October 22, 2018

Mary Nichols, Chair
California Air Resources Board (CARB)
1001 I Street
Sacramento, CA 95814

RE: Proposed Amendments to the California Cap on Greenhouse Gas Emissions and Market-Based Compliance Mechanisms Regulation

Dear Chair Nichols:

The American Carbon Registry (ACR), a CARB-approved Offset Project Registry (OPR) for the California cap-and-trade program, welcomes the opportunity to offer input regarding the Proposed Amendments to the California Cap on Greenhouse Gas emissions and Market-Based Compliance Mechanisms Regulation (Proposed Amendments). ACR joins with numerous stakeholders in supporting an ambitious cap-and-trade program that tackles planet-warming emissions across all sectors. Emissions reductions outside the cap, as offsets, generate revenue and jobs for rural, agricultural, disadvantaged, and Native American communities, while lowering costs to consumers.

The Intergovernmental Panel on Climate Change's recent special report, *Global Warming of 1.5 °C*, made clear the drastic changes needed in limited time.[1] The scope and severity of the challenge necessitate that no emissions reduction opportunities be left off the table and that we tackle short-lived climate pollutants (SLCPs) to buy time to implement long-term solutions. Offsets, therefore, play a vital role. They reach beyond sectors covered under the cap-and-trade program and offer opportunities to address methane and fluorinated gases that have amplified 20-year global warming potentials. We simply do not have the luxury to neglect readily available climate action.

In an effort to ensure that AB 398 is translated into regulation to greatest effect, ACR has actively contributed to the current rulemaking process. Our previous comment letters are incorporated by reference in this letter.[2,3,4] We will herein build on previous comments and address specific provisions in the Proposed Amendments.

ACR supports the following staff proposals:

- Construction of section 95854(b), Quantitative Usage Limit on Designated Compliance Instruments—Including Offset Credits.
- Inclusion of a materiality provision in section 95977.1(b)(3)(M)

[1] http://www.ipcc.ch/report/sr15/
[2] https://www.arb.ca.gov/lists/com-attach/36-ct-3-2-18-wkshp-ws-UjMCZ1YlUl5VMAhn.pdf
[3] https://www.arb.ca.gov/lists/com-attach/1211-ct-4-26-18-wkshp-ws-AWBdOAFyBwsDZgJt.pdf
[4] https://www.arb.ca.gov/lists/com-attach/32-ct-6-21-18-wkshp-ws-BWRWM1QnUl4FYABv.pdf

- Appendix E: Offset Project Activities Within the Scope of Regulatory Compliance Evaluation. This amendment appropriately limits the impact of occupational health and safety regulations and regulatory reporting requirements on offset issuance.

With regard to Section 95973(b)(1)(E)(3), ACR supports the provision to remove from offset eligibility only those days during which a forest carbon project is in regulatory non-compliance. However, ACR suggests that CARB allow ODS destruction projects the same type of protections against undue loss of offsets accorded to livestock and mine methane projects in Section 95973(b)(1)(E)(1) and forestry projects in Section 95973(b)(1)(E)(3). Voiding all ODS destruction that occurs under a Certificate of Destruction, as stated in Section 95973(b)(1)(E)(2) is overly punitive and unnecessary. Destruction facilities retain detailed records that would enable only ODS destroyed during a non-compliance event to be discounted from a project.

Direct Environmental Benefits in State

Hewing close to AB 398, the Proposed Amendments use the exact language of the statute as the definition of Direct Environmental Benefits in State (DEBS): "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."

As follows from the DEBS text, ACR supports the staff proposal that all projects located in-state or avoiding any in-state air pollutants, including greenhouse gases (GHGs), qualify as providing DEBS. GHGs are air pollutants, as determined by the EPA and the Supreme Court, and as reflected in CARB's previous regulatory definition. Indeed, the Supreme Court's majority opinion in Massachusetts vs. EPA commented that "greenhouse gases fit well within the [Clean Air Act's] capacious definition of 'air pollutant.'"[5] In associating DEBS with "any" air pollutant, legislators reinforced the "capacious" definition. While all project types under CARB compliance offset protocols provide non-GHG benefits, GHG avoidance or reduction in California is alone sufficient to provide DEBS.

ACR supports the inclusion of a pathway for projects outside California to qualify as providing DEBS. ACR specifically supports the language of Section 95989(b) that states, "Such determination must be based on a showing that the offset project or offset project type provides for the reduction or avoidance of emissions of any air pollutant that is not credited pursuant to the applicable Compliance Offset Protocol in the State or a reduction or avoidance of any pollutant that could have an adverse impact on waters of the State." To ensure consistency and avoid confusion, ACR recommends deletion of the phrase "supporting a claim that the offset project or offset project type results in this type of reduction or avoidance of any pollutant in the State" that appears at the end of Sections 95989(b)(1), 95989(b)(2), and 95989(b)(3). ACR appreciates CARB's recognition of climate research as possible justification for DEBS.

Section 95989(c) indicates that a project outside California can receive consideration for DEBS upon submission of supporting material with the first Offset Project Data Report (OPDR). While process clarity is important, ACR believes that determination at the OPDR stage is too late to facilitate investment decisions. Much better to enable offset projects would be to also allow DEBS consideration prior to and upon project listing.

[5] Massachusetts vs. EPA, https://caselaw.findlaw.com/us-supreme-court/549/497.html

Some stakeholders and the Independent Emissions Market Advisory Committee (IEMAC) have assumed in the meaning of DEBS a legislative intent that excludes benefits associated with GHGs.[6] This runs counter to the inclusive statutory language ("any" air pollutant and "any" pollutant impacting water) and is unsubstantiated by evidence. The IEMAC offers no supporting evidence, conceding no attempt to find any, and ACR has otherwise seen no such evidence. The position of IEMAC is that the DEBS provision has no effect if it does not exclude GHGs and, therefore, must be meant to exclude GHGs.

However, the DEBS provision does have consequence, even if GHGs reductions are the basis for DEBS. The result of the provision is that CARB must provide oversight to ensure at least a portion of offset projects deliver environmental benefits to Californians. This assurance can be understood to be the intent. Whether DEBS are based on GHG reductions or whether Californians enjoy environmental benefits from all offset projects is ultimately not germane.

What evidence is available supports this interpretation of DEBS. At the May 23, 2018 hearing of the Joint Legislative Committee on Climate Change Policies, the author of AB 398, Assemblyman Eduardo Garcia, expounded on the intent of the DEBS provision: "…The thought has been how do we ensure that we're addressing the local problems: clean air, clean water….It was drafted and crafted specifically this way to meet the restrictions or limitations of the law, that could allow us to meet these overall objectives….[Direct environmental benefits] was the appropriate approach, and as the author of the bill I wanted to let you know that that's what we *meant* and nothing beyond that…"[7] Assemblyman Garcia's comments can be understood to support our view that the intent of the law was to direct CARB to provide assurance of DEBS, not to restrict GHGs reductions from qualifying as DEBS and certainly not to limit projects to those in California. Rather, the DEBS approach was taken as a legitimate alternative, implying no in-state requirement and no preference for one path to healthy air and water over another.

Assemblyman Garcia highlighted local air and water quality concerns. The detrimental role of GHGs in air and water quality is established science.

GHGs cause higher temperatures, increasing ground-level ozone formation and its concomitant respiratory health effects. As a secondary pollutant, some might claim ground-level ozone is not an "emissions" reduction or avoidance covered by the DEBS definition. Such a distinction is not only meaningless but legally risky. By improving local air quality, the intent of AB 398 is met. Any assertion that this air quality improvement doesn't qualify as DEBS because the ozone was formed, rather than emitted, in-state would raise serious Constitutional issues around interstate commerce. That would be to disqualify the desired result only because it was generated by investment outside state borders.[8] CARB staff acknowledged similar concerns well before the cap-and-trade program even began.[9]

---

[6] https://calepa.ca.gov/wp-content/uploads/sites/6/2018/10/Draft_Chapter_IEMAC_Annual_Report_Offsets_10-2018.pdf, (page 4)

[7] At the May 23, 2018 hearing of the Joint Legislative Committee on Climate Change Policies, ACR comments on DEBS at 1:18, and Assm. Garcia responds at 1:33: http://calchannel.granicus.com/MediaPlayer.php?view_id=7&clip_id=5543.

[8] Parallels the overriding argument as to why a DEBS distinction between in-state and out-of-state offsets risks violation of the Dormant Commerce Clause: https://climatetrust.org/latest-in-state-offset-proposal-will-raise-legal-challenge-dormant-commerce-clause-analysis/

[9] https://www.arb.ca.gov/regact/2010/capandtrade10/capv2appd.pdf (page 8, comment D-46)

For water impacts, AB 398 defines DEBS as "…reduction or avoidance of any pollutant that could have an adverse impact on waters of the state." GHGs are pollutants that adversely impact waters of the state. For example, diminished surface and ground water concentrate pollutant loads. Reducing or avoiding GHGs anywhere delivers DEBS. The GHG-water linkage is well supported by the science and is recognized in State policy and plans. ACR elaborated on this extensively in our comment letter dated March 16, 2018.[10]

Price Ceiling Units

With regard to Price Ceiling Units (PCUs), ACR fully concurs with the requirements that emissions reductions be real, permanent, quantifiable, verifiable, enforceable, and additional, as described in Section 95915(h)(2) and specified by AB 398. Considering that these requirements are the criteria for offsets, ACR recommends that offsets be incorporated as PCUs. Doing so would streamline the program and ensure that each PCU achieves the requisite emissions reduction.

Should CARB opt for an approach of selling PCUs and, in turn, using the revenue to pay for emissions reductions, ACR recommends the purchase of offsets. Again, offsets would offer the most compatible overlay with the statutory requirements. Furthermore, AB 398 directs CARB to achieve emissions reductions "on at least a metric ton for metric ton basis." If price ceiling revenue is sufficient to purchase more offsets than the number of allowances sold, the legislature has clearly indicated CARB should do so. Indeed, excess offsets could compensate for the additional warming that will occur during the time lag likely between hitting the price ceiling and purchasing offsets.

Regardless of whether offsets are the currency of PCUs or whether price ceiling revenue is used to purchase offsets, CARB should create a framework that helps to ensure offsets are available should the price ceiling be reached. While any offsets produced under the compliance protocols should be automatically eligible, the volume of offsets needed may well necessitate reliance on offsets produced under the voluntary protocols of the OPRs. CARB should pre-qualify the OPR protocols eligible to produce acceptable offsets and should, if necessary, delineate additional criteria for project eligibility (e.g. vintage, location). Going still further, ACR suggests that CARB should approve individual projects that are PCU-eligible, along with a transparent system that creates a queue for the approved projects to deliver offsets. Under such a framework, a project developer that believes the price ceiling will be reached would have the clarity needed to execute an approved emissions reduction project.

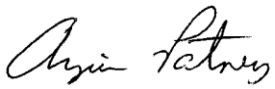
Executive Order to Achieve Carbon Neutrality

By committing the State to carbon neutrality by 2045, with Executive Order B-55-18, Governor Brown reaffirmed California's global climate leadership.[11] Notably, the Executive Order highlights the necessary role of sequestration in forests, soils, and other natural landscapes to achieve this goal. As a result of the offsets program and OPRs, the protocols and the infrastructure for quantification and verification are largely in place. Offsets have played an important role in California's progress to date, and ACR is ready to continue the journey to reach carbon neutrality.

[10] https://www.arb.ca.gov/lists/com-attach/36-ct-3-2-18-wkshp-ws-UjMCZ1YlUl5VMAhn.pdf
[11] https://www.gov.ca.gov/wp-content/uploads/2018/09/9.10.18-Executive-Order.pdf

We appreciate the opportunity to provide these comments, and we look forward to continued engagement as the process moves forward. If you would like to further discuss our thoughts, please feel free to get in touch.

Respectfully,



Arjun Patney
Policy Director, American Carbon Registry
an enterprise of Winrock International
arjun.patney@winrock.org