Nico Aelstyn
18-9-10

Indigenous Peoples
IPRE
Reducing Emissions

November 5, 2018

Via Hand Delivery

Clerk of the Board
California Air Resources Board
1001 I Street
Sacramento, CA 95812

Re: IPRE's Comments on Proposed Amendments to Cap-and-Trade Regulation

Dear Chairwoman Nichols and Members of the Air Resources Board:

Thank you for the opportunity to comment on the California Air Resources Board's ("CARB") proposed amendments to the California Cap on Greenhouse Gas Emissions and Market-Based Compliance Mechanisms Regulation (the "Cap-and-Trade Regulation"). We write to provide the comments of Indigenous Peoples Reducing Emissions ("IPRE") on several issues relating to offsets and the proposed implementation of AB 398's quantitative limit on the use of offsets that "no more than one-half may be sourced from projects that do not provide direct environmental benefits in the state" ("DEBS"). We incorporate by reference IPRE's comment letters dated March 19, 2018 and May 18, 2018 that were submitted to CARB during the "Discussion Draft" phase that preceded the current 45-day rulemaking; copies of those letters ae attached hereto as Exhibits A and B.

1. Indigenous Peoples Reducing Emissions ("IPRE")

IPRE is an association of Alaskan Native and American Indian entities that are actively engaged in creating sustainable climate solutions. IPRE members partner with California's climate change initiatives through the Cap-and-Trade Program. Our members primarily do so by developing forest offset projects, most of which are on lands outside of the state. Among IPRE's members are some of the most disadvantaged communities in the United States; they are often faced with a Hobson's choice of enduring brutal poverty whilst sustaining their forests and their traditional cultures as they have for thousands of years, or cutting down their forests to meet immediate economic needs. For this reason we believe that some IPRE communities are environmental justice ("EJ") communities.

IPRE commends CARB for its leadership in combatting climate change. Its Cap-and-Trade Program serves as an important national and international model. The offsets program enables this model to be more than an inspiration: it provides a means for communities outside of the state – including EJ communities – to partner with California in the global fight against climate change. By creating incentives for others to partner with California, CARB's offset program has been a critical component of California's global leadership on climate issues.

c/o Sheppard Mullin Richter & Hampton LLP
Four Embarcadero Center, 17th Floor | San Francisco, CA 94111-4109 | 415.434.9100 | www.sheppardmullin.com

2. The Proposed Definition of DEBS Requires that a Balance be Struck Between Being Superfluous and Unconstitutional

The proposed definition of DEBS in Section 95802(a) simply adopts the language of AB 398, and thus there can be no question that CARB is adhering to the Legislature's directive. It provides: "'Direct environmental benefits in the State' refers to the reduction or avoidance of emissions of any air pollutant in the state or the reduction or avoidance of any pollutant that could have an adverse impact on waters of the state." IPRE supports this approach, though that does not end the analysis because the statutory language is ambiguous.

As the U.S. Supreme Court held in *Massachusetts v. Environmental Protection Agency*, 549 U.S. 497, 532 (2007), greenhouse gases ("GHGs") are pollutants. It is a maxim of the science of climate change mitigation that the reduction or avoidance of GHG emissions anywhere provides a benefit everywhere. This is reflected in the title of AB 32: the *Global* Warming Solutions Act. Given this, all offset projects provide DEBS regardless of whether in or outside of California. There is nothing in the legislative history that sheds light on what the Legislature intended with this language. None of the legislative reports on AB 398 address what the term "pollutant" in the DEBS provision means,[1] and California courts generally do not give credence to *post hoc* statements by individual legislators as to what the Legislature meant.

Faced with this, many, including the Independent Emissions Market Advisory Committee ("IEMAC"), have "assume[d]" that the DEBS provision "refers to environmental benefits that occur in addition to those impacts that are traceable to reduced or avoided GHG emissions; otherwise, the language of the statute would seem superfluous." 2018 Annual Report of the IEMAC (Oct. 22, 2018) at 46. The IEMAC relies on "a relatively standard canon of statutory construction that words in a statute are to be given effect rather than to have no consequence." *Id.*

Another standard of canon of statutory construction is that ambiguous provisions are not to be given meaning that would be unconstitutional. As we discussed in our March 19 comment letter, see Exhibit A, the DEBS provision must be construed narrowly lest it fall afoul of the constitutional law doctrine known as the Dorman Commerce Clause (the "DCC"). Under the DCC doctrine, a state law is invalid if it discriminates against or places an undue burden upon interstate commerce. In that letter we reviewed the recent Circuit decisions construing the DCC doctrine in the context of challenges to state climate change programs and showed that the DEBS requirement must be construed carefully lest a court rule it to be unconstitutional.[2]

---

[1] The only one that could be construed to have done so is the July 17, 2017 Assembly Floor Analysis, which states at pages 7-8: "While ARB has justified the reliance on compliance offsets as an opportunity for low-cost reductions from outside the cap, others have questioned how offsets, particularly from sources outside the state, might meet AB 32's (Núñez), Chapter 488, Statutes of 2006, requirements or otherwise produce benefits in California."

[2] The analysis in that letter has not changed in light of the Ninth Circuit's subsequent decision in *Am. Fuel & Petrochemical Manufacturers v. O'Keefe*, 903 F.3d 903 (9th Cir. 2018). It addressed a DCC challenge to Oregon's

c/o Sheppard Mullin Richter & Hampton LLP
Four Embarcadero Center, 17th Floor | San Francisco, CA 94111-4109 | 415.434.9100 | www.sheppardmullin.com

Still another canon of statutory construction is that the words are to be given their plain meaning. A close reading of the DEBS provision reveals that it is not appropriate to rely upon an assumption that the Legislature intended to exclude GHGs from both uses of the term "pollutant" in the provision. In sum, the DEBS provision treats air pollutants differently than water pollutants. The first part refers to "the reduction or avoidance of emissions of any air pollutant in the state." The object of the phrase is "emissions," which is qualified by "air pollutant" and "in the state." As it refers to emissions in the state, it may be defensible to assume that the Legislature meant to exclude GHGs from the types of pollutants being emitted.

The second part refers to "the reduction or avoidance of any pollutant that could have an adverse impact on waters of the state." This phrase lacks the geographic limitation that applies to air pollutants. It does not refer to the *discharge* of any water pollutants *in the state*. The object of the phrase is "pollutant" – *i.e.*, the thing rather than the action – and it is qualified by much broader language than those qualifying "emission" in the first part. "*Could have* an adverse impact" is clearly subject to later determinations, and "waters *of* the state" is clearly broader than emissions that occur "in the state." (This is made plain if one considers the large body of case law under the federal Clean Water Act construing the analogous term "waters of the United States.") Certainly, the Legislature takes a broad view as to what constitutes "waters of the state, as is reflected in the very first provision of AB 32: "The potential adverse impacts of global warming include . . . a reduction in the quality and supply of water to the state from the Sierra snowpack, a rise in sea levels resulting in the displacement of thousands of coastal businesses and residences, [and] damage to marine ecosystems and the natural environment." Health & Safety Code Section 38501(a).[3]

Given both the much broader language used in the second part of the DEBS provision and the danger of falling afoul of the Dormant Commerce Clause if one too narrowly construes just how direct the environmental benefits in the state must be, it would be inappropriate and quite possibly unconstitutional to assume that the Legislature meant to exclude GHGs from the meaning of "any pollutant that could have an adverse impact on waters of the state." Happily, CARB has given meaning to this distinction in its crafting of Section 95989, the proposed regulation implementing the DEBS provision of AB 398.

///

---

low carbon fuel program that is substantially the same as California's, and the Court followed its earlier decision in *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070 (9th Cir. 2013), a case that we discussed in our letter.

[3] The State has followed through on this broad understanding. *See* the State Water Resources Control Board's Resolution 2017-0012, Comprehensive Response to Climate Change, (available at https://www.waterboards.ca.gov/board_decisions/adopted_orders/resolutions/2017/rs2017_0012.pdf), Resolution No. 10 of which directs the Regional Boards to identify actions to address the recommendations of the West Coast Ocean Acidification and Hypoxia Science Panel (available at http://westcoastoah.org/wp-content/uploads/2016/04/OAH-Panel-Key-Findings-Recommendations-and-Actions-4.4.16-FINAL.pdf).

c/o Sheppard Mullin Richter & Hampton LLP
Four Embarcadero Center, 17th Floor | San Francisco, CA 94111-4109 | 415.434.9100 | www.sheppardmullin.com

3. Section 95989(b)'s Distinction Between "Emissions of Any Air Pollutant in the State" and "Any Pollutant that Could Have an Adverse Impact on Waters of the State" Should be Retained and Clarified

First, we wish to state that IPRE welcomes the proposal in Section 95989 to establish a process by which offset projects can demonstrate that they provide DEBS. We appreciate the recognition that projects outside of California can and do provide direct environmental benefits in the State. The process outlined in subsection (b) of Section 95989 reflects a commitment to science-based approach to this process, which will help to ensure the integrity of the program.

Section 95989(b) expressly provides that the benefit of "the reduction or avoidance of emissions of any air pollutant" must be of one "that is not credited pursuant to the applicable Compliance Offset Protocol in the State" – *i.e.*, that it be something other than a GHG. Section 95989(b) does not contain a parallel exclusion of GHGs from the benefit provided by "the reduction or avoidance of any pollutant that could have an adverse impact on waters of the state." As discussed above, this is consistent with the plain language of the DEBS provision, and IPRE supports it.

Nonetheless, we agree with the recommendation of the IEMAC Report that the language of Section 95989(b) should be clarified to make this distinction clear. This clarification is needed because subsections (1)-(3) of Section 95989(b), which specify the kinds of scientific information that can be relied upon to make the requisite showing, elides the distinction. Each subsection inconsistently and inappropriately collapses the difference between air and water pollutants to simply refer to the "reduction or avoidance of any pollutant in the State." It's more concise, but unfortunately creates ambiguity. We urge the Board to make it clear that if a sufficient scientific showing is made that an out-of-state offset project that reduces or avoids any pollutant – including any GHG – that could have an adverse impact on waters of the state, then it shall be determined to provide DEBS. Doing so will help to ensure the regulation's consistency with the statute and reduce the risk of a judicial finding that it is unconstitutional.

We also appreciate that Section 95989(b) provides that the requisite scientific showing can be made for an "*offset project type*." We understand the inclusion of this term to mean that CARB will establish a process that will facilitate replicability, such that a determination that a particular project type provides DEBS could later be applied to other projects of the same type. This is critical to provide the regulatory certainty that is necessary to ensure investments in offset projects, and also to provide administrative efficiency so that CARB's processes do not become over-burdened and unduly delayed. We ask that this too be confirmed and clarified.

///

c/o Sheppard Mullin Richter & Hampton LLP
Four Embarcadero Center, 17th Floor | San Francisco, CA 94111-4109 | 415.434.9100 | www.sheppardmullin.com

4. Section 95989(d) Improperly Construes the DEBS Requirement as Applying to Offsets Generated Prior to 2021

Section 95989(d) provides that out-of-state offset projects that have already been issued ARB offset credits can be deemed to provide DEBS by making the same showing as provided in subsection (b) for future offset projects. This effectively implements the DEBS provision as applying to all existing offsets, even though AB 398's limitation on the use of offsets applies only after 2021. This is an incorrect reading of the statutory language and prejudicial to out-of-state offset projects such that it may well run afoul of the constitution. For the reasons detailed in our May 18 comment letter, see Exhibit B, the DEBS requirement of AB 398 does not apply to offsets issued prior to 2021, and therefore Section 95989(d) should be amended to provide that all offsets issued prior to December 31, 2020 can be used for compliance purposes after that date.

The Initial Statement of Reasons states only that the proposed regulation "does not result in a retroactive application of a statutory mandate, but implementation, prospectively, of the legislative requirement." ISOR at 51-52. This is not correct. As detailed in our May 18 letter, the plain language of that portion of AB 398 that includes the DEBS provision directs CARB to develop regulations applicable only to the specified period post-2020.

While the point of regulation for the DEBS usage limitation is the surrendering of offsets post-2020, there is no question that it nonetheless impacts offsets generated pre-2021. Offsets are compliance instruments issued for the sole purpose of meeting compliance obligations under the Cap-and-Trade Program. If that sole usage is limited, offsets are impacted. Thus, though the language of AB 398 does not address pre-2021 offsets, if the DEBS provision is applied to them it likely will diminish their value.[4] "A statute is retroactive if it affects rights, obligations, acts, transactions and conditions performed or existing prior to adoption of the statute and substantially changes the legal effect of those past events." *In re Marriage of Reuling*, 23 Cal.App.4th 1428, 1439 (1994)(citations omitted).

We refer you to our May 18 letter for a detailed discussion of this legal issue. In sum, for a statute that has a retroactive impact to be upheld it must be shown both (a) that the Legislature intended the statute to be retroactive, *and* (b) that the retroactive law is not unconstitutional. As we showed, there is nothing in the legislative history that indicates that the Legislature intended the DEBS provision to have retroactive impact on offsets generated prior to 2021. And if that intent were read into the statute, then a court likely would deem it to be unconstitutional because it would deprive the holders of those offsets of a vested right without due process.

[4] It has been suggested that those that invested in offset projects anticipated this because the Cap-and-Trade Program was due to sunset after 2020. That is not correct. Prior to the adoption of AB 398 CARB maintained that it had the authority to continue the Program post-2020. Those that invested in offset projects reasonably relied on CARB's statements and had a reasonable expectation that the Program would continue post-2020.

c/o Sheppard Mullin Richter & Hampton LLP
Four Embarcadero Center, 17th Floor | San Francisco, CA 94111-4109 | 415.434.9100 | www.sheppardmullin.com

5. Conclusion

We appreciate the opportunity to provide these comments. In general, we support the proposed amendments, including most of the provisions relating to offsets. However, it is critical that Section 95989(b) be clarified to confirm the distinction between air and water pollutants in the process for determining whether an out-of-state project provides DEBS, and also that that process is replicable. In addition, Section 95989(d) must be changed such that AB 398 is not improperly given retroactive effect.

IPRE and its members are committed to continuing to partner with the State in its efforts to combat climate change – in particular those that are Alaska Native entities. Alaska is currently the state most effected by climate change. Sea level rise and ice flow change is already requiring communities to be moved, melting permafrost, melting glaciers, and many other effects. Alaska and California both border on the Pacific Ocean and are both contending with the effects of ocean acidification and hypoxia caused by climate change, as discussed in footnote 3 above. The clarifications and changes suggested set forth here will greatly enable IPRE's members to continue to partner with California in these crucial efforts to combat climate change – and they also will greatly improve the ability of the State to partner with others as well. While the offsets program is a small part of California's efforts to reduce GHG emissions, it is a critical component. It is the primary means by which it incentivizes those outside the State to join with it in the fight to combat climate change.

Sincerely,

Nicholas W. van Aelstyn

cc: Rajinder Sahota, Assistant Chief, Industrial Strategies Division (*via email*)
Jason Gray, Branch Chief, Cap-and-Trade Program (*via email*)

c/o Sheppard Mullin Richter & Hampton LLP
Four Embarcadero Center, 17th Floor | San Francisco, CA 94111-4109 | 415.434.9100 | www.sheppardmullin.com

EXHIBIT A

Indigenous Peoples
IPRE
Reducing Emissions

March 19, 2018

Via Electronic Submission

Rajinder Sahota
Assistant Division Chief
Industrial Strategies Division
California Air Resources Board
1001 I Street
Sacramento, CA 95814

Re: Comments of IPRE on CARB's Preliminary Concepts Paper and the Accompanying Workshop on March 2, 2018

Dear Ms Sahota:

Thank you for sharing with stakeholders the California Air Resources Board's ("CARB") Preliminary Discussion Draft of Potential Changes to the Cap-and-Trade Regulations (the "Discussion Draft") and for providing an opportunity to comment on it. We write to provide the comments of Indigenous Peoples Reducing Emissions ("IPRE") on that portion of the Discussion Draft that outlines CARB's proposed approach to implementing AB 398's quantitative limit on the use of offsets that "no more than one-half may be sourced from projects that do not provide direct environmental benefits in the state" ("DEBS"). AB 398 defines DEBS as "the reduction or avoidance of emissions of any air pollutant in the state or the reduction or avoidance of any pollutant that could have an adverse impact on waters of the state."

1. Indigenous Peoples Reducing Emissions ("IPRE")

IPRE is an association of Alaskan Native and American Indian entities that are actively engaged in creating sustainable climate solutions. IPRE members support and partner with California's climate change initiatives through the state's Cap-and-Trade Program. Our members achieve this through the development of forest offset projects, most of which are on lands outside of the State of California. Among IPRE's members are some of the most disadvantaged communities in the United States, and they are often faced with a Hobson's choice of enduring brutal poverty whilst sustaining their forests and their traditional cultures as they have for thousands of years, or cutting down their forests to meet immediate economic needs. For this reason we believe that some IPRE communities may be characterized as environmental justice ("EJ") communities.

IPRE recognizes and appreciates the global leadership that the State of California has taken with respect to combatting the drivers of climate change and reducing greenhouse gas ("GHG") emissions. California's Cap-and-Trade Program is an innovative approach to achieve these goals and for several years now has served as an important national and international

c/o Sheppard Mullin Richter & Hampton LLP
Four Embarcadero Center, 17th Floor | San Francisco, CA 94111-4109 | 415.434.9100 | www.sheppardmullin.com

model. CARB's offsets program has enabled the Cap-and-Trade model to be more than an inspiration to other jurisdictions: it has provided a means for communities outside of California – including EJ communities like those of IPRE's members – to partner with California in the global fight against climate change, a fight that must be undertaken on a global level if we are to succeed. By creating incentives for others to partner with California in this global effort, CARB's offset program has been a critical component of California's leadership on climate issues. However, if construed in an unconstitutional manner, AB 398's DEBS requirement threatens to undermine California's leadership.

2. DEBS and the Dormant Commerce Clause

The July 17, 2017 Assembly Floor Analysis of AB 398 discusses the use of carbon offsets. It notes that the majority of the compliance offsets have been generated by projects located outside of California, and identifies Arkansas, Michigan, New Hampshire, and Ohio as the major sources of carbon offsets. To address this, AB 398's DEBS requirement creates a preference for offsets that "provide direct environmental benefits *in the state*." This raises the specter of litigation brought under the constitutional law doctrine known as the Dormant Commerce Clause ("DCC"). Under the DCC doctrine, a state law is invalid if it discriminates against interstate commerce or if it places an undue burden on interstate commerce. A review of the recent Circuit decisions construing the DCC doctrine in the context of challenges to a variety of state climate change programs reveals the vulnerability of California's program if it does not implement the DEBS requirement in a prudent manner.

In Rocky Mountain Farmers Union v. Corey, 730 F.3d 1070 (9th Cir. 2013), CARB withstood a DCC challenge related to the state's low carbon fuel standard ("LCFS"). The LCFS was adopted to reduce the carbon intensity of motor vehicle fuel sold within the state. CARB overcame the challenge by demonstrating that the higher carbon intensity ascribed to ethanol from the Midwest was due to an objective analysis that incorporated the emissions associated with the transportation of the fuel – and not an effort to discriminate against out-of-state producers. The *Rocky Mountain* court found the state was regulating internal markets and setting incentives for firms to produce less harmful products for sale in California and not regulating extraterritorial conduct. Unlike *Rocky Mountain*, AB 398's preference is not based on an objective difference between offsets produced in-state vs. those produced out-of-state. Both are generated in accordance with California's offset protocols, the purpose of which is reduce or sequester GHG emissions with0ut regard to location.

Similarly, in *Energy and Environment Legal Institute ("EELI") v. Epel*, 793 F.3d 1169 (10th Cir. 2015), the court found that the DCC was not violated because Colorado's 20% Renewable Portfolio Standard ("RPS"), while it applied to electricity on a multi-state grid, was not regulating extraterritorial conduct because it established a uniform quota applicable regardless of origin. The court stated that, "without a regulation more blatantly regulating price and discriminating against out-of-state consumers or producers,' the near *per se* rule of invalidation would not apply." If the DEBS requirement is implemented in a manner that

expressly preferences in-state offsets over out-of-state offsets, then it may not, as Colorado's RPS did, avoid the "*per se* rule of invalidation."

A similar result occurred in a DCC case brought against Connecticut's renewable portfolio standards. In *Allco Finance v. Dykes*, 861 F.3d 82 (2nd Cir. 2017), the relevant state program distinguished between renewable energy credits based on their place of origin. The court held that the program did not amount to discrimination against interstate commerce, as there were legitimate regulatory reasons to consider credits produced in Connecticut differently from those produced outside of the state relative to the reduction of in-state air pollution. The language in the Connecticut program is similar to that in AB 398. However, the Connecticut program made geographic distinctions only insofar as those distinctions were made by a federally-supervised program that encouraged the creation of independent (in-state) and regional organizations for the defensible purpose of encouraging the management of the electric grid (which is itself regional). *See Allco Finance*, 861 F.3d at 106. AB 398 makes geographic distinctions without reference to any federal program and without reference to a regional grid. Global warming, by definition, does not respect political or even geographic boundaries. Thus, given these distinctions and the fact that this decision was issued by the Second Circuit and not the Ninth (which includes California), The *Allco Finance* decision by no means indicates that a challenge brought against California's offset program will have similar results.

The language of AB 398 also resembles that of the Minnesota statute addressed by the decision in *North Dakota v. Heydinger*, 825 F.3d 912 (8th Cir. 2016), where the program was found to violate the Dormant Commerce Clause. In *Heydinger*, while the judges on the panel were split with regard to preemption and DCC rationales, they were united in invalidating Minnesota's statute that prohibited any person from importing or committing to import power from an out-of-state, new large energy facility, or from entering into a new long-term power purchase agreement that would increase Minnesota's statewide carbon dioxide emissions. In short, though it purported to address the state's GHG emissions, it clearly regulated commerce into and out of the state. If not properly implemented, the DEBS requirement could be held to be blatantly discriminatory just as Minnesota's statute was.

There is one clear rule that can be derived from these complex and somewhat conflicting decisions, and that is that the law concerning the Dormant Commerce Clause is uncertain. Enough ambiguity exists in the case law to encourage a litigant to challenge California's offset Program with the goal of invalidating it, and such a challenge could pose a threat to the state's entire Cap-and-Trade Program. To prevent potential challenges to the implementation of AB 398's DEBS requirement, CARB should avoid making simple, bright line rules that could be construed as blatantly discriminating against offsets generated out-of-state.

For this reason, IPRE supports the approach to implementing the DEBS requirement outlined in the Discussion Draft. In sum, CARB proposes to define DEBS by using the exact words of AB 398 and to develop a process that allows proponents of a particular offset project to make a case as to why that project meets the DEBS criteria, drawing upon the facts of the project

and the available science. This is a prudent approach that reflects a welcome administrative humility. Climate science is fast developing and new data is being generated every day that increases our understanding of climate change and its impacts. If CARB were to establish static, bright line rules today, it could well exclude an offsets project that does provide direct environmental benefits in the state – DEBS. An example of the difficulty of developing a workable static interpretation of the DEBS criteria is evidenced by an Ozone Depleting Substances ("ODS") project located in Compton, California. Operated by Appliance Recycling Centers of America, the project produces carbon offsets by extracting refrigerant and other harmful chemicals from the appliances they recycle. These appliances are sent to the recycling center from all over the country. A strict, static reading of the DEBS requirement could exclude this project. Similar complexities can arise with many other offsets projects. It would be impossible for CARB to anticipate all such complexities today and develop fair rules that do not improperly discriminate based simply on location of the project as opposed to DEBS.

As noted above, CARB proposes to adopt AB 398's definition of DEBS as "the reduction or avoidance of emissions of any air pollutant in the state or the reduction or avoidance of any pollutant that could have an adverse impact on the waters of the state." As the science of climate change continues to evolve, the mechanisms that contribute to and reduce adverse climate effects are changing. Science has not yet reached a point where we are able to determine all of the factors that causes air pollutants in a particular geographic area nor what will result in the avoidance of pollutants in the environment. The air does not respect state boundaries. As our knowledge of environmental challenges continue to expand, new policies and technologies will be required to address these changes. Implementation of California's offset program must accept this reality and provide a mechanism whereby a project's environmental benefits to the state is supported by scientific evidence, as opposed interpretation of the statute which on its face appears to discriminate against California's out-of-state partners.

3. DEBS and the Waters of California'

The definition of DEBS quoted above includes "the reduction or avoidance of any pollutant that could have an adverse impact on waters of the state." These are broad terms. As the U.S. Supreme Court held in *Massachusetts v. Environmental Protection Agency*, 549 U.S. 497 (2007), GHGs are pollutants, and thus the reference to "any pollutant" includes GHGs.[1] GHGs have a considerable adverse effect on many aspects of our environment, including being a major contributor to climate change, which in turn has significant negative effects on the waters of the State of California.

---

[1] "[T]he fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth" (internal quotation marks omitted)). Because greenhouse gases fit well within the Clean Air Act's capacious definition of "air pollutant," we hold that EPA has the statutory authority to regulate the emission of such gases from new motor vehicles." 549 U.S. at 532.

Climate change has affected California in many ways, including persistent drought and increased wildfires, rising sea level and threats to California's coasts, and warmer waters throughout the state. Each of these effects of climate change has an adverse impact on the waters of the state. The historic droughts that the State has endured has lowered the levels of the Colorado River and the California snowpack, limiting the amount of water that the state has for all uses. The State's wildfires, which recent experience has shown can be severe indeed, require the use of water for control and maintenance, and also increase the susceptibility of watersheds to flooding and erosion, which subsequently impair water supplies. Runoff from burned regions also enter the state's water bodies, leading to increased contamination. Warmer water throughout the state has numerous adverse impacts, including loss of the state's native fish, increasing pollutant levels and the proliferation of invasive species.

In implementing AB 398's DEBS requirement, IPRE calls upon CARB to consider the myriad factors that have an "adverse impact on the waters of the state." All of the offset projects currently being developed by IPRE are reducing GHG emissions, providing a solution to the challenges of climate change and as a result providing a direct environmental benefit to the state of California by reducing an adverse impact on the state's waters.

IPRE and its members are committed to continuing to partner with the State in its efforts to combat climate change. Implementation of AB 398's DEBS criteria presents considerable risks and challenges both to the Cap-and-Trade Program and California's efforts to get others to partner with its efforts. IPRE wishes to work with CARB to ensure that that the risks of DCC litigation can be avoided and the challenges to nondiscriminatory implementation of DEBS overcome. While the offsets program is a small part of California's multifaceted efforts to reduce GHG emissions, it is a critical component. It is the primary means by which CARB incentivizes those outside the State to join with it in the fight to combat climate change, including drawing in partners in states that often otherwise differ from California, thereby helping to broaden the support for the fight against climate change in important ways. To ensure that California continues its role in creating national and international solutions to fighting climate change it is critical that CARB implement the DEBS requirement in a manner that continues to ensure the environmental integrity of the Cap-and-Trade Program and is not improperly discriminatory.

Sincerely,

Nicholas W. van Aelstyn

c/o Sheppard Mullin Richter & Hampton LLP
Four Embarcadero Center, 17th Floor | San Francisco, CA 94111-4109 | 415.434.9100 | www.sheppardmullin.com

EXHIBIT B

Indigenous Peoples
IPRE
Reducing Emissions

May 18, 2018

Via Electronic Submission

Rajinder Sahota
Assistant Division Chief
Industrial Strategies Division
California Air Resources Board
1001 I Street
Sacramento, CA 95814

Re: Comments of IPRE on CARB's April 26, 2018 Cap-and-Trade Workshop

Dear Ms. Sahota:

Thank you for the opportunity to comment on the California Air Resources Board's ("CARB") April 26, 2018 Workshop to Continue Informal Discussion on Potential Amendments to the Cap-and-Trade Regulation. We write to provide the comments of Indigenous Peoples Reducing Emissions ("IPRE") on several of the issues relating to offsets that were addressed during the workshop – in particular the potential application to offsets generated prior to 2021 of AB 398's quantitative limit on the use of offsets that "no more than one-half may be sourced from projects that do not provide direct environmental benefits in the state" ("DEBS"). We refer CARB to our earlier comment letter dated Mach 19, 2018 for additional discussion of the DEBS requirement. We reaffirm but do not repeat those comments here.

1. Indigenous Peoples Reducing Emissions ("IPRE")

IPRE is an association of Alaskan Native and American Indian entities that are actively engaged in creating sustainable climate solutions. IPRE members partner with California's climate change initiatives through the Cap-and-Trade Program. Our members primarily do so by developing forest offset projects, most of which are on lands outside of the state. Among IPRE's members are some of the most disadvantaged communities in the United States; they are often faced with a Hobson's choice of enduring brutal poverty whilst sustaining their forests and their traditional cultures as they have for thousands of years, or cutting down their forests to meet immediate economic needs. For this reason we believe that some IPRE communities are environmental justice ("EJ") communities.

IPRE commends CARB for its leadership in combatting climate change. Its Cap-and-Trade Program serves as an important national and international model. The offsets program enables this model to be more than an inspiration: it provides a means for communities outside of the state – including EJ communities – to partner with California in the global fight against climate change. By creating incentives for others to partner with California, CARB's offset program has been a critical component of California's global leadership on climate issues.

c/o Sheppard Mullin Richter & Hampton LLP
Four Embarcadero Center, 17th Floor | San Francisco, CA 94111-4109 | 415.434.9100 | www.sheppardmullin.com

2. The DEBS Requirement Does Not Apply to Offsets Generated Prior to 2021

On Slide 33 of its presentation at the April 26 Workshop, CARB stated that "Most stakeholders did not support retroactively applying DEBS to offset credits issued prior to 2021," and noted that most stakeholders expressed "support for exempting from or automatically meeting DEBS standard for previously issued offset credits." In addition to strong stakeholder support for that interpretation, there is strong legal support. For the reasons set forth below, IPRE believes that the DEBS requirement simply does not apply to offsets issued prior to 2021 and calls upon CARB to amend the Cap-and-Trade Regulation accordingly.

a. *The Plain Language of Health & Safety Code Section 38562 Makes Clear that DEBS Does not Apply to Offsets Issued Before 2021*

The DEBS limitation is not a standalone statute. AB 398 amended the California Health & Safety Code ("HSC") and its provisions must be construed within their statutory context. The DEBS provision is set forth in Subsection E of HSC Section 38562(c)(2). It is one of many subsections that provide specific directions to CARB under Section 38562(c)(2)'s overarching direction: "**In adopting a regulation applicable from January 1, 2021, to December 31, 2030**, inclusive, pursuant to this subdivision, the state board shall do all of the following: . . . ." (Emphasis added.) Thus, the plain language of the statute that includes the DEBS provision directs CARB to develop regulations applicable only to the specified period post-2020.

HSC Section 38562(b) precedes Section (c) and provides general direction to CARB. Several provisions of Section (b) make clear that the DEBS limitation should not be construed to apply to offsets generated prior to 2021:

- Subsection (b)(1) establishes the overarching direction to CARB to "[d]esign the regulations . . . in a manner that . . . encourages early action to reduce greenhouse gas emissions." Interpreting DEBS to apply pre-2021 would *discourage* those that took action early to reduce GHG emissions by developing offset projects.

- Subsection (b)(5) directs CARB to "[c]onsider [the] cost-effectiveness of these regulations." Offsets are a key cost flexibility mechanism and drastically limiting existing offsets would increase the cost that the Cap-and-Trade Program imposes.

- Subsection (b)(7) directs CARB to "[m]inimize the administrative burden of implementing and complying with these regulations." Developing a process by which CARB would determine "ways to address existing projects where the offsets have not been used for compliance" CARB Preliminary Discussion Draft at 18, would be hugely burdensome for the agency, both to develop such a process and then to apply it to the existing projects and the offsets generated by them.

b. *Absent Action by CARB to Exempt Pre-2021 Offsets from DEBS It Will Have an Improper and Illegal Retroactive Effect*

If CARB does not amend the Cap-and-Trade Regulation to establish that offsets generated pre-2021 either are exempt from the DEBS limitation or automatically meet it, the DEBS usage limit will impact pre-2021 offsets despite the fact that AB 398 does not directly apply to them. While the point of regulation for the DEBS usage limitation is the surrendering of offsets post-2020, there is no question that it nonetheless impacts offsets generated pre-2021. Offsets are compliance instruments issued by CARB for the sole purpose of being used to meet compliance obligations under the Cap-and-Trade Program. If that sole usage is limited, the offsets are impacted. Thus, though the language of AB 398 does not address pre-2021 offsets, it does impact them. The value of pre-2021 offsets that are not either deemed exempt from or to automatically meet DEBS will be greatly diminished.[1] "A statute is retroactive if it affects rights, obligations, acts, transactions and conditions performed or existing prior to adoption of the statute and substantially changes the legal effect of those past events." *In re Marriage of Reuling*, 23 Cal.App.4th 1428, 1439 (1994)(citations omitted). Absent appropriate regulatory action by CARB, the DEBS provision will have retroactive impact. That raises a significant legal issue.

The California Supreme Court has established a two-part test for determining if a statute has an improper retroactive effect. First, the Court must determine if the legislature intended the statute to be retroactive. If not, that ends the discussion. If so, then the Court must determine whether the application of the retroactive law is unconstitutional. *In re Marriage of Buol*, 39 Cal.3d 751, 756 (1985)("Legislative intent, however, is only one prerequisite to retroactive application of a statute. Having identified such intent, it remains for us to determine whether retroactivity is barred by constitutional constraints.").

i. *The Legislature Did Not Intend DEBS to have Retroactive Effect*

California courts have held that for a statute to have a retroactive effect the legislature must have clearly and expressly stated that that it does so. "[It is a] well-established presumption that statutes apply prospectively in the absence of a clearly expressed contrary intent . . . ." *Californians for Disability Rights v. Mervyn's, LLC*, 39 Cal.4th 223, 230 (2006), *citing Evangelatos v. Superior Court*, 44 Cal.3d 1188, 1218 (1988). In determining this issue, courts look to the language of the law to determine if a statute was intended to be retroactive. "[Legislative intent] is always considered significant because, '[t]he Legislature is well

[1] It has been suggested that those that invested in offset projects anticipated this because the Cap-and-Trade Program was due to sunset after 2020. That is not correct. Prior to the adoption of AB 398 CARB maintained that it had the authority to continue the Program post-2020 and repeatedly stated that it would do so. Many independent legal analyses supported CARB's position. Those that invested in offset projects reasonably relied on CARB's statements and had a reasonable expectation that the Program would continue post-2020.

acquainted with the rule requiring a clear expression of retroactive intent, and the fact that it did not so express itself or did not make the amendment effective immediately is a significant indication it did not intend to apply the amendment retroactively.'" *Wienholz v. Kaiser Found. Hosps.*, 217 Cal.App. 3d 1501, 1505 (1989), *citing Perry v. Heavenly Valley* 163 Cal.App.3d 495. 500 (1985). In addition to the plain language of HSC Section 38562 discussed above, the legislative record of AB 398 makes clear that the Legislature did not intend the DEBS limitation to have retroactive impact upon pre-2021 offsets.

In *Wienholz*, the absence of express language providing retroactivity took on special significance as certain sections of the relevant statute contained express references to retroactive application, whereas the challenged provision did not. That is the case here as well. AB 398 also added Subsection C to HSC Section 38562(c)(2), which "[r]equire[s] that current vintage allowances designated by the state board for auction that remain unsold in the auction holding account for more than 24 months to be transferred to the allowance price containment reserve." Thus, when it adopted AB 398, the Legislature knew how to make it apply to existing compliance instruments. That it did not do so for Subsection E of this same provision makes it clear that it did not intend for the DEBS limitation to have retroactive impact.

Moreover, there is nothing in the legislative history of AB 398 that indicates that the Legislature intended for DEBS to apply immediately. The Legislature issued seven different reports pertaining to AB 398 and not one of them discusses the application of DEBS to pre-2021 offsets much less sets forth an express intent for DEBS to apply prior to the specified period of January 1, 2021, to December 31, 2030.[2] The absence of any reference to AB 398's retrospective application, indicates that it was not the intent of the legislature to have it do so. "A statute's silence as to retroactivity is an authoritative indication the Legislature intended a prospective application." *Reuling*, 23 Cal.App.4th at 1439-1440.

Another factor that courts consider is whether the statute's purpose would be "served significantly by its application to transactions which preceded the change and the principle that retrospective imposition of increased liabilities is to be carefully avoided". *City of Los Angeles v. Shpegel-Dimsey, Inc.*, 198 Cal.App.3d 1009, 1019-1020 n. 2 (1988). The purpose of AB 398 is to strengthen the Cap and Trade Program. Retroactive application of AB 398 will have the opposite effect. It would alter the value of existing carbon offsets, undermine the economic assumptions of the participants in the Program, and add uncertainty to the carbon market.

---

[2] *See* Assembly Floor Bill Analysis AB 398 (2017-2018 Reg. Sess.), July 17, 2017; Senate Floor Bill Analysis AB 398 (2017-2018 Reg. Sess.), July 17, 2017; S. Comm. on Appropriations, Bill Analysis AB 398 (2017-2018 Reg. Sess.), July 17, 2017; S. Comm. on Environmental Quality, Bill Analysis AB 398 (2017-2018 Reg. Sess.), July 12, 2017; Assembly Floor Bill Analysis AB 398 (2017-2018 Reg. Sess.), May 30, 2017; A. Comm. on Appropriations Bill Analysis AB 398 (2017-2018 Reg. Sess.), May 15, 2017; and A. Comm. on Appropriations, Bill Analysis AB 398 (2017-2018 Reg. Sess.), March 30, 2017.

ii. *If Read to have Retroactive Effect DEBS is Unconstitutional*

The second issue is the question of constitutionality. The California Supreme Court has "long held that the retrospective application of a statute may be unconstitutional if it is an *ex post* facto law, if it deprives a person of a vested right without due process of law, or if it impairs the obligation of a contract." *Buol*, 39 Cal.3d at 756. The statute at issue in *Buol* was held to be unconstitutional as it deprived the plaintiff in the case a vested right without due process of law.

Here, if the DEBS provision is construed to apply to existing offsets it likely would be found to be unconstitutional by depriving the holders of those offsets of a vested right without due process. Last year it was definitively determined that compliance instruments – which include offsets – consist of property rights that may not be taken absent due process. *See California Chamber of Commerce v. State Air Resources Bd.*, 10 Cal. App. 5th 604, 646-649 (2017). The Court's analysis is thorough and well-reasoned.[3] The Court began with the observation that "the due process and *takings clause* concepts of property are not coterminous," and that the "*due process clause* recognizes a wider range of interests in property." *Id.* at 647 (citations omitted). It held that while compliance instruments may not constitute property vis-à-vis the government, "this does not mean compliance instruments, including emissions allowances, lack value *to the holders*. [They] . . . consist of valuable, tradable, private property rights. *Id.* at 649. If CARB does not amend the Cap-and-Trade Regulation to make clear that offsets issued prior to 2021 are either exempt from or meet the DEBS requirement, then the holders of those offsets would be deprived of their property rights without due process and may well seek legal recourse.

For all of the foregoing reasons, IPRE calls upon CARB to amend the Cap-and-Trade Regulation to make clear that offsets issued prior to 2021 are either exempt from or meet the DEBS requirement. Doing so would be consistent with the plain language of HSC 38562 and its directives to CARB, the intent of the Legislature when it adopted AB 398, the constitution, and good policy.

3. The Regulation's Invalidation Provisions Should Be Revised

On Slide 38 of its presentation at the April 26 Workshop, CARB invited stakeholder input on "[r]evising invalidation provisions to further narrow types of activities or actions that could result in an invalidation." In response to a question posed by IPRE during the workshop, CARB staff clarified that it invited input not only on narrowing the invalidation provisions but also on reconsidering the Buyer Liability approach to invalidation altogether. Staff expressed particular interest in getting input on these issues as they relate to forest offset projects.

IPRE supports and endorses the May 10 comments of the California Forest Carbon Coalition. Many forest offset projects are on or are part of larger tracts of forest lands where

[3] Notably, the California Supreme Court declined to review the case. 2017 Cal. LEXIS 4991.

timber is harvested. Like California, many states have extensive timber harvesting regulations, and thus minor infractions of environmental, health and safety ("EHS") regulations are not unusual on forest lands. These NOVs may have nothing to do with a forest offset project on or a part of these lands and yet under the current language of the Regulation's invalidation provisions such NOVs may result in the offsets generated by those projects being invalidated. That can be a particularly devastating result for forest offset projects because – unlike, say, ODS projects – the vast majority of a forest project's offset credits are issued at one time. If an unrelated NOV happens to occur during the same narrow period, virtually the entire project's offsets could be invalidated.

This same concern extends to other types of EHS regulations. We are aware of at least one significant forest offset project in Kentucky that was registered with CARB but recently was abandoned due to concerns about potential invalidation. In that instance, after having made significant investments in the forest offset project, the forest owner could not obtain adequate assurance that the offsets generated by its project would not be invalidated in the event that mining operations were conducted beneath the surface that might give rise to EHS violations (mines are subject to many regulations such that minor NOVs are not unusual) – even though the two activities would be wholly unrelated, one above ground and one below. Thus, in this particular instance, with the collapse of the forest project, the owner of the land will have little choice but to pursue coal mining at its property. That surely is not a result that California's climate policies are intended to further.

4. Conclusion

IPRE and its members are committed to continuing to partner with the State in its efforts to combat climate change. Implementation of AB 398's DEBS criteria presents considerable risks and challenges both to the Cap-and-Trade Program and California's efforts to get others to partner with its efforts. While the offsets program is a small part of California's multifaceted efforts to reduce GHG emissions, it is a critical component. It is the primary means by which CARB incentivizes those outside the State to join with it in the fight to combat climate change, including drawing in partners in states that often otherwise differ from California, thereby helping to broaden the support for the fight against climate change.

Sincerely,

Nicholas W. van Aelstyn

cc: Jason Gray