March 19, 2018

***Via Electronic Submission***

Rajinder Sahota
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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

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.

Indigenous Peoples IPRE Reducing Emissions

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,

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