CENTER *for* BIOLOGICAL DIVERSITY

March 12, 2010

Via email: policy@climateactionreserve.org

Derik Broekhoff
Vice President, Policy
Climate Action Reserve
523 W. Sixth Street, Suite 428
Los Angeles, CA 90014

Re: Preliminary Guidance on Forest Project Protocol, Section 6.2.1.1 (Legal Requirements for Project Baseline; March 18, 2010 Workshop)

Dear Mr. Broekhoff:

The Center for Biological Diversity (the "Center") welcomes the opportunity to comment on a draft guidance document[1] developed by the Climate Action Reserve (the "Reserve") regarding the relationship between California forestry regulations and the baseline for forest management projects under the Reserve's Forest Project Protocol (the "Protocol").

The Reserve's guidance document correctly provides that certain requirements of California law must be reflected in the baseline for forest projects under the Protocol. California's Forest Practice Act and Rules require timberland owners to demonstrate that logging operations will not interfere with maximum sustained production of high quality timber products. For larger landowners, this demonstration requires preparation of a "sustained yield plan" or "Option A" document that calculates the long-term sustained yield of timber for the ownership over a 100-year period. Absent compliance with these requirements, these landowners cannot lawfully log their land. In order to ensure the additionality of forest projects, these legal requirements must be reflected in the forest project baseline.

For the same reasons, the baseline also must ensure that landowners do not obtain carbon credits for actions they would have taken anyway ("business as usual"). This requirement is reflected in the two-part definition of additionality set forth in AB 32, the California Air Resources Board's preliminary draft cap and trade regulations, and the Protocol itself: to be additional, a project must exceed *both* applicable legal standards *and*

[1] Climate Action Reserve, *Guidance Document for Verifiers, Project Developers, and Interested Parties* (Feb. 24, 2010), *available at* http://www.climateactionreserve.org/how/protocols/adopted/forest/events/ (last visited March 10, 2010).

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business-as-usual practices. Above all else, a landowner's adopted projection of long-term sustained yield is a good indicator of business as usual. Thus both components of the additionality definition require that these projections be incorporated into the forest project baseline.

The Reserve's current guidance document thus reflects a correct interpretation of California law. Altering the Protocol or the guidance document in a manner that fails to ensure the additionality of forest projects, in contrast, would risk rendering the Protocol of questionable utility—and carbon credits issued under the Protocol of negligible value—in AB 32's emerging compliance market.

I. Legal Background

The Reserve's guidance document focuses primarily on the requirements of the Forest Practice Act and Rules. Also critical, however, are the requirements of AB 32, draft regulations currently under consideration by the Air Resources Board, and provisions of the Protocol itself governing the additionality of offset projects.

A. A Demonstration of Maximum Sustained Production and Long-Term Sustained Yield Is a Requirement of California Forestry Law.

One of the key goals of California's Forest Practice Act is to achieve "maximum sustained production of high-quality timber products . . . while giving consideration to values relating to recreation, watershed, wildlife, range and forage, fisheries, regional economic vitality, employment, and aesthetic enjoyment." (Pub. Res. Code § 4513(b).) The California Supreme Court has called maximum sustained production "perhaps *the* core concept of the Forest Practice Act." (*Envt'l Prot. Info. Ctr. v. Cal. Dept. of Forestry* (2008) 44 Cal.4th 459, 475, fn. 4 (hereafter "*EPIC*").)

In accordance with this goal, each individual timber harvesting plan ("THP") must use "systems and alternatives which achieve maximum sustained production of high quality timber products." (Forest Practice Rules[2] ("FPR") §§ 913, 933, 953.) The Forest Practice Rules allow landowners to make this demonstration in more than one way. However, owners of more than 50,000 acres of timberland must choose one of two approaches: they may prepare either a sustained yield plan ("SYP") or a so-called "Option A" document. (See FPR §§ 913.11(c)(5), 933.11(c)(5), 953.11(c)(5).)

Both the SYP and the Option A require a demonstration of long-term sustained yield ("LTSY") over a 100-year planning period. (See FPR § 895.1 [defining LTSY as "the average annual growth sustainable by the inventory predicted at the end of a 100 year planning period"].) A landowner demonstrates LTSY by projecting and balancing growth and harvest over time such that projected harvest levels do not exceed overall yield in the last decade of the planning period. (See FPR §§ 913.11(a)(2), (b)(4),

[2] All references to the "Forest Practice Rules" or "FPR" are to title 14 of the California Code of Regulations.

933.11(a)(2), (b)(4), 953.11(a)(2), (b)(4).) The California Supreme Court has observed that "the long-term sustained yield estimate is at the core of a sustained yield plan." (*EPIC*, *supra*, 44 Cal.4th at p. 501.) Such an estimate also forms the core of an Option A.

A demonstration of LTSY must account for "biologic and economic factors," as well as "limits on productivity due to constraints imposed from consideration of other forest values." (FPR §§ 913.11(a)(1), 933.11(a)(1), 953.11(a)(1) [Option A]; 913.11(b)(2), (3), 933.11(b)(2), (3), 953.11(b)(2), (3) [SYP].) According to the leading legal treatise on the Forest Practice Act, this means that "a landowner must project the intended yield of timber products only after accounting for any limits on the amount of harvest that can be achieved while complying with the environmental protection requirements of the [Forest Practice Act], FPRs, and other applicable laws and regulations."[3] The Supreme Court has agreed with this view, noting that if restrictions on harvest related to these considerations are not properly analyzed at the outset of planning, LTSY projections will be wrong. (See *EPIC*, *supra*, 44 Cal.4th at pp. 503-04.)

In order to harvest timber, therefore, a landowner must demonstrate compliance with the maximum sustained production goals of the Forest Practice Act, and a large landowner must do so by preparing either an Option A or a SYP that projects LTSY. The LTSY calculation, in turn, must encompass and reflect compliance with all other environmental laws and regulations. These are clearly regulatory requirements under California law.

B. Reductions Associated with Forest Projects Must Exceed Both Minimum Legal Requirements and "Business As Usual" Practices.

The overarching goal of AB 32, California's Global Warming Solutions Act, is to reduce the state's greenhouse gas emissions to 1990 levels by 2020. Health & Saf. Code § 38550. AB 32 authorized the Air Resources Board to develop a "market-based compliance mechanism" to assist in this effort. Health & Saf. Code § 38570. The Air Resources Board's "Scoping Plan" for AB 32 sketched the outlines of this market-based system and envisioned the use of "offsets"—including offsets for forest projects—as one tool for achieving AB 32's overall emissions reduction goals.[4]

Carbon credits issued by the Reserve are thus expected to function as offsets under AB 32's cap-and-trade system. Emitters in capped sectors will look to purchase offsets as a cost-effective alternative to reducing their own emissions. In this context, every credit issued by the Reserve could represent a tonne of very real greenhouse gas emissions that otherwise would have to be controlled or avoided. In a very real and direct sense, therefore, carbon offsets *enable* carbon emissions.

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[3] S. DUGGAN & T. MUELLER, GUIDE TO THE CALIFORNIA FOREST PRACTICE ACT AND RELATED LAWS at p. 161 (2005).

[4] Cal. Air Res. Bd., *Climate Change Scoping Plan: A Framework for Change* at pp. 36-38 (Dec. 2008); see also *id.*, Appendix C, at pp. C-21 to C-23.

This is why additionality is a critical concern in any carbon offset regime. If a carbon credit is awarded for activities that would have happened anyway—either because the activities are required by law, or because the project proponent would have undertaken the activities for other reasons—then that credit facilitates a ton of emissions without any corresponding reduction or sequestration.

Existing law, proposed regulations, and the Protocol itself thus reflect a two-pronged definition of additionality: an activity must exceed *both* the requirements of applicable law *and* the norms of business-as-usual practice. For example, AB 32 provides that emissions reductions under a market-based program must be "in addition to any greenhouse gas emission reduction otherwise required by law or regulation, *and* any other greenhouse gas emission reduction that otherwise would occur." (Health & Saf. Code § 38562(d)(2) (emphasis added).) The Air Resources Board's preliminary draft regulation implementing a cap-and-trade system under AB 32 provides that emission reductions are considered additional only if they (1) "are not required by or undertaken to comply with any federal, state or local law or ordinance, including any regulation, consent order, and Memorandum of Understanding"; and (2) "are not considered common practice or would not have occurred under a business-as-usual scenario."[5]

The Protocol itself employs a similar two-part test for additionality. Forest projects must satisfy *both* a "legal requirement test" (i.e., they must achieve reductions or removals beyond those resulting from compliance with "any federal, state, or local law, statute, rule, regulation, or ordinance") *and* a "performance test" (i.e., they must achieve reductions or removals above and beyond those "that would result from engaging in Business as Usual activities").[6] Indeed, the Protocol defines a project as additional *only* "if it would not have been implemented without incentives provided by the carbon offset market, including the incentives created through the Climate Action Reserve program."[7] Both the "legal" test and the "performance" test must be reflected in the baseline calculation under sections 6.2.1.1 and 6.2.1.2 of the Protocol.[8]

In sum, additionality is critical because carbon credits, especially in a compliance market like the one being assembled for AB 32, may be purchased in lieu of controlling actual emissions. Accordingly, those credits must represent real reductions, and in order for those reductions to be real, they have to be additional. If they are not additional, they will lead directly to increased greenhouse gas emissions. For this reason, non-additional credits cannot play any role in AB 32's compliance market.

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[5] Cal. Air Res. Bd., Preliminary Draft Regulation for a California Cap-and-Trade Program (Nov. 24, 2009) at p. 64 (proposed § 96240(c)(1), (2)).
[6] Protocol at p. 6.
[7] Climate Action Reserve, Forest Project Protocol v3.1 (Oct. 7, 2009) (hereafter "Protocol") at p. 64.
[8] See Protocol at pp. 47-48.

II. The Reserve's Guidance Document Correctly Incorporates LTSY into Forest Project Baseline Calculations.

In order to ensure additionality, the LTSY demonstration contained in an Option A or SYP must be incorporated into the Protocol's baseline for forest projects. This is necessary for two basic reasons. First, preparation of a SYP or Option A document is not voluntary, but rather is legally required, for ownerships larger than 50,000 acres. Second, a landowner's previously approved SYP or Option A document and LTSY projections—adopted without consideration for any incentives the carbon market might provide—illustrate the most likely "business as usual" scenario for that ownership. Both components of AB 32's additionality definition thus require that SYP or Option A documents be reflected in the forest project baseline under the Protocol.

A. Baseline Calculations Must Reflect Legal Requirements, Including the Option A/SYP Requirement.

Critics of the Reserve's guidance document have argued that an Option A or SYP is a purely voluntary document (one that can be rescinded or altered at any time) and that the growth and harvest levels used to determine LTSY are left to the landowner's sole and complete discretion.[9] These arguments are incorrect as a matter of law.

As previously discussed, any landowner holding more than 50,000 acres of timberland must prepare either an Option A or a SYP. Without preparing one or the other document, such landowners cannot harvest timber commercially. The contents of those documents, moreover, are not left entirely to the landowner's discretion, but rather must meet a number of specific requirements under the Forest Practice Rules. (See FPR §§ 913.11(a), (b), 933.11(a), (b), 953.11(a), (b), 1091.1-1091.15.) Therefore, these are not "voluntary" documents in any commonly accepted sense of the word. Rather, they are legal prerequisites to timber harvest on large ownerships.

Critics also have claimed that the LTSY calculations underlying Option A and SYP documents are not actually legally required because they can be changed at any time. This claim is misleading at best. LTSY calculations, like SYPs and Option A documents, must be performed according to specific standards in the Forest Practice Rules, and therefore cannot be changed according to a landowner's whim. Indeed, according to the California Department of Forestry and Fire Protection, LTSY calculations may be modified only for specific reasons.[10] Once again, the mere fact that an LTSY calculation might be modified from time to time, in compliance with strict legal standards, does not in any way render it "voluntary."

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[9] See Cal. Forestry Assn., Cal. Farm Bureau Federation, and Forest Landowners of California, Letter to L. Adams, Chair, Climate Action Reserve (Feb. 2, 2010) (hereafter "CFA Letter") at pp. 1-2.

[10] Cal. Dept. of Forestry & Fire Prot., Memorandum to G. Gero, Climate Action Reserve, Re: Long Term Sustained Yield Regulatory Requirements (Jan. 25, 2010) at pp. 2-3.

In order to harvest timber lawfully in California, all timberland owners must demonstrate that their harvest plans are consistent with maximum sustained production of high-quality timber products, and owners of more than 50,000 acres of timberland must prepare either an Option A or a SYP containing this demonstration. The California Department of Forestry and Fire Protection has characterized these documents as legal requirements. Under governing additionality standards—including those of AB 32, the Air Resources Board's proposed cap-and-trade regulations, and the Protocol itself—such legal requirements must be reflected in the forest project baseline.

B. Baseline Calculations Must Reflect a Landowner's "Business As Usual" Practices As Set Forth in an Approved Option A or SYP.

Critics of the Reserve's guidance document also have argued that the demonstration of LTSY in an Option A or SYP document may exceed the "regulatory minimum" required, primarily because some landowners may be planning to increase timber volume on their lands over time at rates beyond those hypothetically necessary to demonstrate that harvest will not exceed growth over the relevant planning horizon. Certain critics of the Reserve's guidance document have gone so far as to suggest that landowners should be granted carbon credits for simply following the LTSY projections in their existing Option A or SYP documents.[11]

This argument fails because it focuses at best on only one of the two prongs of the definition of additionality. Under AB 32, draft cap-and-trade regulations, and the Protocol itself, reductions associated with a forest project must not only go beyond the "regulatory minimum" under applicable law, but also must go beyond "business as usual." Yet an approved SYP or Option A is, more than anything else, an indicator of the landowner's long-term plan for "business as usual." These are 100-year plans that justify present logging practices by projecting and balancing growth against planned harvest over time, while taking into account all other relevant environmental, social, and economic constraints. (See FPR §§ 913.11(a), (b), 933.11(a), (b), 953.11(a), (b).) Accordingly, the growth and harvest projections in an existing Option A or SYP were almost certainly adopted for the purpose of meeting the legal prerequisites for approval of logging plans, not for the purpose of obtaining market incentives for carbon sequestration. Even if a landowner has elected to project harvest levels below the theoretical maximum allowable under the Forest Practice Act and Rules, he or she may have done so for economic or other reasons (or in response to other incentives) unrelated to the availability of carbon credits. An existing Option A or SYP thus provides a good indication of what the landowner was planning to do anyway. As indicators of business as usual, these documents must be reflected in the forest project baseline.

In short, granting carbon credits to landowners who simply follow an approved Option A or SYP—even if that Option A or SYP arguably exceeds some theoretical

[11] See CFA Letter at p. 2 (claiming that guidance document's interpretation would preclude landowners from "creating forest carbon credits because the baseline and the project line would be one-in-the-same").

"regulatory minimum"—violates one of the two key tests for additionality. Any revision to the Protocol or the Reserve's guidance document allowing such "business as usual" credits would create a pool of offsets for which additionality cannot be demonstrated.

III. Conclusion

The two-pronged definition of additionality provided under AB 32, proposed cap-and-trade regulations, and the Protocol itself requires that Option A documents, SYPs, and underlying LTSY calculations be incorporated into the forest project baseline. These documents are not only legal requirements under California forestry law, but also represent "business as usual" for the many landowners already operating according to their provisions. Accordingly, any modification to the Protocol designed to remove these legal requirements from the baseline calculation would lead to the creation of carbon credits for non-additional actions.

Such a modification could deprive these credits of much of their potential value. Carbon credits in a compliance system literally represent greenhouse gases emitted into the atmosphere rather than controlled. Accordingly, a failure to ensure the additionality of such credits would be inconsistent with AB 32's emission reduction goals. If the Reserve were to change the Protocol or its guidance documents to eliminate Option A documents, SYPs, and LTSY calculations from the forest project baseline calculation, the Air Resources Board would be legally bound to conclude that the Protocol does not comply with the additionality requirements of AB 32. Thus, the somewhat ironic consequence of an attempt to expand access to the carbon markets by relaxing additionality standards would be the Air Resources Board's inability to approve the Protocol as an emissions reduction methodology—thus excluding participating landowners from a potentially lucrative market for carbon offsets. Both the Reserve and the critics of the proposed guidance document should keep in mind that advocating for the creation of dubious carbon credits is not only a poor environmental decision, but also a risky business decision.

The Reserve Board should affirm the February 24, 2010 guidance document as a correct interpretation of California law. Thank you for your consideration of our views in this matter. We look forward to participating in the Reserve's upcoming workshop.

Sincerely,

Kevin P. Bundy
Senior Attorney