Comments on the Draft PIA
Forest Project Protocol Version 3.0
June 11, 2009

Dear Colleagues at the Climate Action Reserve,

We are pleased to have the opportunity to provide comments on the current draft of the proposed Project Implementation Agreement and applaud you for having provided this for public review.

We support the creation of a strong, enforceable long-term contract between the Climate Action Reserve and a forest landowner to better ensure the clarity of a project owner's obligations and the longevity of the Carbon Reduction Tons issued. We believe the general approach taken in the PIA is good. We are pleased that this draft, unlike the previous one, creates a contract that should be distinct from and additional to other legal instruments, such as a conservation easement, that would restrict a property's deed in favor of sustaining the project activity and resulting CRTs.

Nonetheless, in our view the current draft contract would benefit greatly from further refinement to ensure it is not only strong from CAR's point of view, but is sufficiently fair and equitable to be acceptable to a wide array of forest owners. Absent these changes, we can envision this contract becoming a serious damper on participation in Reserve projects.

Specifically:

1. Recital D: Should define and identify the Project Area as it exists within the Property and subsequent provisions for Compliance (paragraph 3) and Monitoring (paragraph 4) should be limited to the Project Area. It is inappropriate over-reaching for CAR to seek to restrict the actions of a landowner outside the Project Area if it is only a portion of the Property.

2. In Paragraph 4, CAR's right to entry should be scoped more tightly to what is needed for monitoring and verification. As written, CAR could enter the property frequently as it wants to, with little notice. This creates a burden and liability for the landowner. We believe CAR's genuine interests could be equally well served by allowing for entry as part of periodic monitoring and verification, not to exceed twice yearly without cause. Five days' notice is too short; two weeks is more reasonable. It is standard for landowners to require a party like CAR to provide proof of insurance to limit liability to landowners for the access so provided and this should be added. The word "Forest Owner's" should be added in the last sentence between "adheres to the" and "reasonable health and safety practices".

2. In Paragraph 5, it is overly broad, unreasonable and unworkable to require that every and all holders of any kind of interest in the Property adhere to the terms of the PIA. It should be sufficient that the Forest Owner shoulders the obligation and that subsequent interests be subordinated or otherwise conveyed subject to the PIA (as in paragraphs **5**(d) and **5**(e)).

3. In 5 (a), if the Reserve wants to maintain the "right" to withhold approval, then it should set forth factors or conditions that it is concerned about so any decision to withhold approval is in fact not arbitrary. Moreover, if a dispute arises, a decision maker has guidance as to what is "reasonable".

4. In 5 (a), CAR needs to clarify exactly what it is referring to in the sentence, "Notwithstanding any consent of the Reserve that releases any Assignor from any Forest Owner Obligation, the Assignor shall remain obligated to and liable for any Forest Owner Obligation which arose during the time that the Assignor held an Interest in the Property . . . " From our reading, it is a clear inference but an unreasonable requirement to hold the Assignor responsible for the maintenance of CRTs registered during Assignor's term of ownership after that ownership and Assignment have been made given that Assignor will have no control over the Property or Project at that point.

5. In Paragraph **5**(a)(4), the grammar does not make sense. In addition, this language does not reconcile with that in 6(d).

6. As to Paragraph **5**(e), there needs to be some alternative to formal subordination, which will be overly cumbersome or impossible to obtain in some important instances. There are other approaches, such as described in **5**(d).

7. In Paragraph 12, while we are glad dispute resolution language is being added, the requirement for binding arbitration is not what we and others are looking for. We recommend a staged process that is oriented to actually resolving the problem out of court, but does not do away with access to court. We suggest that at the end of the 30 day cure period, if the alleged breach is still outstanding, but after the Project Account is frozen, CAR allow 15 day "appeal" process within CAR as the first step and, if this doesn't resolve the dispute, then require mediation within 30 days by a mutually agreeable third party, and if still not resolved the parties can go to court and CAR can avail itself of its permitted Remedies. Arbitration in a complex and novel area such as that covered by the PIA does not provide any greater ease or lower expense, but it has greater potential of abuse with no right of appeal.

8. Paragraph 7 appears to make Termination optional, at CAR's discretion (end of first sentence, ". . . At the Reserve's option). That seems contradictory and arbitrary. If the Protocols, as referenced, allow for termination, which they do, then those terms should be final. There needs to be certainty as to an exit to the PIA, even subject to replacement provisions, liquidated damages, etc.

9. In Paragraph (13) the indemnity language is unacceptable. It is not mutual and has the Forest Owner paying for CAR's choice of lawyer, and potentially paying for CAR's negligence because it covers anything "arising from or in any way connected with this Agreement". A more reasonable provision would say the following:

(a) "Forest Owner shall hold harmless, indemnify, and defend the Reserve and its directors, officers, employees, agents, contractors and representatives (collectively the "Indemnified Parties") from and against all liabilities, penalties, costs, losses, damages, expenses, causes of action, claims, demands or judgments, including reasonable attorney fees and legal costs, arising from the gross negligence or willful misconduct of the Forest Owner in connection with this Agreement, provided however, that this provision shall not apply to any of the forgoing to the extent caused by the gross negligence or willful misconduct of any Indemnified Party."

(c) We also propose adding to the beginning of (c) the following: "The Indemnified Parties shall, to the extent possible, reasonably mitigate damages and fully cooperate with Forest Owner with respect to any claims or proceedings arising hereunder."

10. The requirement for Recordation in paragraph 14 appears to create a cloud on the title due to the terms of California Civil Code Section 1220. While the Code language pertains to timber and the creation and maintenance of the Project and CRTs are not a recognized property right nor directly grounded in the timber, the Project does have the effect of limiting the management of the timber, so an argument could be made. This is a gray (dark gray) area where existing law and emerging arrangements could collide. We believe that the other provisions of the PIA are strong enough that this or other recordation requirements do not strengthen CAR's position, but, if included, could severely deter landowner participation.

Again, many thanks for the opportunity to participate in the public discussion of the draft PIA. We look forward to continuing to work with CAR to craft a robust and practical agreement.

Sincerely,

Constance Best
Managing Director

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