



July 20, 2018

Mr. Jason Gray  
Cap-and-Trade Program, Branch Chief  
California Air Resources Board  
Sacramento, CA

*Submitted via online portal at:* <https://www.arb.ca.gov/lispub/comm2/bcsubform.php...>

**Re: Additional comments to the 2018 amendments to California's GHG Cap-and-Trade regulation and the June 21, 2018 workshop**

Dear Mr. Gray:

These comments are submitted on behalf of the Center for Biological Diversity ("Center") regarding potential changes to the regulation for the California Cap on Greenhouse Gas Emissions and Market-Based Compliance Mechanisms and the associated public workshop held on June 21, 2018. I appreciate the information that was shared at that workshop, and I appreciate this opportunity to provide additional input on the changes being considered by the Air Resources Board in the coming months.

These comments are offered in addition to the previous letters submitted by the Center on March 16 and May 10, 2018 and we incorporate those letters by reference here.<sup>1</sup> In particular, we reiterate our arguments that: 1) the risk that overallocation of allowances will undermine real reductions and the state's GHG reduction goals must be taken into account by CARB staff; 2) the Industry Assistance Factors should decline for the 2018-2020 period as proposed under the current rule and the Industry Assistance Factor for petroleum refining should be set at 0% over that period, in order to increase the amount of reductions achieved in that sector; 3) the use of offsets for 2024 and 2025 emissions should be capped at 4% to be consistent with the intent of AB 398; and 4) the use of price ceiling funds should not be dedicated to the purchase of offsets or restricted to a determined set of offset projects.

In these comments, the Center addresses ARB's request for feedback on defining "direct environmental benefits in the state" ("DEBS"). AB 398 specifies that after 2020 no more than one-half of offset credits may be sourced from projects that do not provide "direct environmental benefits in the state," and defines "direct environmental benefits in the state" 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." ARB's definition is so vague and broad that it would eviscerate the intent of the statute. Instead, ARB should evaluate the

<sup>1</sup> March 16 Center comments, available at <https://www.arb.ca.gov/lists/com-attach/54-ct-3-2-18-wkshp-ws-WmsGOFEPUDAKUwMy.pdf>; May 10, 2018 Center comments, available at <https://www.arb.ca.gov/lists/com-attach/1199-ct-4-26-18-wkshp-ws-UmNXaVMNB2EKUwQ1.pdf>.

offset protocols and provide clear science- and health-based criteria—consistent with the intent of providing *direct* (not tangential, hypothetical, or global) benefits to in-state communities—for what types of projects may be considered to have DEBS. Only once a project meets these criteria might ARB conduct more specific project-level assessment of whether the project actually directly benefits the state.

As the Center has previously stated, defining “direct environmental benefits in the state” to include any watershed that flows into California would severely undermine the intent of that provision. If this definition were interpreted in its broadest sense, this would include projects anywhere within the greater Colorado River watershed, which includes more than 24,000 square miles in five states outside of California, and extends more than 500 miles outside the border of California.

This broad geographical definition would not guarantee that offset projects provide “direct environmental benefits in the state” as required by law. Even in the case of a project that could ostensibly result in the reduction or avoidance of water pollutants locally, the potential for that benefit to reach California is extremely tenuous. Furthermore, in the case of offset projects registered under any of the current protocols, there is no assurance of any reduction or avoidance of any pollutant that could have an adverse impact on waters even locally.

Rather, ARB should establish clear standards and evaluation procedures for assessing whether a project meaningfully impacts the quality of waters entering the state by an independent scientific review. Instead, ARB proposes that “[i]f [the] project is located adjacent to a water body that flows within or into California, no further information” on that project’s impacts or benefits would be needed.<sup>2</sup> Thus, a project could simply avoid putting a pollutant somewhere in the Colorado River watershed thousands of miles upstream, and not have to provide any information that such an avoidance *actually* benefits California. The focus should be on *impact* rather than geographical location of the project.

Notably, a study published in the last few weeks (“Cushing Study”) found that rather than investing in green projects within the state, an astounding seventy-five percent of offset credits went towards projects outside of California.<sup>3</sup> Meanwhile, the Study found, from 2011-2015, disadvantaged communities within California experienced *increases in both GHG emissions and co-pollutant emissions* from regulated facilities disproportionately located in their neighborhoods.<sup>4</sup> Incentivizing out-of-state projects while actively harming California’s disadvantaged communities undermines the intent of AB 398.<sup>5</sup>

Indeed, the intent of the legislation to benefit disadvantaged communities is evident from the plain language of Health and Safety Code section 38591.1(a) (AB 398), which directs ARB

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<sup>2</sup> ARB, Preliminary Discussion Draft, June 2018, p. 17.

<sup>3</sup> Cushing, Lara et al., “Carbon trading, co-pollutants, and environmental equity: Evidence from California’s cap-and-trade program (2011– 2015),” *PLoS Med* 15(7) (July 10, 2018) (“Cushing, Carbon Trading”), available at <http://journals.plos.org/plosmedicine/article?id=10.1371/journal.pmed.1002604>.

<sup>4</sup> Cushing, Carbon Trading.

<sup>5</sup> Note that the Office of the Senate Floor Analyses stated its understanding that, of the offset credits allowed, AB 398 “[r]equires 50% of all offsets to be *in* California.” See Senate Floor Analysis for AB 398, p. 5 (emphasis added).

to create a task force to create guidance for new offset protocols for a “market-based compliance mechanism 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.) It is clear from this language—one of only two places in the statute that “DEBS” is used—that any DEBS definition must recognize and incorporate that the direct benefits should be not only within the boundaries of the state but also prioritize disadvantaged communities.

This reading is also consistent with the statutory scheme of California’s climate regulation. As noted in the Senate Committee on Environmental Quality (“SCEQ”) report for AB 398, AB 32 specified that prior to the inclusion of any market-based compliance mechanism in the regulations, ARB was required to (1) “consider the potential for direct, indirect, and cumulative emission impacts from these mechanisms, including localized impacts in communities that are already adversely impacted by air pollution,” (2) “design any market-based compliance mechanism to prevent any increase in the emissions of toxic air contaminants or criteria air pollutants,” and (3) “maximize additional environmental and economic benefits for California, as appropriate.” Moreover, AB 197 (Garcia, 2016) directed ARB to consider social costs and prioritize direct emission reductions at large stationary, mobile, and other sources in order to protect disadvantaged communities.<sup>6</sup>

Moreover, to the extent ARB has raised dormant Commerce Clause concerns regarding the DEBS requirement, the clearer and more direct the environmental benefits are to California communities, the less likely a dormant Commerce Clause claim would survive in court.<sup>7</sup> “The guiding principle in determining whether a state regulation discriminates against interstate or foreign commerce is whether either the purpose or the effect of the regulation is economic protectionism.”<sup>8</sup> Here, the purpose of requiring in-state benefits from offset credits is clearly protecting California’s communities from pollution-related harm, not economic protectionism. Indeed, the Cushing Study clearly supports the need for such regulation. But the offset limits should be based on their *effects* on the state’s environment, rather than the location of the project.<sup>9</sup> The more the DEBS criteria focus on scientific- and health-based criteria and the benefits to local communities, the better the regulation will be able to withstand any dormant Commerce Clause challenges.

In sum, AB 398 is meant to *improve* California’s market-based program,<sup>10</sup> and requires ARB to prevent the very outcomes the Cushing Study demonstrates have occurred. Interpreting

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<sup>6</sup> Health and Safety Code § 38562.5.

<sup>7</sup> See e.g., *Rocky Mtn. Farmers Union v. Corey*, 730 F.3d 1070, 1087-88 (9<sup>th</sup> Cir. 2013) [upholding California’s Low Carbon Fuel Standard against dormant Commerce Clause claims] [“Absent discrimination, we will uphold the law ‘unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits.’” *Pike v. Bruce Church, Inc.*, 397 U.S. [137,] 142.”].

<sup>8</sup> *Pacific Northwest Venison Producers v. Smitch*, 20 F.3d 1008 (9<sup>th</sup> Cir. 1994); accord, *Rocky Mountain*, 730 F.3d at 1087.

<sup>9</sup> A statute that “‘treat[s] all private companies exactly the same’ does not discriminate against interstate commerce.” (*Association des Eleveurs de Canards et d’Oies du Quebec v. Harris*, 729 F.3d 937, 947 (9<sup>th</sup> Cir. 2013) (“*Association*”).)

<sup>10</sup> See e.g., SCEQ report for AB 398 (July 12, 2017), p. 8: “Ensuring Improvement – a Better Cap-and-Trade System.”

DEBS to allow for projects with tangential benefits or that may reach a waterway inside California ignores the entire cap-and-trade statutory scheme, perpetuating the most unjust aspects of the program. ARB should evaluate the offset protocols and provide clear science- and health-based criteria—consistent with the intent of providing *direct* benefits to in-state communities—for what types of projects may be considered to have DEBS. These criteria should prioritize benefits to disadvantaged and tribal communities.

Thank you for your consideration of these comments. Please contact me if you have any questions.

Sincerely,

A handwritten signature in blue ink, appearing to read 'MGK', is positioned above the typed name.

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