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Mr. Gary Gero, President
Climate Action Reserve
523 W. 6th Street, #428
Los Angeles, CA 90014

Dear President Gero:

We are writing concerning the Climate Action Reserve's Preliminary Guidance on Forest Project Protocol. For the following reasons, we believe that the Preliminary Guidance will not serve Assembly Bill 32's objective of reducing greenhouse gas emissions and urge the revision of this proposal.

I. INTRODUCTION

In every submission save one concerning the preliminary draft guidance on California Maximum Sustained Productivity ("MSP") requirements (the "proposed guidelines") delivered to the Climate Action Reserve (the "Reserve"), stakeholders have opposed the proposed guidelines because of their unintended, but very serious, consequences that will have the effect of nullifying the very purpose of Assembly Bill 32 ("AB 32") of encouraging more responsible environmental behavior and could result in a loss of environmental gains from the past 40 years.

Put simply, should these proposed guidelines go into effect, no carbon credits will be earned by responsible forest owners unless they submit a false "Option A plan" (a plan submitted pursuant to 14 CCR 953.2[a]) or Sustained Yield Plan ("SYP"). Assuming forest owners are not willing to submit a false document to a government agency, any forest owner that endeavors to sequester greenhouse gases at a standard far above the minimum standards of the California Department of Forestry and Fir ("Cal Fire") would have set a bar so high that said forest owner could never earn a carbon credit. Conversely, a forest owner who has sought only to meet the bare minimum requirements set by Cal Fire will have set a bar low enough that, by only becoming slightly more responsible, that forest owner will be entitled to earn carbon credits. Thus, the rewards in this system would flow only to the least environmentally responsible parties.

The Center for Biological Diversity ("CBD"), the author of the only submission favoring the proposed guidelines, has submitted a paper which mischaracterizes the relevant issues because the CBD's true motive is to thwart any carbon market from developing at all, rather than to ensure that the guidelines for any such market are

designed to effectively carry out the intent of AB 32 as it has been interpreted by the California Air and Resources Board. Indeed, the CBD's stance wholly against the creation of any carbon market is made well-known in various articles published on its website.[1]

However, the California State government and the people of California have already decided in favor of developing carbon markets with the passage of AB 32, putting to rest the policy debate over whether a carbon market should exist, so the CBD now hopes that guidelines are adopted that make it nearly impossible for a forest owner to earn carbon credits, thereby thwarting the policy objectives of AB 32. With this submission, we attempt both to clarify the CBD's misrepresentations and, also, to assist the Reserve in developing guidelines that will better meet the policy objectives of AB 32 and continue California's role at the forefront of environmental responsibility.

II. BRIEF RECITATION OF RELEVANT FACTS

Under the Forest Practice Act and Forest Practice Rules, an owner of forestland must submit, and receive approval from, Cal Fire of a plan for their land (e.g., an Option A plan or SYP) that meets the minimum resource conservation and silviculture standards. If that landowner later seeks to cut down trees, a Timber Harvesting Plan must be filed with Cal Fire that is consistent with the owner's Option A or SYP plan that has been previously approved by Cal Fire. As Cal Fire represented to Mr. Gero and the Reserve, "[t]hese conservation standards establish a floor, or minimum legal requirement for post-harvest stocking."[2] The Option A plan or SYP may be revised at any time by the landowner "for a number of reasons including:

> 1. Change in management direction chose by the landowner,
> 2. Change in ownership,
> 3. Sale of a significant portion of the lands included in the demonstration of MSP that would reduce the calculation of [Long Term Sustained Yield ("LTSY")] for the area in the MSP demonstration,
> 4. Addition of significant new acreage if the landowner chooses to increase or significantly change his level of harvest, silvicultural practices or other aspects of management that could potentially reduce the LTSY calculation,
> 5. Change in regulatory constraints that impact potential harvest levels and reduce the calculated LTSY,
> 6. Significant change in conditions such as catastrophic fire, insects or disease which has the potential to impact LTSY,

[1] *See, e.g., Politics as Usual While the Planet Burns: Cap(italize) and Trade(off),* Brian Tokar, at http://www.biologicaldiversity.org/news/media-archive/WaxmanMarkeyBill_Counterpunch_7-2-09.pdf; *Frequently Asked Questions: Setting a National Pollution Cap on Greenhouse Gases Under the Clean Air Act*, Bill Snape and Rose Braz, at http://www.biologicaldiversity.org/programs/climate_law_institute/global_warming_litigation/clean_air_act/pdfs/Clean-Air-Act-FAQ.pdf.

[2] *See* January 25, 2010 letter from William E. Snyder, Deputy Director, Resource Management, Cal Fire, p. 1.

7. Change due to legally binding actions or limitations imposed by voluntary agreements such as HCPs, NCCPs, Conservation easements, etc. that would represent new constraints that would reduce the calculated LTSY."[3]

After AB 32 was passed into law, the California Air and Resources Board (the "ARB") was given the difficult task to develop regulations and market mechanisms that will ultimately reduce California's greenhouse gas emissions by 25 percent by 2020. One mechanism that the ARB introduced was the creation of a carbon market. In order to determine exactly when a forest owner has earned a carbon credit, the ARB delegated this responsibility to the Reserve. The Reserve developed Forest Project Protocol, Section 6.2.1.1 (the "Protocol"). This Protocol required that "[i]n modeling the baseline for standing carbon stocks, the Forest Owner must incorporate all legal requirements that could affect baseline growth and harvesting scenarios." Following this Protocol, debate ensued over what should be considered a "legal requirement" and thus incorporated into modeling the baseline. The Reserve issued the proposed guidelines that indicated that the Option A plan or SYP, which differs for each forestland owner, would be considered the legal requirement and must be reflected in the modeling of an Improved Forest Management project's baseline carbon stocks, rather than the minimum legal standards that Cal Fire requires the forest owner to meet in order to have an Option A plan or SYP approved.

III. THE LEGAL REQUIREMENTS ARE THAT AN OPTION A PLAN OR SYP MEET CAL FIRE'S MINIMUM STANDARDS

The CBD incorrectly argues that because an Option A plan or SYP must be submitted to Cal Fire in order to show that the forest owner's management plan comports with Forest Practice Rules minimum requirements, that these documents are legal prerequisites that must be reflected in the modeling of an Improved Forest Management project's baseline carbon stocks.[4] The CBD even notes that an Option A plan or SYP "must meet a number of specific requirements under the Forest Practice Rules."[5] However, the CBD fails to recognize that the ***minimum requirements*** under the Forest Practice Rules are the legal requirements of any forest management plan, not the Option A or SYP documents themselves. To hold that an Option A plan or SYP is itself a legal requirement is essentially to hold that a landowner creates his or her own legal requirements, which would then be reflected in the modeling of an Improved Forest Management project's baseline carbon stocks. Hence, forest owners would be free to adopt plans that meet the bare minimum required by the Forest Practice Rules in order to lower their baseline. As such it is only the minimum requirements under the Forest

[3] *Id.*, pp. 2-3.

[4] *See* CBD letter of March 12, 2010, to Derik Broekhoff, Vice President, Policy, of the Reserve (the "CBD Letter"), pp. 2-3.

[5] *Id.*, at p. 5.

Practice Rules that should be considered legal requirements under the language of the Protocol.

Nor does the fact that *submission of these documents* is involuntary mean that *the specific subject matter of the plans* is involuntary and, therefore, creates a strict legal commitment. The Option A and SYP plans do not create legal requirements; they merely attempt to meet legal requirements of the Forest Practice Rules. It is the mere submission and approval of a plan that are legal requirements, not the specific contents of those documents. In fact, SYPs and Option A plans are very frequently revised according to Forest Practice Rules. Although the CBD might be literally correct that the documents cannot be changed according to a "landowner's whim," this statement is something of a mischaracterization because the instances in which a plan may be revised are incredibly broad, most notably when there is a "change in management direction chosen by the landowner." As long as the landowner's whim satisfies the Forest Practice Rules, it is indeed in the landowner's discretion to revise the documents at any time. The fact that these plans can be, and are, so frequently changed demonstrates that it is not the specific approved forest management plan that is a legal requirement. The only applicable "legal requirements," in the sense that the term is used in the Protocol, are the minimum legal standards established by the Forest Practice Rules that guide those documents.

IV. THE "BUSINESS AS USUAL" CONCEPT REQUIRES A MORE COMPLEX ANALYSIS TO AVOID PERVERSE INCENTIVES

The CBD incorrectly argues that an Option A plan or SYP demonstrates a 100-year plan that equates with "business as usual" for that particular landowner and is, therefore, the proper benchmark for determining the "additionality" of any forest management project.[6] However, as noted above, these plans are changed often, sometimes only three years after a former plan concerning the same parcel of land had been approved. The plans' frequent revisions demonstrate that these plans do not represent a 100-year plan for a particular land parcel. A major reason for the frequent changes in the SYP and Option A plans for a particular forestland parcel is inherent in the very nature of timber harvesting. Unlike harvesting of corn, where all of the corn grown on a plot will be harvested ever year on a typical corn farm, timber harvesting fluctuates based on factors such as supply and demand for timber, risk of forest fire, and the environmental sensibilities of the landowner. Hence, these plans cannot be considered concrete long term plans and may often encompass voluntary carbon sequestration above and beyond any legal requirements under the Forest Practice Rules. Therefore, SYP or Option A plans should not be simplistically relied upon to inform us of what should be considered "business as usual" for the land in question.

To properly determine what activity should be considered "business as usual," we should consider the type of activity that would take place on a similar piece of property if the property owner was using the land solely for business purposes. Looking at the maximum amount of timber harvesting allowable under the Forest Practice Rules is one

[6] *See* the CBD Letter, pp. 6-7.

way to accomplish that and is, at the very least, a possible starting point for the analysis. Another possibility, raised in the March 12, 2010, letter on behalf of the California Forestry Association, et al., addressed to President Gero, at p. 3, suggests a potential "business as usual" determination that also warrants careful consideration, whereby a "'common practices' baseline [would] reflect the average private forest practices within a forest eco-region that is constrained by various legal, ecological and economic restrictions from which additionality is to be determined. The best and most accurate representation of common practice, that is replicated nationwide, is the USDA Forest Service Inventory Analysis (FIA) permanent plot data for private landowners, delineated by forest eco-type." Either analysis reaches a more realistic conclusion concerning the additionality of a particular forest management project than merely looking at a forest owner's previous voluntarily designed forest management project.

An analysis of the nature we and other interested stakeholders are suggesting also reaches a fairer result to forest owners. From a policy perspective, the proposed guidelines would penalize the very persons that ought to be rewarded under any carbon market system. Simply because a landowner has always sought to go above and beyond any minimum requirement of the Forest Practice Rules does not mean that this effort should be taken for granted and not further encouraged by a system under which that additional effort is recognized in the means of awarding carbon credits.

Perhaps even worse, the proposed guidelines would reward those timber harvesters who have used their land for maximum extraction of timber or otherwise failed to meet higher standards of conservation and prevention of wildfires. Those landowners could easily earn carbon credits by simply reducing their timber extraction or making minimal efforts to otherwise sequester more carbon. This is a perverse system that would completely turn the policy of AB 32 on its head, by encouraging landowners to sequester as little carbon as possible under the minimum requirements of the Forest Practice Rules and then slowly increase sequestration in order to earn carbon credits. If forestland is removed, decomposing timber is not used or disposed of properly, or if current efforts to prevent forest fires (which are the largest emitters of greenhouse gases in the forest sector) are not continued at their current level or better, California's 2020 goals will not be reached because assumptions that the forest sector will continue to improve its ability to sequester carbon will fail.[7] Thus, any "business as usual" analysis must contain an objective analysis of standard regional forestry practices in order to recognize the achievements of those foresters who have voluntarily gone above and beyond the minimum requirements of the law to improve their forests' ability to sequester carbon despite the fact that no system has been in place to properly reward them for their public service.

Indeed, the ARB has explicitly recognized the role forest owners have already been playing in reducing greenhouse gases. In the *Climate Change Draft Scoping Plan:*

[7] *Climate Change Draft Scoping Plan: a framework for change*, June 2008 Discussion Draft, p. 8. ("The Forest sector is unique in that forests both emit greenhouse gases and uptake CO2. While the current inventory shows forests as a sink of 4.7 MMTCO2E, carbon sequestration has declined since 1990. For that reason, the 2020 projection assumes no net emissions from forests.")

a framework for change, June 2008 Discussion Draft, pp. 27-28, the ARB stated that "[f]uture land use decisions will play a role in reaching our greenhouse gas emission reduction goals for all sectors. Loss of forest land to development increases greenhouse gas emissions because less carbon is sequestered. Avoiding or mitigating such conversions will support efforts to meet the 2020 goal… Public investments to purchase and preserve forests and woodlands would also provide reductions that will be accounted for as projects are funded. Urban forest projects can provide the dual benefit of carbon sequestration and shading to reduce air conditioning load. ***The Forest sector is already a source of voluntary reductions that would not otherwise occur***." (Emphasis added). These "voluntary reductions" -- the exact words of the ARB -- deserve recognition by the Reserve.

V. DANGER OF NEEDLESSLY DISADVANTAGING CALIFORNIAN FORESTERS IN A CAP-AND-TRADE MARKET

Finally, since the proposed guidelines can only regulate California forest owners, it is possible that, without corresponding legislation to prevent such activity, California polluters may simply buy carbon credits from out-of-state carbon credit holders where the rules concerning earning carbon credits are not so onerous for responsible forest owners. At any rate, even if such legislation was adopted by the California state government, it could run afoul of the Commerce Clause of Article I, § 8 of the United States Constitution and, therefore, be an unconstitutional and impermissible means to prevent this outcome because such legislation would discriminate against out-of-state actors and interfere with interstate commerce, which is the sole province of the Federal Government.[8]

Moreover, even if constitutional, any such system could make a national or regional carbon market unworkable, which defeats the ARB's goal of "working closely with six other states and three Canadian provinces in the Western Climate Initiative (WCI) to design a regional greenhouse gas emission reduction program that includes a cap-and-trade approach."[9] One, credits would become less liquid if each state had to approve all other states' and provinces' regulatory schemes prior to allowing out-of-state carbon credits to be traded to in-state polluters. Two, if the states are to design plans that mirror each others' plans, the proposed guidelines create such an impossible standard and the dangers of creating such a system are so serious that other states and provinces are unlikely to adopt similar guidelines, and might decide to create a regional market that does not include California. Three, even if the states and provinces agree to trade credits despite high variances in how they measure carbon credits, Californian foresters will be the only potential participants in this market who would be penalized -- not Californian polluters or possibly less responsible out-of-state foresters.

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[8] *See, e.g., C&A Carbone, Inc. v. Town of Clarkstown, New York*, 511 U.S. 383 (1994); *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978).

[9] *Climate Change Draft Scoping Plan: a framework for change*, June 2008 Discussion Draft, p. ES-3.

VI. CONCLUSION

It is imperative that the creation of a carbon market actually accomplishes the goal of reducing greenhouse gases. However, if the proposed guidelines are accepted, then landowners -- if they seek to earn and trade what might well become a very valuable commodity -- will only earn carbon credits through having timber harvesting plans approved that meet only the bare minimum requirements of the Forest Practice Rules, thereby setting the bar quite low and earning credits at the expense of shrinking forestland in the aggregate. Even worse, without the ability to earn carbon credits for their land, economic pressure could lead some forest owners to turn to development of the land, leading to destruction of the forest altogether. This shrinking forestland will reduce sequestration of carbon dioxide and ultimately undermine California's attempt to create a comprehensive scheme to reduce greenhouse gases.

As the ARB stated: "Future land use decisions will play a role in reaching our greenhouse gas emission reduction goals for all sectors. Loss of forest land to development increases greenhouse gas emissions because less carbon is sequestered. Avoiding or mitigating such conversions will support efforts to meet the 2020 goal." *Climate Change Draft Scoping Plan: a framework for change*, June 2008 Discussion Draft, p. 27. The proposed guidelines will not result in greater sequestration of carbon, but instead will likely result in less sequestration and, therefore, we strongly urge the Reserve to reconsider the proposed guidelines and revise them in order to develop a regulatory scheme that does encourage sequestration of carbon and will help California in reaching its lowered emissions goals for 2020 and beyond.

Respectfully,

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