plant trees. (*Ibid.*)

28 In order to receive offset credits, entities must also meet longevity requirements.

1 Respondent requires a legally enforceable commitment from the credited entity to maintain all  
2 credited trees for 100 years and not to decrease the maintenance budget for non-credited trees.  
3 (R-386, 393.) This ensures that credited trees will continue to sequester carbon for at least a  
4 century and ineligible trees will not be neglected in favor of maintaining and planting more  
5 credited trees. (*Ibid.*) If credited trees do not survive for at least a century, the entity must return  
6 previously issued credits. (R-393.) If a credited tree is destroyed, the entity has a year to replace  
7 the tree. (*Ibid.*)

8 **iv. U.S. Forest Protocol**

9 CAR began work on the U.S. Forest Protocol in April 2003. The Protocol encourages  
10 forest conservation, conservation-based management, and reforestation projects in order to  
11 increase forest carbon sequestration. (R10-3147.) The Protocol awards offset credits for three  
12 types of forest-related projects: 1) Reforestation Projects; 2) Improved Forest Management  
13 Projects; and 3) Avoided Conversion Projects. (R4-444 to 445.)

14 There are two additionality standards for Reforestation Projects: the 10-10 Standard and  
15 the Significant Disturbance Standard. Under the 10-10 Standard, project land is considered  
16 additional if it has had less than ten percent canopy cover for at least ten years. (R5-1720.)  
17 Under the Significant Disturbance Standard, projects qualify for credit if reforestation would not  
18 occur in a conservative business-as-usual scenario considering the costs of preparing a site, the  
19 value of the harvested products, rotation age and site class, and whether the forest owner has  
20 historically engaged in or allowed timber harvesting on the area of land disturbance, such as  
21 municipal park land. (R-435, 531.)

22 Once additionality is established under either standard, a quantification equation  
23 determines what portion of the timber on the project site is additional. (R-459.) The equation  
24 subtracts the baseline carbon (the likely vegetative conditions and activities that would take place  
25 on the project site in a conservative business-as-usual scenario) from the amount of carbon  
26 actually sequestered on the project site. (R-458 to 460.) This equation decreases the amount of  
27 credits awarded to take into account timber harvesting at the site and secondary effects of the  
28 project, including leakage, emissions from machinery used in the project, and shifting cropland or



1 grazing activities outside the project area. (R-458 to 459, 462 to 464.) The amount of credits  
2 awarded is further reduced by 20 percent because Respondent assumes that an additional 0.2 tons  
3 of sequestered carbon will be harvested on non-project sites that for every ton of carbon  
4 sequestered by a project. (R-459 to 460.) Both types of reforestation projects must achieve net  
5 reduction of GHG emissions above what would be achieved in the absence of the projects, which  
6 reflects “an assessment of the commercial value of trees within the project area over the next 30  
7 years.” (R-444; R-486.)

8 Improved Forest Management Projects encourage both GHG reductions (by preventing  
9 harvesting that would otherwise occur) and GHG removal enhancements (by encouraging the  
10 growth of carbon dioxide absorbing trees). (R-431 to 432.) Project activities must produce GHG  
11 emission reduction or removals in excess of those that would have occurred under a conservative  
12 business-as-usual scenario, which is determined by comparing the project area’s carbon stocks to  
13 the common practice on similar situated lands in the same region; financial and legal constraints  
14 are also considered. (R-465 to 476.)

15 Avoided Conversion Projects prevent forestland from being converted to non-forestland  
16 use by dedicating the land to continuous and perpetual forest cover, either through transferring the  
17 land to public ownership or recording a Qualified Conservation Easement against the property.  
18 (R-432.) Qualified Conservation Easements are perpetual and expressly acknowledge  
19 Respondent as a third-party beneficiary with full enforcement rights. (R-432, 438 to 439.) These  
20 projects must demonstrate a significant threat of conversion to non-forest land, and only applies  
21 to land that is privately held before the project’s commencement. (R-432, 433.) A significant  
22 threat is shown through submitting a real estate appraisal verifying the project could be legally  
23 and economically converted to an alternative land use. (R-435 to 436.)

## 24 DISCUSSION

### 25 A. Standard of Review

26 “The appropriate degree of judicial scrutiny in any particular case is perhaps not  
27 susceptible of precise formulation, but lies somewhere along a continuum with nonreviewability  
28 at one end and independent judgment at the other.” (*Yamaha Corp. of America v. State Bd. of*

1 *Equalization* (1998) 19 Cal.4th 1, 7 citing *Western States Petroleum Assn. v. Superior Court*  
2 (1995) 9 Cal.4th 559, 575-576.) This case is governed a two-step analysis described in *Yamaha*  
3 and codified in Government Code section 11342.2. First, the court determines whether the  
4 regulation is consistent with, and not in conflict, with the enabling statute. This step can be  
5 reviewed under a spectrum of standards ranging from *de novo* to arbitrary and capricious.  
6 Second, the court determines whether the regulation is reasonably necessary to effectuate the  
7 enabling statute's purpose. (*Communities for a Better Environment v. California Resources*  
8 *Agency* (2002) 103 Cal.App.4th 98, 108.) The court assesses this step under an arbitrary and  
9 capricious standard. The court only disturbs a regulation "if the agency's action was arbitrary,  
10 capricious, or without reasonable or rational basis." (*Id.* at p. 109.)

11 As this case's primary battleground is which standard of review applies to *Yamaha's* first  
12 step, an extended review of how to determine the appropriate standard is required. A spectrum of  
13 standards can apply to the first step because this step is used to review a variety of administrative  
14 actions, which derive their legal force from different governmental branches. Generally, these  
15 actions are divided into two categories: quasi-legislative and interpretive. (*Yamaha Corp. of*  
16 *America v. State Bd. of Equalization, supra*, 19 Cal.4th at p. 10.)

17 Quasi-legislative regulations are legislative, have the dignity of statutes, and are an  
18 authentic form of substantive lawmaking. (*American Coating Assn., Inc v. South Coast Air*  
19 *Quality Dist.* (2012) 54 Cal.4th 446, 460.) In other words, the agency is exercising lawmaking  
20 power delegated by the Legislature. (*Ibid.*) The court will not upset a regulation duly  
21 promulgated within legislatively conferred authority unless it is arbitrary or capricious. (*Yamaha*  
22 *Corp. of America v. State Bd. of Equalization, supra*, 19 Cal.4th at pp. 10-11.) Review is  
23 narrowly limited to determine whether the regulation falls within the delegated lawmaking  
24 authority and if it is reasonably necessary to effectuate the statute's purpose. (*Ibid.*)

25 This deference is not limitless, regulations that "alter or amend the statute or enlarge or  
26 impair its scope are void and courts not only may, but it is their obligation to strike down such  
27 regulations." (*Yamaha Corp. of America v. State Bd. of Equalization, supra*, 19 Cal.4th at p. 16  
28 (conc. opn. of Mosk, J.) citing *Morris v. Williams* (1967) 67 Cal.2d 733, 748.) While quasi-

1 legislative rules are afforded the dignity of statutes, courts are the final arbiter of the law and have  
2 the last word on whether a regulation lies within the authority delegated by the Legislature.

3 (*Slocum v. State Bd. of Equalization* (2005) 134 Cal.App.4th 969, 974.) “This is a question  
4 particularly suited for the judiciary as the final arbiter of the law, and does not invade the  
5 technical expertise of the agency.” (*Community for a Better Environment v. California Resources*  
6 *Agency, supra*, 103 Cal.App.4th at pp. 108-109.) This type of review has been called *de novo*,  
7 independent judgment, and respectful non-deference. Whatever the title, the *sine qua non* of  
8 reviewing quasi-legislative actions that transgress the bounds of delegated authority is the court’s  
9 ability to give as little or as much weight to the regulation as it wishes.

10 The second category of administrative action is interpretive rules, when an agency  
11 interprets a statute or regulation. These rules are judicial in nature and represent an agency’s  
12 interpretation of a statute’s legal meaning and effect. Interpreting a statute lies within the  
13 constitutional domain of the courts. In these matters, the judiciary has the final say and is not  
14 bound by the agency’s interpretation. (*Yamaha Corp. of America v. State Bd. of Equalization*,  
15 *supra*, 19 Cal.4th at p. 12.) This does not mean the court casts the agency’s interpretation aside;  
16 instead it is one among many tools available to the court. (*Id.* at p. 7.) “Depending on the  
17 context, [the interpretation] may be helpful, enlightening, even convincing. It may sometimes be  
18 of little worth.” (*Id.* at pp. 7-8.) The deference given to such an interpretation is based on a  
19 complex of factors that generally indicate whether the agency has a comparative interpretive  
20 advantage over the court and if the interpretation is probably correct. (*Id.* at p. 12.)

21 Not all regulations fall neatly into one category or the other. (*Ramirez v. Yosemite Water*  
22 *Co., Inc.* (1999) 20 Cal.4th 785, 799.) A continuum of deference exists between quasi-legislative  
23 and interpretive regulations. (*Id.* at pp. 798-799.) “Regulations that fall somewhere in the  
24 continuum may have both quasi-legislative and interpretive characteristics, as when an  
25 administrative agency exercises a legislatively delegated power to interpret key statutory terms.”  
26 (*Ibid.*) In these instances the California Supreme Court has conducted an independent analysis to  
27 determine whether the instant interpretation falls within the agency’s delegated lawmaking  
28 authority. (see *American Coatings Assn. v. South Coast Air Quality Dist.*, *supra*, 54 Cal.4th 446;

1 *Ramirez v. Yosemite Water Co., Inc., supra*, 20 Cal.4th 785; *Moore v. California State Bd. of*  
2 *Accountancy* (1992) 2 Cal.4th 999.)

3       There is an important qualification to the standard articulated in *Yamaha*. (*Yamaha Corp.*  
4 *of America v. State Bd. of Equalization, supra*, 19 Cal.4th at p. 17 (conc. opn. of Mosk, J.)) If the  
5 court finds the Legislature delegated interpretive authority to the agency, then that interpretation  
6 “may be subject to the most deferential ‘arbitrary and capricious’ standard of review.” (*Yamaha*  
7 *Corp. of America v. State Bd. of Equalization, supra*, 19 Cal.4th at p. 18 (conc. opn. of Mosk,  
8 J.)) In this instance, the agency’s interpretation comes to the court heavily freighted with policy  
9 choices the agency is empowered to make. (*American Coatings Assn., Inc. v. South Coast Air*  
10 *Quality Dist., supra*, 54 Cal.4th at p. 461 citing *Yamaha Corp. of America v. State Bd. of*  
11 *Equalization, supra*, 19 Cal.4th at p. 17 (conc. opn. of Mosk, J.)) This type of delegation may  
12 often be implied when broadly worded statutes are combined with an authorization of agency  
13 rulemaking power. (*Ibid.*) Conversely, an agency’s discretion is correspondingly narrower if the  
14 agency must enforce a detailed statutory scheme. (*Ibid.*)

15       If the regulation is consistent with the statute, the Court proceeds to *Yamaha*’s second step  
16 and determines, under an arbitrary and capricious standard, whether the regulation is reasonably  
17 necessary to effectuate the enabling statute’s purpose. “When reviewing an exercise of  
18 discretion, the scope of review is limited out of deference to the agency’s authority and presumed  
19 expertise. The court may not reweigh the evidence or substitute its judgment for that of the  
20 agency. [citation] In general the inquiry is limited to whether the decision was arbitrary,  
21 capricious, or entirely lacking in evidentiary support. [citation] When making that inquiry the  
22 court must ensure that an agency has adequately considered all relevant factors, and has  
23 demonstrated a rational connection between those factors, the choice made, and the purposes of  
24 the enabling statute.” (*American Bd. Of Cosmetic Surgery v. Medical Bd. of California* (2008)  
25 162 Cal.App.4th 534, 547-548 internal quotation marks omitted.)

26 **B. Appropriate Standard of Review for the First Step of the *Yamaha* Analysis**

27       The parties are sharply divided on which standard of review to apply to the first step.  
28 Petitioners contend a *de novo* standard applies and limits their challenge to the first step. They

1 specifically focus on whether Respondent’s Protocols are within the Act’s statutory bounds.  
2 Petitioners urge the court to find that standards-based approaches to additionality are  
3 impermissible because they enlarge the Act’s scope by making non-additional reductions eligible  
4 for offset credits. Respondent and Intervenors invoke Justice Mosk’s qualification from his  
5 concurrence in *Yamaha*. They contend an arbitrary and capricious standard applies because  
6 Respondent was delegated the authority to interpret additionality.

7       There is much to commend use of an arbitrary and capricious standard if this court was  
8 reviewing the propriety of Respondents additionality definitions. This statute contains other  
9 “exceptionally broad and open-ended” sections that leave “virtually all decisions to the discretion  
10 of [Respondent].” (*Association of Irrigated Residents v. California Air Resources Bd.* (2012) 206  
11 Cal.App.4th 1487, 1495.) Similar language is found in the sections relevant here, the Legislature  
12 provides Respondent with only nine directives to guide the promulgation of a comprehensive  
13 GHG reduction regulatory program. (§ 38562, sub. (b).) These factors are not always  
14 harmonious and often stand in conflict with one another. How these competing directives are met  
15 and the Act’s goals achieved are left entirely to Respondent. Even the choice of whether to adopt  
16 any market-based compliance mechanisms is delegated to Respondent. (§ 38562, subd. (c).) The  
17 Legislature only requires that reductions made pursuant to a market-based compliance mechanism  
18 are real, permanent, quantifiable, verifiable, enforceable, and additional. (§38562, subd. (d).)

19       These broad statutory directives, and near silence on how to achieve them, are coupled  
20 with rulemaking authority. The Legislature gave Respondent vast discretion to develop  
21 regulations to curb GHG emissions. The convergence of open-ended statutory language with rule  
22 making authority implies the Legislature delegated interpretive authority to Respondent, which  
23 would require this court to review this case under an arbitrary and capricious standard.

24       However, Petitioner does not challenge Respondent’s additionality definitions. Petitioners  
25 contend that Respondent has expended its power beyond what the Act allows by using a  
26 standards-based approach. Additionality is the keystone of the offset program. If this  
27 requirement is not met, the ability of the cap-and-trade scheme to realize real reductions is  
28 severely undermined. The Legislature did not delegate to respondent the authority to undercut the

1 Act'g goals. The Court cannot allow Respondent to expand its authority beyond what was  
2 legislatively delegated. It is the Court's obligation to strike down any regulation that  
3 impermissibly expands an agency's authority.

4 And even if Respondent's definition was at issue, a *de novo* standard still applies. A  
5 delegation of interpretive authority grants Respondent the power to *elaborate* the meaning of key  
6 statutory terms, not expand them; the proper interpretation of a statute is the Court's  
7 responsibility. (*American Coatings Assn., Inc. v. South Coast Air Quality Dist.*, *supra*, 54 Cal.4th  
8 at p. 452 citing *Ramirez v. Yosemite Water Co.*, *supra*, 20 Cal.4th at p. 800 (emphasis added).)  
9 Interpretive authority does not include the power to expand a statutory definition beyond what is  
10 statutorily permitted and the Court is obligated to strike down definitions that transgress the  
11 boundaries laid out by the Legislature.

12 Considering the importance of additionality to the Act's purpose of reducing GHG  
13 emissions and the Court's duty to ensure Respondent does not transgress the bounds of its  
14 delegated authority, the Court finds a *de novo* standard applies to whether the legislature  
15 delegated to Respondent the authority to use a standards-based approach to determine  
16 additionality; this standard is limited to this question only. If the use of standardized methods fall  
17 within Respondent's delegated authority, an arbitrary and capricious standard applies to the  
18 remainder of the case.

19 **C. Whether the Protocols Fall within Respondent's Delegated Authority**

20 In order to properly apply this standard, it is essential to separate statutory construction,  
21 which lies within the province of the court, from policy choices that are best made by  
22 Respondent. The *de novo* standard only applies to divining the Legislature's intent and  
23 determining if it permits Respondent to use a standards-based approach. It cannot be applied to  
24 the details and nuances of an individual Protocol. When the Court inquires into such matters, it  
25 leaves the courtroom and enters the stakeholder meetings, laboratories, farms, and forests where  
26 Respondent's expertise and experience far outstrips the Court's. In other words, the Court  
27 determines whether a standards-based approach can be used to set an additionality threshold.  
28 Respondent determines how high or low to set this threshold, so long as the level is not arbitrary

1 or capricious.

2 In order to determine whether a standards-based approach is consistent with the Act, the  
3 court determines the Legislature’s intent. (*Renee J. v. Superior Court* (2001) 26 Cal.4th 735,  
4 743.) The best source for the Legislature’s intent is the language of the Act. (*Ibid.*) The  
5 Legislature granted Respondent vast discretion to promulgate any type of GHG reduction  
6 measure. Even the decision of whether to adopt a cap-and-trade program was left to Respondent.  
7 The Legislature gave no indication as to a preferred additionality mechanism, only that there must  
8 be one. As Petitioners aptly conclude, “[g]iven [the Act’s] high altitude instructions, it is pure  
9 speculation to conclude that the legislature was expressing a preference for a particular type of  
10 offset protocol.” (Petitioners’ Reply Brief 22:11-12.)

11 Petitioners move beyond the utter lack of Legislative preference and contend that the use  
12 of a standards-based approach is legislatively foreclosed by the requirement that “any” reduction  
13 be additional to what otherwise would occur. (§ 35862 subd. (d)(2).) Petitioners focus their  
14 attention on “any,” contending that any must be construed to mean “each and every.” (Brief for  
15 Petitioners 21:28-22:2.) Petitioners’ support their position with a case holding that a ban on  
16 importing any product containing kangaroo meant a ban on each and every product containing  
17 kangaroo, not just kangaroos protected by the Federal Endangered Species Act. (*Viva! Intern.*  
18 *Voice for Animals v. Adidas Promotional Retail Operations, Inc.* (2007) 41 Cal.4th 929, 937.)  
19 Using this support misplaces the focal point of this case. All parties agree that each and every  
20 reduction must be additional. They disagree on how to determine additionality. Analogizing to  
21 *Viva!*, the issue is not if some or all kangaroo products are banned; it is how to determine whether  
22 a product is from a kangaroo in the first place. While it is fairly simple to precisely determine  
23 whether a product is from a kangaroo, it is not as easy to precisely determine whether a reduction  
24 is additional.

25 Determining additionality is difficult, and it is impossible to precisely delineate between  
26 additional and non-additional projects. (R24-4-7.) All additionality determinations suffer from  
27 this limitation, not just standards-based approaches. Petitioners ignore this reality and insist  
28 Respondent must use a perfect additionality mechanism or none at all. This argument is

1 inconsistent with the science behind additionality and Petitioners own statements. Petitioners  
2 claim to support Respondent’s definition of additionality and only oppose the four Protocols.  
3 However, Respondent defines a conservative business-as-usual scenario as one that is “*more*  
4 *likely than not* to understate net GHG reductions.” (Cal. Code Regs. tit. 17, § 95802, subd.  
5 (a)(58) (emphasis added).) By including the term “more likely than not” this definition admits  
6 that GHG reductions might not be understated, that they could be overstated or include non-  
7 additional reductions.

8         Despite conceding this is an appropriate definition, Petitioners attempt to show the  
9 Legislature did not intend for Respondent to use a standards-based approach by pointing to a  
10 handful of digesters, ODS programs, urban forest projects, and U.S. forest projects. They contend  
11 that these few projects are non-additional but will receive offset credits prove the failure of  
12 Respondent’s Protocols. Whether a particular digester, ODS program, or tree is additional has no  
13 bearing on whether the Legislature delegated to respondent the power to use a standards-based  
14 approach.

15         This overly narrow focus on potential failures of the a standards-based approach ignores  
16 other portions of the Protocols that address Petitioners’ concerns. At oral hearing Petitioners  
17 urged this Court to find that “the record is irrelevant” and only to examine the portion of the  
18 Protocol that addresses additionality. (Transcript of Hearing 151:16.) The Court declines to do  
19 so and examines not only the entirety of each Protocol, but the record as well, finding that many  
20 of Petitioners’ concerns are already addressed. This is discussed more thoroughly in the second-  
21 step analysis.

22         Petitioners request the Court to do something it does not have the power to do. Rewrite  
23 the statute to forbid the use of offsets. Respondent would have to abandon any use of offsets, and  
24 perhaps the entire cap-and-trade program, if this Court found that the Act’s ambit was  
25 transgressed every time a credited reduction was potentially non-additional. This is also true if a  
26 standards-based approach was found impermissible, as project-by-project approaches are  
27 inaccurate and practicably unworkable. While there are reasons for pursuing a different type of  
28 market-based compliance mechanism, that issue is not before the Court. All parties agree it is



1 well within Respondent's authority to create a cap-and-trade program with offsets. This Court  
2 cannot set aside the Legislature's directions simply because Petitioners believe there is a better  
3 approach.

4 Additionally, at oral argument, Petitioners conceded that a standards-based approach is  
5 within the statutory bounds the Legislature set for Respondent. (Transcript of Hearing 38:12-  
6 39:12.) All parties agree that Respondent has the authority to use a standards-based approach in  
7 some situations and project-by-project approaches in any situation. If a standards-based approach  
8 is permissible in some situations, then it is consistent with the statute, and the Court's use of the  
9 *de novo* standard is at an end. At this stage of the analysis the Court is keenly focused on whether  
10 a standards-based approach fits within Respondent's law-making authority as intended by the  
11 Legislature. Whether a particular Protocol furthers this intention is reserved for *Yamaha's*  
12 second-step. And that is where the Court must address those questions, under an arbitrary and  
13 capricious standard. Any higher standard makes no practical sense as this Court would have to  
14 quickly acquire the skill and expertise necessary to adroitly examine the anaerobic digester  
15 market, the ODS destruction market, the common practices of urban forest planting, and  
16 management practices for forests across the United States.

17 This court finds that the use of a standards-based approach is consistent with the Act for  
18 the preceding reasons.<sup>10</sup>

19 **D. Individual Challenges to Each Protocol**

20 Petitioners explicitly limited their challenge to the first step of the *Yamaha* analysis.  
21 (Brief for Petitioners 17:22-28.) As the Court finds that the use of a standards-based approach  
22 falls within the Act's ambit, Petitioners challenge to the statute is at an end. However, Petitioners  
23 raised a number of challenges to each Protocol's ability to achieve the Act's purpose. While  
24 Petitioners raised these challenges in the context of *Yamaha's* first-step, they must be addressed  
25 in the second-step. The Court now proceeds to *Yamaha's* second step to address Petitioners'  
26 remaining challenges.

27 At the threshold of deciding the issues relating to individual protocols, the Court must

28 <sup>10</sup> The Court carried out the same analysis under an arbitrary and capricious standard and reached the same result.

1 address parties' Requests for Judicial Notice and Motion to Correct the Record. As to all requests  
2 for judicial notice, the Court takes judicial notice of the existence of the documents but not their  
3 content.

4 As to Petitioners' Motion to Correct the Record, it is granted in part and denied in part. It  
5 is granted as to CAR's Forest Project Protocol Version 3.2 (R24-700B-1 to 350), CAR's U.S  
6 Ozone and Article 5 Ozone Depleting Substances Project Protocol Version 1.0 (R24-700G-1 to  
7 426), CAR's Urban Forest Project Protocol (R24-700H-1 to 227), and CAR's U.S. Livestock  
8 Project Protocol (R24-700J-1 to 447). Respondent does not object to including these four  
9 documents in the record and the Court finds that Respondent relied upon them when creating the  
10 Protocols at issue here.

11 Generally courts may consider only the administrative record when reviewing quasi-  
12 legislative decisions. (see *Western States Petroleum Assn. v. Superior Court, supra*, 9 Cal.4th at  
13 p. 573.) A narrow exception allows consideration of extra-record evidence only in those rare  
14 instances where: 1) the evidence existed before the agency made its decision, and 2) it was not  
15 possible in the exercise of reasonable diligence to present this evidence to the agency before the  
16 decision was made so that it could be considered and included in the administrative record.

17 The Motion to include CAR's Program Manual (R24-700K-1 to 42) is denied because it  
18 does not meet the first element of the exception. The Program Manual Petitioners wish to include  
19 in the record was published on October 26, 2011, five days after the adoption of the Protocols.  
20 (R24-700K-2; R-265, 321, 375, and 423.) The Program Manual did not exist before Respondent  
21 made any decision regarding the Protocols. The Motion to include CAR's 2008 and 2009 Annual  
22 Report is denied because Petitioners have not shown that it was not possible in the exercise of  
23 reasonable diligence to present these documents to Respondent before the adoption of the  
24 Protocols. In fact, Petitioners put forward no argument on why to include these documents and  
25 do not rely upon them in any of the papers submitted to this Court.

26 The Court's discretion to independently judge Respondent's actions is limited to whether  
27 the use of a standards-based approach falls within Respondent's delegated discretion. As the  
28 Protocols fall within Respondent's legislatively delegated law-making power, the Court must

1 examine the remaining challenges under an arbitrary and capricious standard to determine  
2 whether the Protocols are reasonably necessary to effectuate the Act's purpose.

3 **i. Livestock Protocol**

4 Petitioners challenge the Livestock Protocol's failure to use profitability analysis,  
5 inclusion of ongoing and existing methane digesters, and failure to take into account nuisance and  
6 environmental liability alleviated by the digesters.

7 Profitability analysis examines whether a proposed project is financially feasible without  
8 revenue generated by offset credits, and is similar to the Investment Analysis used by the CDM.  
9 (R24-384-58.) If the return on a project is below a benchmark, the project is additional; if it is  
10 above the benchmark it is not. (R22-1226.) Petitioners contend the Protocol will award credits to  
11 profitable projects that would occur even without offset credits.

12 The record lends little support to this contention. Sixty-nine anaerobic digesters, out of  
13 the over 8,000 that could be installed, would be installed without offset credits. (R22-999.) This  
14 shows that less than ten percent of the digesters that could be installed would be installed without  
15 offset credits. It is not standard practice to install anaerobic digesters. Cost is the primary barrier  
16 to installing digesters and offset credits directly address this problem. Upon looking at the factors  
17 present, it is reasonable to conclude that digesters will not be installed without the funding  
18 derived from offset credits.

19 Beyond the particulars of anaerobic digesters' profitability, Petitioners underlying  
20 reasoning is disingenuous. Petitioners demand that Respondent take profitability into account,  
21 but criticize all profitability analysis as inherently uncertain and prone to manipulation. The  
22 Petition alleges that

23 "a 'profitability analysis' test is a flawed method for meeting the [Act's] Integrity  
24 Standards because it is inherently subjective and uncertain. Specifically, the test  
25 relies on knowing, among other things: (a) the costs of all inputs for the project,  
26 (b) the value of potential liabilities avoided by the project, (c) the amount of the  
27 offset payments for GHG reductions or sequestration, and (d) the value that the  
28 project will generate in addition to the offsets payment, such as timber, electricity,  
and 'green' advertising. The value of each of these items is highly variable and  
unpredictable, cannot be known in advance and may vary greatly over time.  
While [Respondent] relies on this test in the context of the U.S. Forests Projects  
Offset Protocol, [Respondent] presents no evidence that it can reliably distinguish  
whether the offset price will make *the* difference in whether such a project is

1 profitable. Therefore, any determination of additionality based on this method is,  
2 at best, a guess about the future, which allows project proponents and verifiers to  
3 ‘turn the knobs’ in order to get the result they seek and to include projects ‘that  
4 otherwise would occur,’ in violation of the [Act’s] Integrity Standards.”

(First Amended Petition (“FAP”) ¶53 (emphasis in original).)

5 Profitability analysis’s failure to determine additionality in the CDM supports Petitioners’  
6 concerns and shows why Respondent did not employ it in this Protocol. Under the CDM,  
7 profitability analysis was criticized as inherently uncertain and easily manipulated. (R22-1226.)  
8 The analysis has been described by those who validate a project’s additionality as one with many  
9 “knobs you can turn” to reach any desired result. (R22-1223.) These knobs range from  
10 increasing the costs of inputs, decreasing the price of produced products, or simply omitting  
11 revenue streams such as tax breaks. (R22-1226 to 1228.) This reasoning equally applies to  
12 Petitioner’s profitability challenge to the ODS Protocol.

13 As to the timing challenge, Petitioners contend that Protocols awards credits to projects  
14 that were existing and ongoing when the protocols were adopted on October 20, 2011. Petitioners  
15 argue these early reductions cannot be additional because they occurred before the  
16 implementation of the Protocol, thus it was impossible to factor in the offset credits when  
17 determining whether to initiate the project. While Petitioners’ reasoning is sound, their choice of  
18 date is not. They should measure from the inception of the Early Action Program in 2006 that  
19 formed the basis of the Protocol.

20 Large regulatory programs take years to develop and adopt. The Legislature designed the  
21 Act to encourage businesses to act during the development of the final regulations. In particular,  
22 the Act directed Respondent to create, publish, adopt, and implement a list of discrete early action  
23 GHG emission reduction programs prior to adoption of the full panoply of reduction measures.  
24 (§ 38560.5.) Once all the reduction measures were adopted, Respondent was to “[e]nsure that  
25 entities that [had] voluntarily reduced their greenhouse gas emissions prior to the implementation  
26 [of the reduction regulations] receive appropriate credit for early voluntary reductions. (§ 38562,  
27 subd. (b)(3).) To this end Respondent set eligibility cut-off dates for the Protocols and Early  
28 Action Projects to include reductions occurring prior to the final approval of the regulations.

1 Reductions occurring after December 31, 2006 are eligible for offset credits and early voluntary  
2 reductions occurring on or after January 1, 2005 are eligible for credit. (Cal. Code Regs. tit. 17, §  
3 95973, subd. (a)(2)(B); Cal. Code Regs. tit. 17, § 95973, subd. (c).) Programs qualifying for  
4 early voluntary credits must be registered prior to January 1, 2012. (Cal. Code Regs. tit. 17, §  
5 95990, subd.(b).)

6 Finally, Petitioners contend that Respondent failed to take into account the nuisance and  
7 environmental violation liability digesters alleviate. However, manure has smelled and posed  
8 environmental health risks ever since it has been amassed in large quantities. To the extent that  
9 liability is a factor, it is reasonable to conclude it has already been taken into account.

10 The Court finds that the Livestock Protocols is reasonably necessary to effectuate the  
11 purpose of the statute and Respondent was neither arbitrary nor capricious in its promulgation.

12 **ii. Ozone Depleting Substances Protocol**

13 Petitioners challenge the ODS protocol on three grounds: Respondent failed to use  
14 profitability analysis, the Protocols award offset credits to ongoing and continuous projects, and  
15 Respondent misconstrued data.

16 As to profitability analysis, Petitioners' contention fails for the reasons discussed in the  
17 Livestock Protocol discussion above. Petitioners point out that some projects are profitable and  
18 demands Respondent take a project's profitability into account. However, Petitioners were the  
19 first party to state that this type of analysis is a "flawed method ... because it is inherently  
20 subjective and uncertain." (FAP ¶53.) The Court will not order Respondent to pursue a course of  
21 action that the Court, Respondent, and Petitioner feel is imprudent, unwise, and against the  
22 weight of experience and evidence.

23 As for timing, development of this Protocol began in 2009, raising a concern that  
24 reductions from 2007 to 2009 would be credited even though offset credits could not have been a  
25 factor in starting the project. However, Petitioners fail to show this Court where the record  
26 discloses a reduction occurring between 2007 and 2009. The GE/ARCA partnership that  
27 Petitioners discuss at length was not operational until the second quarter of 2011. (R22-1662.)

28 As to Respondent misconstruing data, Respondent used a study by ICF International for

1 the EPA to support its conclusion that the destruction of ODS is not currently common practice in  
2 the United States. (R24-700G-65.) Petitioners contend that Respondent misconstrued data in  
3 these studies and drew conclusions that are not supported by the evidence. However, under an  
4 arbitrary and capricious standard, it is not for this court to reweigh the evidence. When treading  
5 into the murky waters of statistical analysis and scientific studies, the Court defers to  
6 Respondent's expertise, experience, and sweeping grant of law-making powers.

7 The court finds that the Ozone Depleting Substances Protocol is neither arbitrary nor  
8 capricious.

9 **iii. Urban Forest Protocol**

10 The Urban Forest Projects encourage municipalities, educational campuses, and utilities to  
11 plant trees in order to sequester carbon. Petitioners contend that urban forest projects are certain  
12 to occur as many are already underway across the country and the Protocol fails to screen out  
13 already occurring projects and fails to take into account other "environmental and economic  
14 benefits" that might inure to the tree-planting entity. (Brief for Petitioners 32:19.)

15 Petitioners assume, without any evidentiary support in the record, that because a project is  
16 occurring now, it will occur ad infinitum. The Court does not make such an assumption. Parks  
17 can be turned into malls. Trees can die, burn, or be cut down. A municipality's current  
18 leadership could plant trees that are removed by new leaders following the next election. In order  
19 to hedge against such risks, Respondent included longevity and leakage provisions in this  
20 Protocol. A project's eligibility is dependent on sequestering carbon at least 100 years. Every  
21 tree that receives a credit must be maintained for at least a century. If a credited tree dies or is  
22 destroyed, it must be replaced within one year or the offset credits issued for that carbon will be  
23 retired. This 100-year commitment goes above and beyond a conservative business-as-usual  
24 scenario. This Court has not found, and Petitioners have not pointed to, any evidence in the  
25 record that any city has committed to maintaining trees for a century.

26 Petitioners also oppose this Protocol on the grounds that it fails to take into account other  
27 economic and environmental factors that could influence an entity's decision to plant trees.  
28 Petitioners argue that the survey underlying Respondent's performance standard shows several

1 cities already have successful tree planting programs. However, Petitioners ignore that the same  
2 survey shows that a third of the surveyed cities have a net tree loss and many others have a tiny  
3 net tree gain.

4 A regulation is not arbitrary or capricious if Respondent has considered all relevant factors  
5 and demonstrated a rational connection between those factors, the choice made, and the purposes  
6 of the enabling statute. Setting standardized additionality thresholds seeks to minimize costs and  
7 the administrative burden while maximizing the environmental benefits to California. Petitioners  
8 do not contend that Respondent failed to consider all the relevant factors. Instead, Petitioners  
9 contend that Respondent should have reached a different result. Respondent examined the urban  
10 forest programs in cities across the nation and concluded that a net tree gain threshold of zero is  
11 appropriate. This threshold is reasonable and the Court will not upset Respondent's conclusion  
12 just because Petitioners find them unfavorable.

13 Petitioners also contend that the lack of a net tree gain requirement for utilities is contrary  
14 to the Act. Respondent states that utilities infrequently replace trees felled during line clearing  
15 operations. (R-384.) As less than 400 trees are planted annually in the United States, any tree  
16 planting is additional as it goes above and beyond common practice. (*Ibid.*)

17 This Court finds that the Urban Forest Project Protocol is not arbitrary or capricious.  
18 Respondent has adequately considered all relevant factors, and has demonstrated a rational  
19 connection between those factors, the policies implemented, and the purposes of the enabling  
20 statute.

21 **iv. U.S. Forests Protocol**

22 Petitioners contend that Respondent does not properly understand forestry practices and  
23 urges this Court to adopt Petitioners' understanding. Petitioners do not offer evidentiary support  
24 in the record showing that Respondent lacks this understanding.

25 As to reforestation projects, Petitioners contend that Respondent offers no support for its  
26 10-10 Standard and ignores evidence that this standard fails to screen out non-additional projects.  
27 Respondents reasonably assume potential project sites with minimal tree cover for over a decade  
28 will not be reforested without offset incentive. (R-1720.) This assumption serves to determine

1 additionality in a cost-effective manner. Petitioners provide no evidence that this assumption is  
2 unreasonable, let alone arbitrary and capricious. They pick two forest projects (Ohio's Wauseon  
3 Park Windbreak Planting and Wisconsin's Resorting Idle Fields to Native Woodlands) out of a  
4 list of forty-two projects to show Respondent's assumption is unreasonable. (R22-1804 to 1806.)  
5 However, the record merely contains a brief description of these two projects and no information  
6 about tree cover or other factors that bear on additionality. (*Ibid.*) There is no evidence as to  
7 whether these projects met the 10-10 standard or any of the Protocol's other requirements.

8       Even if Petitioners are able to show the 10-10 standard does not ensure additionality in the  
9 project site, they have wholly neglected to address Respondent's quantification mechanisms.  
10 Assuming *arguendo*, that a non-additional site meets the 10-10 standard, it is reasonable to  
11 assume that Respondent's quantification measures will ensure that any reduction is additional to  
12 what would otherwise occur.

13       As to reforestation projects eligible under the Significant Disturbance Standard,  
14 Petitioners criticizes the factors Respondent used to determine additionality. Petitioners call the  
15 Respondent's approach "simplistic ... because it does not take into account all the reasons a land  
16 owner may undertake a reforestation project." (Brief for Petitioners 36:3-5.) But Petitioners only  
17 put forward the vague factor that a non-profit might want to enlarge habitat or act "for some other  
18 reason." (Brief 36:6.) Not only is this factor vague, it is not mutually exclusive with  
19 additionality. A non-profit might wish to expand habitat or act for some reason, but be  
20 financially constrained. That type of constraint could be alleviated by offset credits.

21       Petitioners also misplace the burden. It is for Petitioners, not Respondent to show the  
22 Protocol is arbitrary and capricious. As with the 10-10 Standard, Petitioners offer no evidence  
23 beyond a summary of reforestation projects that merely lists the name of the project, the  
24 responsible entity, and the project's goal. It includes nothing that bears on the additionality of  
25 those projects. And while Petitioners fail to produce evidence, Respondent shows the Protocol  
26 was developed in lengthy consultations with industrial and non-industrial forest managers,  
27 experts from California and federal forest agencies, environmental organizations, forest  
28 landowners, and forestry scientists. (R24-700B-3 to 9.) The Court finds that Respondent



1 considered all relevant factors and has demonstrated how its choices support the purposes of the  
2 Act.

3 As to improved forest management practices, Petitioners contend that currently existing  
4 average practices that are “virtually certain” to continue will qualify as additional. Petitioners  
5 offer no evidence to support this contention. Respondent replies that the best current practices are  
6 the most likely to be curtailed as forest owners are less likely to maintain above-average timber  
7 stocks because of the economic benefit of harvesting the timber. (R10-3157.) Petitioners urge  
8 this Court to adopt their understanding of forest practices over Respondent’s. The Court cannot  
9 and does not adopt Petitioners understanding of forest practices without evidence that overcomes  
10 the evidence in the Administrative Record and strong presumption that Respondent properly  
11 exercised its large grant of law-making authority.

12 As to avoided conversion projects, Petitioners reiterate that Respondent did not take into  
13 account all the proper factors. But they offer no evidentiary support upon which this Court can  
14 overlook Respondent’s technical expertise and delegated law-making authority in order to  
15 overturn their decision.

16 The U.S. Forest Protocol is not arbitrary and capricious.

### 17 FINDINGS

- 18 1. The Court finds as to the Livestock Protocol, the Ozone Depleting Substances  
19 Protocol, the Urban Forests Protocol, and the U.S. Forests Protocol, that Respondent  
20 has adequately considered all relevant factors and has demonstrated a rational  
21 connection between these factors, the policy implemented, and the purpose of the  
22 enabling statutes. The Court finds the Protocols are not arbitrary and capricious.
- 23 2. The Court finds that Health and Safety Code section 38562, subdivision (d)(2) does  
24 not foreclose Respondent from using standardized mechanisms and it is within the  
25 Respondents legislatively delegated lawmaking authority to choose standardized  
26 mechanisms. The Court has employed a *de novo* standard in making this finding of  
27 legislative intent. The Court has employed a highly deferential standard in all other  
28 findings herein.

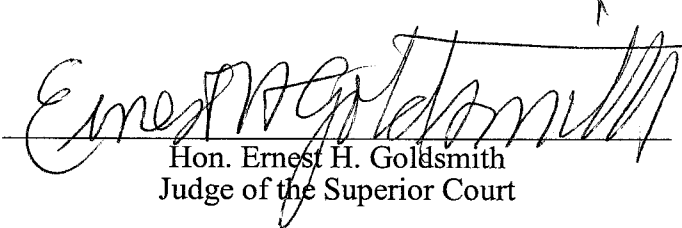
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- 3. The Court finds that Respondent's use of standardized mechanisms is supported by evidence contained in the administrative record.
- 4. The Court finds Petitioners have failed to demonstrate that the Legislature foreclosed the use of standardized additionality mechanisms or demonstrate that Respondent acted arbitrarily or capriciously in promulgating additionality standards.

For the reasons stated above, Petition is DENIED.

Respondent is ORDERED to prepare an order consistent with the Court's ruling.

IT IS SO ORDERED.

Dated: *January 25, 2013* 

Hon. Ernest H. Goldsmith  
Judge of the Superior Court

**Superior Court of California  
County of San Francisco**

CITIZENS CLIMATE LOBBY AND OUR CHILDREN'S  
EARTH FOUNDATION,

PLAINTIFFS,

VS.

CALIFORNIA AIR RESOURCES BOARD,

DEFENDANTS.

Case Number: **CGC-12-519554**

**CERTIFICATE OF MAILING**  
(CCP 1013a (4))

I, Don Feinberg, a deputy clerk of the Superior Court of the City and County of San Francisco, certify that I am not a party to the within action.

On January 25, 2013, I served the attached **STATEMENT OF DECISION RE: PETITION FOR WRIT OF MANDATE**, filed on January 25, 2013, by placing a copy thereof in a sealed envelope, addressed as follows:

**[See Attached Service List]**

and, I then placed the sealed envelopes in the outgoing mail at 400 McAllister Street, San Francisco, CA. 94102 on the date indicated above for collection, attachment of required prepaid postage, and mailing on that date following standard court practices.

Dated: January 25, 2013

T. MICHAEL YUEN, Clerk

By: 

Don Feinberg, Deputy Clerk

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