June 11, 2009

To the Climate Action Reserve,

Sent via email to: <policy@climateactionreserve.org>

Re: Comments on Draft Project Implementation Agreement and the Consequences for Reversals and Early Termination

You have asked for comments on a proposed Project Implementation Agreement ("PIA") provided by the Climate Action Reserve ("CAR"). The following comments are submitted on behalf of all four of the small and large forest landowner representatives of the Climate Action Reserve's Forest Carbon Protocol Work Group.

We clearly feel that as drafted the overall feasibility or desirability of the PIA will be unlikely to be acceptable to forest landowners. The three major conceptual issues raised by the construction of the PIA are the requirement that all subsequent mortgages must subordinate to the PIA, that the PIA has the effect of creating a deed restriction due to provisions in at least three different sections, and the overly broad and one-sided indemnification requirements are significant barriers to participation.

Thus despite the stakeholder work groups 18 month effort to remove barriers to participation in the protocol, many of the same impediments have been rebuilt in the PIA. Also the PIA effectively precludes an entity that might act as an aggregator by having the responsible party always identified as the forest landowner, rather than the project proponent, even though the protocol suggests that aggregation should be allowed.

Please note that the version released for public comment leaves a great deal of substance to various portions and exhibits, which apparently are yet to be drafted. This continues the on-going difficulty of effective commenting on a final proposed language set.

We have elaborated many of our concerns in order of the document construction below. But as an overarching comment, while we recognize that CAR wishes to have a standard agreement that all project proponents must sign, it needs more balance to be reflective of an agreement between parties rather than a one sided document. There are numerous fine detail examples of how this manifests itself in the PIA and hopefully by highlighting the larger example of this problem the entire PIA can be reviewed in that light, a light that would encourage participation rather than discourage it.

1. Recital F and Section 5(a)(1) – "Interest"

   The PIA states that when any "Interest" in the property is granted to anyone, that person assumes all the Forest Owners Obligations unconditionally and without modification or amendment, this is clearly overly broad. Granting an easement to use an existing road is very common and conveys an "Interest" but should someone who wishes to drive on a project road be forced to assume all the forest owners obligations. Any "Interest" should be qualified to something like "any interest that could materially affect registered tons of

carbon offsets". This should be limited to verified and registered tons because that is the true limit of CAR's interest in a project. If the landowner chooses to simply stop selling and or registering more tons, but meets his monitoring obligations on those verified and registered tons, no matter what his original modeling of project tons indicated, he has met his obligations to CAR. This "interest" issue pervades section 5 and needs to be addressed in the unnumbered paragraphs of section 5 and 5(c)

2. Section 4 and 13(a) - Indemnity

Section 4 establishes that verifier, even though employed by the project proponent is an agent of CAR and receives blanket indemnification regardless of the landowners requirements for its contactors to carry insurance and act in a prudent manner. So in Section 4, inserting "landowners, insurance requirements," in front of the word reasonable. Under Section 13 the problem compounds as it is in direct conflict with Section 12 which says the prevailing party in the binding arbitration can recover legal costs etc, but Section 13 would require, if the prevailing part was the landowner, that he still pay all CARs legal fees and costs.

3. Section 4, 5(d) and Section 14 – Recordation and Deed Restriction

Section 4, 5(d) and Section 14 when interpreted under California Civil Code Section 1220 create a deed restriction. The work group worked diligently to remove the primary identified barrier to participation in the first adopted protocol, the conservation easement. In its collaborative process the stakeholder work group established two approaches to the issues surrounding permanence, first to allow projects to participate with the permanence of the verified and registered tons being protected by the contract (the PIA) and then identified that landowners who wanted to provide even greater protection and bolster permanence with a deed restriction or conservation easement would be granted lower buffer requirements because of the added value of these mechanisms to permanence. Now the PIA has rebuilt those barriers by these two sections. In no case does the contract, deed restriction, or conservation easement result in a situation where the atmosphere or the registry have offsets that are not protected, given the remedies procedure. The atmosphere is clearly made whole and much more.

4 Section 5 – Clarity and Subordination

It is not clear what the "reasonable discretion" standard means in an unnumbered paragraph after section 5(a)4. Is it different from the covenant to not withhold consent unreasonably? If so, how? Also, it would be helpful if all paragraphs are numbered. Again, later in that group of unnumbered paragraphs the "not be unreasonably withheld" standard is resurrected.

The unnumbered paragraph that makes unapproved transfers void is, like the rest of that section, overly broad. There is no attempt to separate transactions and transfers that have

no material effect on the goal of the PIA. Another example of overly burdened transactions would be such items as lot line adjustments.
As a sign of the overly cautious nature of this PIA, in the 3rd unnumbered paragraph after 5(a)(4) we find that despite complying with all assignment requirements of the PIA and having some new owner accept all responsibilities with CAR releasing the first owner, CAR still requires the first owner remain obligated to and liable for all Forest Owner obligations which arose during the time that then assigner held an interest in the property or was subject to or liable for any forest owner obligation

Section 5(c), the subordination clause is unreasonable and overly broad. With this provision, our lending institutions indicate that it would be problematic for a forest owner to obtain conventional new or refinancing. Again, there is no attempt to tie these prohibitions to actions that would have some material, adverse effect on the goals of the PIA. We have previously provided a form of a subordination clause that would allow CAR to subordinate as necessary to normal refinancing, etc.

At section 5(f), requiring any assignee to become a "Forest Owner" and be subject to the provisions of the PIA, is overly broad and does not tie this prohibition to the goals of the PIA. For instance, granting an easement to a neighbor or settling disputes from old, vague surveys by doing lot line adjustments with neighbors would be unduly burdened.

5 Section 6 – Remedies

This is a unilateral process, no dispute process or mediation process is described, when dealing with very complex protocols and processes. The only option is directly to binding arbitration?

6 Section 7 – Termination

Why if the protocol and PIA provide for project termination and once those obligations are met does CAR reserve the right to terminate at its option?

7 Sections 12 and 13

These require indemnification of CAR, but also provide that the prevailing party receive its costs, expenses and attorney fees. The remedy provided does not mention mediation, which we think should be pursued first in the event of a dispute before binding arbitration.

8 Section 17

The rule of construction set forth is vague, unreasonable and overly broad. In effect, it provides a license to an arbitrator or judge to rewrite any provision of the Agreement in such a way as to "give effect to the purpose" of the agreement. I have no idea what this means. If this is the case, there is no point to even having a written agreement. How is

this supposed to connect with the covenant to not unreasonably withhold consent or the covenant allowing CAR to withhold consent in the exercise of reasonable discretion?

Thank you for this opportunity to comment.

Very truly yours,

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