

Native American Venture Fund

March 16, 2018

Ms. Rajinder Sahota
California Air Resources Board
1001 I Street
Sacramento, CA 95814

Re: Comments of Native American Venture Fund on February 16, 2018 Staff Preliminary Discussion Draft of Proposed Amendments to the Offsets Provisions of the California Cap-and-Trade Regulation

Dear Ms. Sahota and Air Resources Board Staff:

The Native American Venture Fund (“NAVF”) appreciates the opportunity to submit the following comments on the Staff Preliminary Discussion Draft (“PDD”) of Proposed Amendments to the Offsets Provisions of the California Cap-and-Trade Regulation (“Cap-and-Trade Program”) seeking to implement Assembly Bill (“AB”) 398.

NAVF supports the Air Resources Board’s (“ARB”) proposal to designate projects that are not physically located in California or adjacent to waters of the State, and that demonstrate they directly reduce air pollutants or benefit the waters of California, as projects that have direct environmental benefits (“DEBS”) to the State. However, NAVF strongly advises against retroactively applying AB 398 to projects with issued credits before 2020. NAVF respectfully requests that all carbon offsets from tribal lands issued before 2020 remain eligible for all of the offset targets referenced in AB 398. Such offsets from tribal lands should be deemed to directly benefit disadvantaged Native American communities and result in lower greenhouse gas emissions nationwide.¹

The Native American Venture Fund promotes and develops carbon offset projects on tribal lands. NAVF finances all of the costs of such projects for Native American tribes, and the tribes receive the lion’s share of revenues from selling carbon credits that the ARB issues for such projects. NAVF works closely with leaders from Native American communities

¹ See, for example, Hayhoe et al. “Emissions pathways, climate change, and impacts on California.” National Academy of Sciences of the USA. August 2004 - <http://www.pnas.org/content/pnas/101/34/12422.full.pdf>. Reducing greenhouse gas emissions anywhere clearly reduces or avoids a pollutant that has an adverse impact on the waters of California.

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who promote reforestation, conservation, and economic development. The revenues from such projects are used to provide disadvantaged tribal communities with essential needs, such as medical services, education, and infrastructure.

AB 398 states that half of the carbon credits from offset projects “may be sourced from projects that do not provide direct environmental benefits in the state.” The ARB has the authority to interpret the offset provisions of AB 398 consistent with controlling law.²

Under controlling law, the ARB has the discretion to decide how projects with credits issued after 2021 can demonstrate they have DEBS to the State. NAVF supports the PDD proposal that projects can show DEBS from scientific, peer-reviewed materials, intergovernmental panels on climate change or government agency reports (which would presumably include reports from tribal governments), and monitoring or analytical data, to determine whether a project demonstrates DEBS. NAVF encourages the ARB to state that the list of such “additional materials” that could show DEBS consists of examples of sources and is not exclusive. This would allow for other types of relevant information to be considered in the future, such as project feasibility study reports, worldwide climate change reports, and white papers from scientists or climate change conferences. NAVF encourages the ARB to implement a timeline or process by which the ARB would make determinations for each project, to provide more certainty for offsets developers and project financiers.

Controlling law does not allow the application of AB 398 to existing projects with issued credits prior to 2021. NAVF requests that the ARB reconsider its proposal to apply AB 398 to existing projects, contrary to the stated intent of AB 398. As a matter of law, statutes operate prospectively unless the Legislature has clearly indicated it intended retroactive or retrospective application.³ Absent an express retroactivity provision, a statute will not be applied retroactively unless it is clear from extrinsic sources such as legislative history that the Legislature intended that effect.⁴ Courts particularly disfavor the retroactive application of laws when the laws create new obligations, impose new duties, or exact new penalties because of past transactions.⁵ Courts have not allowed the retroactive application of a law where a court has determined that to do so would impair a vested property right, and thus violate due process.⁶

AB 398 contains no such express statement that it applies retroactively. Notably, AB 398 does not expressly state that it applies retroactively to offsets issued before 2021. In fact, it expressly states it applies to offsets as of January 1, 2021.⁷

Applying AB 398 to existing projects would undermine the value of their offsets and retroactively create new obligations for project developers to demonstrate DEBS.

² See, e.g., Government Code section 11342.2.

³ See, e.g., *Evangelatos v. Superior Court* (1988) 44 Cal. 3d 1188, 1207.

⁴ *Id.* at pp. 1209-1210.

⁵ See *In re Marriage of Reuling* (1994) 23 Cal. App. 4th 1428, 1439; see *Wienholz v. Kaiser Foundation Hospitals* (1989) 217 Cal. App. 3d 1501, 1505.)

⁶ *Plotkin v. Sajahtera, Inc.* (2003) 106 Cal.App.4th 953, 963-964 (citing *In re Marriage of Buol* (1985) 39 Cal.3d 751, 761).

⁷ Health and Safety Code § 38562(c)(2)(ii)(E).



Developers and potential buyers of offsets would have to wait until the end of 2021 to learn if existing projects changed in value. The value of contracts with potential buyers of offsets from tribal lands would remain uncertain and could significantly change. As a result, tribal communities will be deprived of the revenues they use from such offsets for their basic needs like electricity, medicine and schools. In effect, retroactive application would significantly reduce the value of tribal projects that would not qualify as DEBS, which could also be construed as a penalty. NAVF strongly encourages the ARB to reconsider such action.

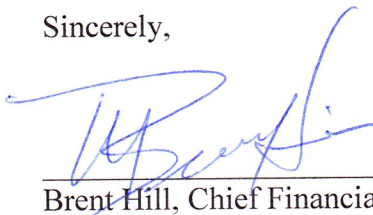
Such an impact would diminish the State's offsets industry, which would impact the State's goals to reduce greenhouse gas emissions by 40 percent by 2030. Such offsets contain compliance costs for entities that comply with the Cap-and-Trade Program, which promotes continued participation in the Program. The State receives revenues from that continued participation.

Accordingly, NAVF requests that the ARB exercise its authority to designate as DEBS all existing projects on tribal lands where the ARB has issued credits before 2021 that have not yet been used for compliance. If implemented, the ARB's current proposal would devalue projects that produce revenues for disadvantaged tribal communities throughout California and its neighboring states. Designating existing projects as DEBS is consistent with AB 398, which establishes a Compliance Offsets Protocol Task Force to provide guidance on new offset protocols under the Cap-and-Trade Program, "for the purposes of increasing offset projects with direct environmental benefits in the state while prioritizing disadvantaged communities, Native American or tribal lands, and rural and agricultural regions" (emphasis added). The Legislature intended to prioritize communities on tribal lands, which should govern the ARB's implementation of AB 398.

NAVF appreciates that the ARB Staff has put a great amount of work and thought into the PDD, and applauds those efforts. NAVF encourages the ARB to schedule further discussion at workshops on how to preserve the robust market for offsets after 2020 for the benefit of the State and tribal communities.

NAVF welcomes the opportunity to discuss these issues further with the ARB and interested stakeholders.

Sincerely,



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