CENTER *for* BIOLOGICAL DIVERSITY

November 9, 2009

Via Federal Express and Electronic Mail

Mary Nichols, Chair, and Members
California Air Resources Board
1001 I Street
P.O. Box 2815
Sacramento, CA 95812

Re: CEQA Violations in Adoption of Forest Project Protocols

Dear Chair Nichols and Members of the Board:

At its September 24, 2009 meeting, the California Air Resources Board ("Board") adopted Version 3.0 of the Forest Project Protocol (the "Protocol") promulgated by the Climate Action Reserve.[1] The Board did so, however, without considering the potential environmental impacts of its action. As discussed in detail below, the Board's adoption of the Protocol constitutes a violation of the California Environmental Quality Act ("CEQA"), Public Resources Code section 21000 *et seq*., and the CEQA Guidelines, 14 Cal. Code Regs. § 15000 *et seq.*

The Board violated CEQA by failing to consider whether it is reasonably foreseeable that its adoption of the Protocol will result in changes to the physical environment. Just days ago, the California Court of Appeal set aside an analogous offset rule for particulate matter due to the Mojave Desert Air Quality Management District's failure to comply with CEQA. *Cal. Unions for Reliable Energy v. Mojave Desert Air Quality Mgmt. Dist.*, 2009 Cal. App. LEXIS 1746 (Oct. 30, 2009). The air district had determined that its adoption of the offset rule was exempt from CEQA in part because it was merely a "'protocol' to be used in applying for, calculating, and issuing" offsets for road paving activities. *Id.* at *2. The Court of Appeal disagreed, holding that the district had a duty under CEQA to analyze the foreseeable environmental impacts of the "underlying activity" encouraged by the offset program. *Id.* at *24-25, *31-32. The

[1] Climate Action Reserve, *Forest Project Protocol Version 3.0* (Sept. 1, 2009). Following the Board's adoption of the Protocol, and in response to direction in the Board's resolution of adoption, the Climate Action Reserve promulgated Version 3.1 of the Protocol on October 7, 2009. The Board has not yet taken any formal action with respect to Version 3.1, and it is not clear whether the Board intends to do so. The two versions, however, are substantively almost identical and have the same potential to cause environmental impacts. Accordingly, references in this letter to the "Protocol" or "version 3.0" should be taken to include both Version 3.0 and Version 3.1 of the Protocol.

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court also rejected the district's claim that the impacts of road paving encouraged by the rule were too speculative for analysis. *See id.* at *32-33.

The Board's adoption of the Protocol here—like the offset rule struck down in *California Unions*—violated CEQA. Indeed, the Board apparently failed even to consider whether CEQA applied to its action. Yet the Board's adoption of the Protocol will encourage and facilitate "underlying activities," including forest clearcutting and greenhouse gas offset trading, that will undoubtedly have environmental effects. Adoption of the Protocol was therefore a "project" under well-established CEQA principles—a project that the Board approved without the disclosure, analysis, and mitigation of environmental impacts that CEQA requires.

The Board also violated both CEQA and its own regulations by issuing a Staff Report concerning the Protocol that did not consider environmental impacts, mitigation measures, or alternatives. 17 Cal. Code Regs. § 60005. The Board also failed to respond in writing to significant environmental points raised in the public process—including extensive written comments submitted by the Center and other organizations to both the Climate Action Reserve and the Board—*before* taking action to adopt the Protocol. 17 Cal. Code Regs. § 60007. Finally, the Board failed to consider the Protocol's inconsistency with substantive standards set by AB 32, Health and Safety Code section 38500 *et seq.*

We therefore urge the Board to rescind its adoption of the Protocol at its November 19, 2009 meeting and to refrain from taking any further action regarding the Protocol until it has fully complied with the procedural and substantive mandates of CEQA as well as the requirements of AB 32.

I. Legal Background

The Legislature enacted CEQA to "[e]nsure that the long-term protection of the environment shall be the guiding criterion in public decisions." *No Oil, Inc. v. City of Los Angeles*, 13 Cal. 3d 68, 74 (1974). The Supreme Court has repeatedly held that CEQA must be interpreted to "afford the fullest possible protection to the environment." *Wildlife Alive v. Chickering*, 18 Cal. 3d 190, 206 (1976) (quotation omitted).

CEQA also serves "to demonstrate to an apprehensive citizenry that the agency has, in fact, analyzed and considered the ecological implications of its action." *Laurel Heights Improvement Ass'n v. Regents of Univ. of Cal.*, 47 Cal. 3d 376, 392 (1988) ("*Laurel Heights I*"). If CEQA is "scrupulously followed," the public will know the basis for the agency's action and "being duly informed, can respond accordingly to action with which it disagrees." *Id.* Thus, CEQA "protects not only the environment but also informed self-government." *Id.*

CEQA applies to all "discretionary projects proposed to be carried out or approved by public agencies." Pub. Res. Code § 21080(a). Accordingly, before taking any action, a public agency must conduct a "preliminary review" to determine whether

the action is a "project" subject to CEQA. *See Muzzy Ranch Co. v. Solano County Airport Land Use Comm'n*, 41 Cal. 4th 372, 380 (2007).

A "project" is "the whole of an action" directly undertaken, supported, or authorized by a public agency "which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment." Pub. Res. Code § 21065; CEQA Guidelines § 15378(a). Under CEQA, "the term 'project' refers to the underlying activity and not the governmental approval process." *California Unions*, 2009 Cal. App. LEXIS 1746 at *25 (quoting *Orinda Ass'n v. Bd. of Supervisors*, 182 Cal. App. 3d 1145, 1171-72 (1986)). The definition of "project" is "given a broad interpretation in order to maximize protection of the environment." *Lighthouse Field Beach Rescue v. City of Santa Cruz*, 131 Cal. App. 4th 1170, 1180 (2005) (internal quotation omitted). A project need not involve tangible physical activity so long as the agency's discretionary action has the potential to lead to either a direct or a reasonably foreseeable indirect physical change in the environment. *See Communities for a Better Env't v. Cal. Res. Agency*, 103 Cal. App. 4th 98, 126 (2002) ("Governmental organizational activities, such as annexation approvals and school district reorganizations, which constitute an essential step culminating in an environmental effect are 'projects' within the scope of CEQA."); *see also, e.g.*, *Muzzy Ranch*, 41 Cal. 4th at 382-83; *Fullerton Joint Union High Sch. Dist. v. State Bd. of Educ.*, 32 Cal. 3d 779, 796-97 (1982); *Bozung v. Local Agency Formation Comm'n*, 13 Cal. 3d 263, 277-81 (1975).

CEQA requires the preparation of environmental review documents "as early as feasible in the planning process to enable environmental considerations to influence project program and design and yet late enough to provide meaningful information for environmental assessment." *Laurel Heights I*, 47 Cal.3d at 395; *see also* CEQA Guidelines § 15004(b). The purpose of CEQA is to provide decision-makers and the public with environmental information before decisions are made, not after. As the California Supreme Court observed in *Laurel Heights I*, "[i]f post-approval environmental review were allowed, [CEQA analyses] would likely become nothing more than *post hoc* rationalizations to support action already taken. We have expressly condemned this [practice]." 47 Cal. 3d at 394 (citation omitted).

Moreover, "public agencies shall not undertake actions concerning the proposed public project that would have a significant adverse effect or limit the choice of alternatives or mitigation measures, before completion of CEQA compliance." CEQA Guidelines § 15004(b)(2). In particular, an agency shall not "take any action which gives impetus to a planned or foreseeable project in a manner that forecloses alternatives or mitigation measures that would ordinarily be part of CEQA review of that public project." CEQA Guidelines § 15004(b)(2)(B). This is especially important where, as here, a public agency is entrusted with reviewing and approving its own project. *See Laurel Heights I*, 47 Cal.3d at 395.

Here, the Board has already taken action to adopt the Protocol. Until the Board rescinds that action and fully complies with CEQA—by undertaking a full analysis of not only the potential environmental impacts of its action, but also feasible alternatives and mitigation measures—the Board will remain in violation of the law.

II. Adoption of the Protocol Was a "Project" Subject to CEQA.

The Board's adoption of the Protocol meets CEQA's definition of a "project": it was a discretionary action, undertaken, supported, and/or authorized by the Board that has the potential to cause physical changes in the environment. Accordingly, the Board was required to comply with CEQA *before* adopting the Protocol.[2] *See, e.g.*, *Save Tara v. City of West Hollywood*, 45 Cal. 4th 116, 129-30 (affirming that environmental review must occur early enough to inform decision-making, and "at a minimum" before project approval); *Laurel Heights I*, 47 Cal. 3d at 394 (characterizing post-approval environmental studies as "nothing more than *post hoc* rationalizations to support action already taken").

A. Adoption of the Protocol Was a Discretionary Activity Undertaken, Supported, and/or Authorized by the Board.

1. The Board's Action Was Discretionary.

The Board's adoption of the Protocol was a discretionary action. A discretionary action is one that "requires the exercise of judgment or deliberation" on the part of a public agency in deciding whether "to approve or disapprove a particular activity," as distinguished from situations where the agency merely determines "whether there has been conformity with applicable statutes, ordinances, or regulations." CEQA Guidelines § 15357; *see also Mountain Lion Foundation v. Cal. Fish & Game Comm'n*, 16 Cal. 4th 105, 112 (1997) (defining discretionary projects as projects "subject to 'judgmental controls,' i.e., where the agency can use its judgment in deciding whether and how to carry out the project"). At its September 24, 2009 meeting, the Board debated whether to adopt the Protocol as a methodology for greenhouse gas accounting pursuant to AB 32. In so doing, the Board exercised judgment and deliberation—the hallmarks of discretionary action.

2. Adoption of the Protocol Was an Activity Directly Undertaken by the Board.

The Board adopted the Protocol as a methodology for the quantification of greenhouse gas emission reductions from voluntary forest projects. It did so pursuant to an express requirement of AB 32. *See* Health & Saf. Code § 38571. The purpose of

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[2] It is not clear whether the Board's adoption of the Protocol falls within that portion of the Board's regulatory program that has been certified by the Secretary for Resources as meeting the requirements of Public Resources Code section 21080.5. The Secretary's certification applies only to that "portion" of the Board's regulatory program involving "the adoption, approval, amendment, or repeal of standards, rules, regulations, or plans . . . for the protection and enhancement of ambient air quality in California." CEQA Guidelines § 15251(d). Whether or not the Board's adoption of the Protocol falls within its certified regulatory program, the Board was required in the first instance to consider whether its action was a "project" subject to CEQA. *See* CEQA Guidelines § 15252(a)(2)(B).

adopting this methodology is to provide "entities that have voluntarily reduced their greenhouse gas emissions" with "appropriate credit for early voluntary reductions." Health & Saf. Code § 38562(b)(3). Adoption of the Protocol was thus an activity "directly undertaken" by the Board for purposes of CEQA.

3. Adoption of the Protocol Supports and Authorizes the Activities of Others.

The Board's adoption of the Protocol provides crucial support and authorization to entities participating in the private carbon offset market. According to the Board's own press release, "adoption will expand the protocol to allow forestry projects throughout the country," and will further open up the "voluntary offset market" to a greater number of participants.[3] Adoption of the Protocol by the Board effectively assures market participants that voluntary greenhouse gas reductions will receive "appropriate credit" under California's cap and trade system. *See* Health & Saf. Code §§ 38562(b)(3), 38571. The Board's action also confirms for market participants that greenhouse gas reduction credits quantified pursuant to the Protocol's methodology will be eligible for future use and trade as compliance offsets.[4]

Events have borne out the importance of the Board's action. Less than a week after the Board's adoption of the Protocol, Sierra Pacific Industries ("SPI"), California's largest timber company, announced an agreement with an asset management firm to develop "compliance-ready carbon offsets registered under the recently approved Climate Action Reserve (CAR) Protocol Version 3.0. These offsets would be used to comply with emissions reduction goals under California's landmark legislation, Assembly Bill 32."[5] According to SPI's press release announcing the deal, the Board's "endorsement" of the Protocol provides "clarity to investors who want to help develop carbon offset supply from forests" and will "stimulate the development of forest-based carbon projects in advance of the implementation of a California or US carbon trading market."[6] Governor Schwarzenegger has confirmed that the Board's adoption of "important accounting rules for capturing carbon through improved forestry practices" actually "allowed" SPI to enter into the agreement.[7]

By adopting the Protocol, the Board has effectively granted "approval" to private, voluntary greenhouse gas reduction projects pursuant to the Protocol. An "approval" under CEQA is "the decision by a public agency which commits the agency to a definite

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[3] Cal. EPA, *News Release: Air Resources Board Adopts Revised Forest Project Protocol* (Sept. 24, 2009) (attached as Ex. 1).

[4] *See* Cal. Air Res. Board, CLIMATE CHANGE SCOPING PLAN: A FRAMEWORK FOR CHANGE (Dec. 2008) (hereafter "AB 32 Scoping Plan") at 36-37.

[5] Sierra Pacific Industries and Equator LLC, *Sierra Pacific Industries and Equator Announce Largest U.S. Forest Carbon Transaction to Date* (Sept. 30, 2009) at 1 (attached as Ex. 2) (hereafter "SPI Press Release").

[6] *Id.* [SPI Press Release] at 2.

[7] Office of the Governor, *Governor Schwarzenegger Issues Statement on Creation of Nation's Largest Carbon Sequestration Project* (Sept. 30, 2009) (attached as Ex. 3).

course of action in regard to a project intended to be carried out by any person." CEQA Guidelines § 15352(a); *see also Save Tara*, 45 Cal. 4th at 138-42 (courts must look to surrounding circumstances, including an agency's public statements, in determining whether the agency has committed itself as a practical matter to a project or particular project features). Without the relative certainty that voluntary early reductions will have value as offsets under California's cap and trade system—certainty that under AB 32 can be provided only by the Board's adoption of a methodology for calculating those reductions—private entities would have little incentive to pursue early reduction projects. By the same token, the Board will be unlikely to revisit the basic methodology underlying the Protocol at any time in the future, because doing so would risk depriving private entities of the value of their early reduction investments. Accordingly, by adopting the Protocol, the Board has effectively committed itself, as a practical matter, to a definite course of action with respect to voluntary early reductions of greenhouse gas emissions from the forest sector.

It does not matter for purposes of CEQA that the Board or other public agencies may need to render some later decisions with regard to particular projects. *Fullerton*, 32 Cal. 3d at 795. Rather, the question posed by CEQA is whether and how the Board's present action might affect the physical environment, directly or indirectly. Environmental review must accompany an agency's *earliest* commitment to a course of action, taking into account bureaucratic momentum; "CEQA review may not always be postponed until the last governmental step is taken." *Save Tara*, 45 Cal. 4th at 134-35. Nor does it matter that the Board has characterized its adoption of the Protocol as non-regulatory. The Board's own regulations expressly contemplate that non-regulatory actions may be subject to CEQA. *See* 17 Cal. Code Regs. § 60005.

Nor may an agency take steps that give impetus to planned or foreseeable projects in a manner that forecloses alternatives or mitigation measures—including the alternative of not going forward with a project at all. *Save Tara*, 45 Cal. 4th at 138-39; CEQA Guidelines § 15004(b)(2)(B). Here, the Board's adoption of a Protocol that permits particularly destructive forest practices to generate carbon credits will simultaneously provide direct encouragement to those practices and induce reliance in the carbon market on credits generated by forest projects predicated on those practices. The Board's adoption of the Protocol thus threatens to foreclose alternative methodologies that do not encourage clearcutting and that would avoid environmental impacts associated with intensive, even-aged forest management.

III. The Board's Adoption of the Protocol Has the Potential to Cause Physical Changes in the Environment.

The Board's adoption of the Protocol in the absence of CEQA compliance was unlawful. California courts have long held that a public agency's action need not directly alter the physical environment; where even indirect environmental changes are reasonably foreseeable, CEQA applies. *Muzzy Ranch*, 41 Cal. 4th at 383 ("the definition of project for CEQA purposes is not limited to agency activities that demonstrably *will* impact the environment") (emphasis in original), citing *No Oil, Inc. v. City of Los Angeles*, 13 Cal. 3d 68, 83 n.16 (1974); *see also Fullerton*, 32 Cal. 3d at 796-97; *Bozung*,

13 Cal. 3d at 277-81; *Plastic Pipe & Fittings Ass'n v. Cal. Bldg. Standards Comm'n*, 124 Cal. App. 4th 1390, 1412-14 (2004).

In *California Unions*, for example, the Court of Appeal rejected the defendant air district's arguments that its offset rule for PM10 was purely voluntary and that any road paving activities conducted for the purpose of obtaining emission credits under the rule would be subject to future CEQA review. *See California Unions*, 2009 Cal. App. LEXIS 1746 at *24-25. The court held that the air district had to consider the impacts of the "underlying activity"—namely, the road paving—that it was trying to encourage:

> [T]he focus must be not on the project alone, but rather on the project's reasonably foreseeable direct and indirect physical effects. While the adoption of Rule 1406 did not cause any road paving *by itself*, certainly it *encouraged* third parties to pave roads. It is reasonably foreseeable that, if the District allows applicants to obtain PM10 offsets by paving roads, at least some applicants will do so. Otherwise, why adopt the rule?

Id. at *32. The court's decision in *California Unions* is entirely consistent with settled CEQA authority. If a public agency may "reasonably anticipate" that its action might lead to an environmental impact, it must treat that action as a "project" under CEQA. *See Muzzy Ranch*, 41 Cal. 4th at 383 (holding CEQA applicable to land use plan restricting development near airport where lead agency may "may reasonably anticipate" that restricting development in one location could displace development to other locations, causing environmental impacts). *See Muzzy Ranch*, 41 Cal. 4th at 383.

Under these long-standing principles, it is reasonably foreseeable that the Board's action here is a "project" under CEQA because the underlying activity that the Board seeks to encourage—namely, certain kinds of forest practices—may cause physical changes in the environment. As set forth in detail below, the changes made to the Protocol in the latest version adopted by the Board vastly expand the scope of the program and the activities encouraged thereunder. By lending credibility to a forest carbon methodology with relaxed environmental standards, moreover, the Board's adoption of the Protocol creates powerful new incentives for more aggressive, environmentally destructive even-aged forest management. Finally, the Board's action vastly increases the likelihood that greenhouse gas reductions achieved under Board-certified methodologies will be treated as tradable emissions credits in both compliance and voluntary markets. Thus every ton of greenhouse gas "reduction" pursuant to a Board-adopted methodology will likely be used to offset a ton of greenhouse gases emitted, rather than controlled, in the future. It is therefore more than reasonably foreseeable that the Board's adoption of the Protocol will have a number of potentially significant environmental consequences—consequences that demand full disclosure, analysis, and mitigation pursuant to CEQA.

A. Protocol Version 3.0 Relaxes the Previous Protocol's Environmental Standards and Expands its Geographical Scope, With Foreseeable Environmental Consequences.

The Board's adoption of version 3.0 of the Protocol significantly expanded the scope of the program when compared to the previously adopted version 2.1. For example, version 3.0 expands the program's geographic scope to encompass forest lands throughout the United States, including both public lands and industrial timberlands; expands the carbon stores accounted under the Protocol to include harvested wood products; and expands eligible forest project types to include clearcutting and other forms of even-age management.[8] These changes were made in response to the Board's prior direction to staff to "initiate a process to update the forest protocol to reduce barriers to participation, especially for public lands and industrial working forests . . . ."[9]

Individually and cumulatively, these changes in the Protocol will have foreseeable environmental effects. CEQA requires that public agencies analyze the impacts of changes to governing policy documents—even where those changes may be intended to benefit the environment. *See, e.g., Lighthouse Field Beach Rescue v. City of Santa Cruz*, 131 Cal. App. 4th 1170, 1194-1202 (2005). The Board failed to consider the effects of the vast differences between versions 2.1 and 3.0 of the Protocol.

1. The Board's Action Expands the Geographical Scope of the Protocol to Include Hundreds of Millions of Acres of Public and Industrial Timberlands.

In its resolution adopting the revised Protocol, the Board noted some of the potential results of these changes: "The updated forest project protocol (version 3.0) effectively reduces some barriers to participation" and "expands applicability for additional landowner types, including public lands . . . ."[10] This represents an incredible expansion in the Protocol's scope. Lands managed by the U.S. Forest Service alone comprise 193 million acres in the United States.[11] Timberlands held and managed by other federal and state agencies also would be eligible to participate in activities under the Protocol.

The Board also removed "barriers to participation" in programs under the Protocol for "private commercial forests not associated with a land trust"—*i.e.*, industrial private timberlands.[12] It did so primarily by approving a Protocol that allows landowners who rely heavily on intensive, even-aged management practices—including

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[8] *See* Cal. Air Res. Board, Planning and Technical Support Division, Emissions Inventory Branch, *Staff Report: Proposed Adoption of the Updated Climate Action Reserve Forest Project Protocol* (Sept. 10, 2009) (hereafter "CARB Staff Report") at 4, 12, 17.
[9] CARB Staff Report at 1.
[10] Cal. Air Res. Board, Resolution No. 09-43 (Sept. 25, 2009) (hereafter "Res. 09-43").
[11] *See* U.S.D.A. Forest Svc., *The U.S. Forest Service: An Overview* (2009) at 1 (Excerpt attached as Ex. 4).
[12] CARB Staff Report at 1.

clearcutting—to accrue carbon credits for their activities. Gary Rynearson, representing Green Diamond Industries at the September 24 Board meeting, stated that Green Diamond "could not participate" under the "old protocols" because they "could be interpreted to include a ban on even-age management . . . ."[13] According to the American Forest and Paper Association, there are nearly nine million acres of private timberland in California, nearly half of which are in "corporate" ownership.[14] Green Diamond alone owns 440,000 acres of timberland.[15] In addition to incentivizing destructive forest management practices—the potential environmental impacts of which are discussed in greater detail below—the Protocol's provisions allowing even-aged management will further expand its geographical reach.

The expansion of the Protocol's geographical scope is expressly intended to encourage changes in forest management throughout the country. As a result, the Board's adoption of the Protocol is all but certain to cause changes in the physical environment. As the Supreme Court has held, CEQA imposes no strict limitations on the geographical scope of environmental analysis. *See Muzzy Ranch*, 41 Cal. 4th at 387-88. The Board neglected its responsibility under CEQA to disclose, analyze, and identify mitigation for the reasonably foreseeable environmental impacts of expanding the Protocol's reach in such a dramatic fashion.

2. The Board's Action Incentivizes Clearcutting and Other Forms of Environmentally Destructive Even-Aged Forest Management.

The Protocol expressly allows forest projects using intensive even-aged management techniques such as clearcutting to accrue carbon credits.[16] This change is a dramatic departure from the previous protocols, which were generally understood to prohibit even-age management through application of the "natural forest management" requirement.[17]

The Board's endorsement of clearcutting in the revised Protocol will affect the environment in at least two major ways. First, the revised Protocol will result in foregone environmental benefits associated with the previous version's incentive for forest

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[13] Transcript of Meeting of Cal. Air Res. Board (Sept. 24, 2009) at 161:13-15 (hereafter "Tr.").

[14] Am. Forest & Paper Ass'n, *Forest & Paper Industry at a Glance: California* (2009) (attached as Ex. 5).

[15] Tr. at 161:23.

[16] Protocol § 3.9.2 (authorizing even-age management). Revisions to Version 3.1 of the Protocol made at the Board's behest—namely, moving authorization of even-age management from the section discussing "Natural Forest Management" to a different section of the document—made no substantive changes to the Protocol. *See* Protocol (v. 3.1) § 3.9.4.

[17] *See* M. Pawlicki, Sierra Pacific Industries, Letter to ARB Chair Mary Nichols (Sept. 20, 2007) (explaining ARB staff position that former protocol required uneven-age management regimes) (attached as Ex. 6).

management projects to incorporate uneven-aged management. This represents a relaxation of environmental standards, with readily foreseeable environmental consequences. This also renders the Protocol inconsistent with AB 32's requirements for market-based compliance mechanisms, which must maximize—not reduce—environmental co-benefits. *See* Health & Saf. Code § 38570(b)(3). The Board failed to analyze the environmental consequences of weakening the Protocol and the resulting conflict with AB 32.

Second, by expanding the Protocol to authorize even-age management, including clearcutting, the Board has created a significant economic incentive for timberland owners and managers to employ more intensive, environmentally destructive management regimes in both public and private forests throughout California and other states. The potential environmental consequences of this change should be well-known to the Board; comments submitted to both the Climate Action Reserve and the Board prior to the adoption of the Protocol specifically objected to inclusion of even-age management and highlighted the significant impacts of that change.[18] Those comments are attached and incorporated by reference as if fully set forth herein.

Provisions of the Protocol allowing clearcutting fail to incorporate even the most basic limitations of California's Forest Practice Rules ("FPRs"). The paragraph of the Protocol allowing 40-acre clearcuts in eligible forest projects was apparently based on the existing FPRs, but with critical omissions. The current FPRs generally limit the size of clearcuts to 20 acres with tractor yarding and 30 acres with cable or aerial yarding, and require clearcut units to be separated by buffer zones of at least 300 feet in all directions. 14 Cal. Code Regs. § 913.1(a)(2), (3). A licensed forester preparing a timber harvesting plan ("THP") may increase the acreage limit to a maximum of 40 acres, but *only* if the Director of the Department of Forestry and Fire Protection makes specified findings, including findings that additional on-site or off-site mitigation measures have been included in a logging plan. *See* 14 Cal. Code Regs. § 913.1(a)(2)(A)-(E). The Protocol contains none of these limitations or requirements.

The Protocols thus would allow far more aggressive clearcutting than is currently practiced by California's large industrial timber companies. Gary Rynearson of Green Diamond testified at the Board's hearing on the Protocols that "[o]ur average opening is 23 acres. *So the 40 acres that you've discussed today is an anomaly.* It's very rare that openings go to 40 acres. Openings are typically between 20 and 30 acres. The more sensitive the lands, the more steeper the land, the more rainfall, the smaller the opening

[18] *See* Center for Biological Diversity, et al., Letter to Cal Air Res. Board Re: Opposition to Forest Clearcutting Provision in the Forest Project Protocols (Sept. 18, 2009); Center for Biological Diversity, Letter to Cal. Air Res. Board Re: Consideration of the Climate Action Reserve Forest Project Protocols (Sept. 15, 2009) (enclosing letter to Climate Action Reserve dated Sept. 1, 2009). These letters are already in the record of proceedings before the Board in this matter. Selected scientific articles referenced in the Center's September 1, 2009 letter to the Climate Action Reserve are attached hereto as Ex. 7.

can be."[19] Yet the Protocol does nothing to constrain these "anomalous" large clearcuts or to protect sensitive landscapes.

The Protocol further allows project participants to effectively obviate this 40-acre limitation by permitting immediately adjacent clearcut units, provided that the earlier clearcut is five years old *or* growth on the earlier clearcut is five feet high.[20] This loophole would allow exceptionally large areas—up to 40 percent of a watershed—to be clearcut within a very short period of time, resulting in erosion and a loss of canopy cover which is deleterious to wildlife and water. Because the Protocol applies to industrial timberlands throughout the country, it would actively encourage these destructive practices—practices that would not be tolerated in California—on millions of additional acres of forest lands.

The expansion of the protocols to include even-age management also provides incentives for clearcutting on federal lands in California and throughout the United States. Contrary to suggestions by ARB staff at the September 24, 2009 Board meeting,[21] even-age management and forest clearcutting *may* take place on federal lands, including National Forests. For example, the Mendocino National Forest Plan expressly authorizes and anticipates even-age management.[22] Even-age management on federal forest lands is often referred to as "regeneration," "salvage," or "seed cut." The Six Rivers National Forest in California is currently evaluating a timber sale alternative that includes several even-age "regeneration" units where nearly all trees would be removed.[23] Federal lands are not protected from clearcutting.

The Staff Report addressed none of the potential environmental impacts associated with creating incentives for clearcutting or the controversy surrounding the Climate Action Reserve's decision to include these incentives in the Protocol. In fact, the Staff Report all but failed even to mention the fact that the updated Protocol included a significant expansion in eligible project types to include clearcutting.[24] Staff's

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[19] Tr. at 162:5-10 (emphasis added).
[20] *See* Protocol § 3.9.2 (§ 3.9.4 in v. 3.1).
[21] *See* Tr. at 182:22-183:3 (statement of Erik Winegar, ARB Planning and Technical Support Division: "The California Forest Practice Act only governs private forest lands. The national forest and public forests are governed differently. And it's my understanding that clearcutting is not generally a practice on public lands, but I don't know for sure.")
[22] U.S.D.A Forest Svc., *Land and Resource Management Plan: Mendocino National Forest* (1995) at IV-69 to IV-70 and App. C (excerpts attached as Ex. 8).
[23] *See* U.S.D.A. Forest Svc., *Draft Environmental Impact Statement: Beaverslide Timber Sale and Fuel Treatment Project* (June 2009) at 12-13, 187 (describing "regeneration" alternative), 202 (defining "regeneration harvest" as "a silvicultural treatment that removes nearly all trees in mature stands for the sake of establishing new stands") (attached as Ex. 9).
[24] The staff report instead mischaracterized the Protocol's expansion to include even-age management as a clarification of the definition of "natural forest management": "'Natural forest management' is also better defined to include a spatial scale for management activities. The management of the diverse age classes must ensure that the

presentation to the Board at the hearing did not mention even-age management at all. During the hearing, Board member Ken Yeager noted that staff had failed to explain the impacts of expanding the protocols to include even-age management or the controversy surrounding it.[25]

The Board's own CEQA regulations expressly require staff reports to discuss the environmental impacts of Board actions. *See* 17 Cal. Code Regs. § 60005. Failure to follow these regulations constitutes a violation of CEQA. *See, e.g., Ultramar, Inc. v. S. Coast Air Quality Mgt. Dist.*, 17 Cal. App. 4th 689, 702-03 (1993). The Staff Report here failed to comply with either CEQA or the Board's own regulations, leaving the Board literally in the dark about one of the most profoundly consequential aspects of the decision it was being asked to take. The Board must remedy this failure.

B. Adoption of the Protocol Creates Incentives for Forest Management Practices that Could *Increase* Short-Term Greenhouse Gas Emissions.

The Protocol adopted by the Board would grant carbon credits to forest projects carried out pursuant to long-term "sustainable" management plans.[26] Such plans, however, could prescribe short-term reductions in timber inventory, balanced by long-term projections of increased growth and sequestration. Thus the Protocol creates a perverse incentive to log now and accrue carbon credits later. Under the Protocol, this is especially a problem in stands that are well-stocked in comparison to "common practice"—essentially creating an incentive to develop a long-term plan based on short-term logging of well-stocked forests.

Such practices, however, would result in decreased carbon storage and increased emissions from the forest sector over the first few years of the long-term management plan. This would cause not only adverse short-term impacts to mature forests and associated environmental values, but also a net emission of carbon during the 2012-2020 period.[27] This is precisely the period critical to achievement of AB 32's goals, and the period during which the most dramatic reductions in carbon emissions must be achieved

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forest can support all endemic plant and wildlife species and does not preclude even-age management, provided the project includes multiple age classes and mixed species at a watershed scale." CARB Staff Report at 12.

[25] *See* Tr. at 179:24-180:7 ("My first comment, Mr. Goldstene, is I know that I and other Board members were briefed on this item. I was briefed on Monday, and this whole topic never came up, the controversy that we're facing now. And I don't think – I think I got my first e-mail on this Tuesday afternoon which generated many of the conversations. And even in the staff report that we heard just moments ago, this issue was never really even discussed or brought up.").

[26] Protocol § 3.9.1.

[27] Logging causes carbon emissions. "Typically 30-50% of the harvested C is lost in manufacturing and initial use, a loss that is larger than could be expected from even the most extreme forest fire." Harmon et al., *Effects of Partial Harvest on the Carbon Stores in Douglas-fir/Western Hemlock Forests: A Simulation Study*, 12 ECOSYSTEMS 777, 778 (2009) (hereafter "Harmon 2009") (attached as Ex. 10).

in order to avoid the worst impacts of climate change. This perverse incentive is contrary to both prevailing climate science and the carbon reduction goals established in AB 32.

The problem stems primarily from the Protocol's calculation of a "baseline" for forest projects. The Protocol is designed to account for net carbon reductions and/or removals of a project over a 100-year period. "The baseline for any Forest Project registered with the Reserve . . . is assumed to be valid for 100 years. This means that a registered Forest Project will be eligible to receive CRTs for GHG reductions and/or removals quantified using this protocol . . . for a period of 100 years following the project's start date."[28] Carbon stored in forests and wood products need only exceed the 100-year average baseline in any given year in order to generate carbon credits.[29]

Under this approach, however, forest projects may cause significant emissions in the short term, yet still potentially qualify for carbon credits in the medium and long-term as the forest recovers over time and carbon stores are eventually replenished. The Protocol itself demonstrates how this could occur, especially in forests where initial standing live carbon stocks exceed common practice. Protocol Figures 6.5 and 6.6 clearly show that short-term reduction of standing live carbon in such stands could occur, while remaining above the 100-year average "baseline" and accruing carbon credits.[30] The Protocol thus provides potential incentives for projects—including projects involving clearcutting—to reduce forest inventory in well-stocked forests in the short term. This will result in increased emissions for many years after the initiation of the project and decreased carbon storage capacity over the long term.[31]

Such a scenario strongly contradicts the purpose and requirements of AB 32, which mandates a dramatic decrease in statewide emissions by the year 2020. AB 32 also expressly requires that voluntary early reduction projects achieve reductions during the same time period as any direct emission reduction ultimately required under the law. *See* Health & Saf. Code §§ 38562(d)(3), 38571. This critical time period is between 2012 and 2020. Forest projects that rely on long-term projected growth in order to balance emissions related to short-term harvest, however, will do nothing to meet this goal, and potentially could cause increases in logging-related emissions over precisely this critical time period.

The Protocol's provisions requiring maintenance of live standing carbon stocks do not effectively address this problem. Under the Protocol, forest projects generally do not qualify for carbon credits if monitoring shows that standing live carbon stocks have

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[28] Protocol § 3.3.
[29] Protocol § 6 (steps 5-7).
[30] *See* Protocol § 6.2.1 (describing baseline depicted in Fig. 6.5 as meeting Protocol conditions), Figs. 6.5, 6.6.
[31] *See* Harmon 2009 at 778 ("Conversion of older forest to younger forests has generally been shown to release C to the atmosphere. . . . Simply put, the net effect of harvest is dependent on whether the average C store in the initial condition is larger or smaller than the average C store in the harvested system.")

decreased over any 10-year consecutive period.[32] This limitation, however, is subject to several exceptions, one of which all but swallows the general rule. An overall decrease in standing live carbon is permitted in accordance with "a planned rebalancing of age classes . . . detailed in a long term environmentally responsible management plan" at the initiation of the project.[33] Because eligible forest projects must be conducted according to such a plan in any event, a timberland owner need only include a short-term reduction in standing live carbon in the plan at the outset. This creates a strong incentive for industrial timberland owners to have their cake and eat it too, specifically by developing a management plan that secures both profits from intensive, short-term logging and long-term accrual of carbon credits. The result, of course, is present environmental damage, a short-term increase in carbon emissions, and a short-term loss of carbon storage.

Even if such a project were ultimately determined by the protocol to be carbon-positive in the long term, the short-term impacts could be far greater than the potential long-term benefits. Globally, greenhouse gas emissions are now more than ever understood to be at a tipping point. In addressing the impacts of greenhouse gas emissions from forest projects, it is important to take into account the impacts of ecological tipping points, irreversible changes in the climate expected to occur when atmospheric concentrations of greenhouse gases reach certain levels.[34]

Reaching any single tipping point can bring severe economic and ecologic consequences, but perhaps more worrisome is the linkage between tipping points such that reaching one tipping point may in turn trigger a subsequent tipping point. An example is the connection between Arctic sea ice and permafrost melt rates; recent evidence indicates that the loss of Arctic sea ice, one tipping point, accelerates permafrost thaw, a second tipping point.[35] Permafrost refers to permanently frozen land; this surface stores large amounts of carbon. As permafrost thaws due to global warming, it releases carbon, often as methane.[36] Methane has a global warming potential that is

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[32] Protocol § 3.9.3.

[33] *Id.*

[34] *See* Meehl et al., *Global Climate Projections*, *in* CLIMATE CHANGE 2007: THE PHYSICAL SCIENCE BASIS. CONTRIBUTION OF WORKING GROUP I TO THE FOURTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE (Solomon et al., eds., 2007) at 775 (attached as Ex. 11). According to recent research, certain tipping points may already have been reached, such that even if emissions had been stabilized as of 2000, humanity still would be "committed" to severe climate change consequences. *See* Meehl et al., *How Much More Global Warming and Sea Level Rise?* 307 SCIENCE 1769 (2005) (attached as Ex. 12).

[35] *See* Lawrence, et al., *Accelerated Arctic Land Warming and Permafrost Degradation During Rapid Sea Ice Loss*, 35 GEOPHYSICAL RESEARCH LETTERS L11506 (2008) (attached as Ex. 13).

[36] *See, e.g.*, Kennedy, et al., *Snowball Earth Termination by Destabilization of the Equatorial Permafrost Methane Clathrate*, 453 NATURE 642 (2008) (attached as Ex. 13) (correlating prehistoric methane emissions from permafrost melting to rapid global warming) (attached as Ex. 14).

approximately 25 times greater than that of carbon dioxide over 100 years.[37] The multiplicative effect of reaching several tipping points on a similar time scale would drastically increase the costs associated with climate change.

The issue of tipping points adds to the need to limit greenhouse gas emissions in the short term. The greenhouse gases emitted from forest clearcutting and associated activities are indubitably adding to the overall atmospheric concentration of greenhouse gases at a time that the global climate is potentially approaching critical tipping points. Specifically, even if these emissions are expected to be offset by forest growth at some point over the next 100 years, critical climate tipping points may be reached in the meantime, potentially making the eventual carbon sequestration irrelevant with regard to the ecological and climate impacts of the front-end emissions.

This means timing is of utmost importance in the sense that the benefits of carbon sequestration in the medium and long term may be greatly undermined or even rendered irrelevant if emissions in the short term contribute to irreversible climate change and associated impacts. The best available scientific evidence now indicates that a warming of 2°C is not "safe" and would not prevent dangerous interference with the climate system. In order to avoid dangerous anthropogenic interference (DAI) with the climate system, sound climate analysis must minimize the risk of severe and irreversible outcomes. Stabilizing greenhouse gas emissions at 350 ppm CO2eq, would reduce the mean probability of overshooting a 2°C temperature rise to 7 percent. A 350 ppm CO2eq stabilization level is also consistent with that proposed by leading climatologists, who have concluded that in order "to preserve a planet for future generations similar to that in which civilization developed and to which life on Earth is adapted . . . CO2 will need to be reduced from its current 385 ppm to at most 350 ppm."[38] While current CO2 levels exceed 350 ppm, a pathway toward 350 ppm is possible though the rapid phase-out of coal emissions, improved agricultural and forestry practices, and possible future capture of CO2 from biomass power plants. *Id*.

In short, time is of the essence when addressing greenhouse gas emissions. Significant emissions in the short term cannot be discounted by pointing to uncertain future sequestration. The Protocol's methodology, however, would encourage precisely this practice. Once again, the Board failed to examine the potential environmental consequences of this aspect of the Protocol prior to adoption, as CEQA requires.

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[37] Solomon, et al., *Technical Summary, in* CLIMATE CHANGE 2007: THE PHYSICAL SCIENCE BASIS. CONTRIBUTION OF WORKING GROUP I TO THE FOURTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE (Solomon et al., eds., 2007) at 33 (Table TS2) (attached as Ex. 15). The most recent research cautions that the global warming potential of methane may be considerably greater than previously estimated due to interactions among atmospheric chemicals and aerosols. *See* Shindell, et al., *Improved Attribution of Climate Forcing to Emissions*, 326 SCIENCE 716 (2009) (attached as Ex. 16).

[38] Hansen, J. et al., *Target Atmospheric CO2: Where Should Humanity Aim?* 2 OPEN ATMOSPHERIC SCI. J. 217, 226 (2008) (attached as Ex. 17).

C. The Protocol's Exemption of Habitat Conservation Plans from Project Baseline Calculations May Result in a Pool of Non-Additional Credits and Consequent Uncontrolled Carbon Emissions.

Although the Protocol mandates that "all legal requirements that could affect baseline growth and harvesting scenarios" be incorporated into a project's baseline, it inexplicably exempts "voluntary Habitat Conservation Plans (HCPs)" from the definition of "legal requirements."[39] The mitigation and minimization measures set forth in HCPs *are* effectively legal requirements, however, and should be incorporated in a project's baseline. HCPs are prepared for the sole purpose of obtaining a permit to take threatened and endangered species under Section 10 of the federal Endangered Species Act. *See* 16 U.S.C. § 1539(a)(2). The holder of an incidental take permit must comply with the terms of an HCP in order to avoid legal liability under the Endangered Species Act.

The Protocol's exemption of HCPs from the set of legal requirements that must be considered in a project's baseline risks creating a pool of non-additional carbon credits. Such credits not only would fail to meet the standards of AB 32, Health & Safety Code § 38562(d)(2), but also would result directly in uncontrolled emissions of greenhouse gases by emitters who purchased the credits as offsets. The Board failed to consider this potential environmental consequence of adopting the Protocol.

D. Adoption of the Protocol Is a Critical "First Step" Toward Accrual of Carbon Credits that Will Be Used to Offset Real Greenhouse Gas Emissions.

Even aside from the physical changes to the environment that the Protocol's incentives will cause, the Board's adoption of the Protocol is inexorably linked to another important environmental consequence: emissions of greenhouse gases themselves. The forest carbon accounting methods in the updated Protocol are intended to result in the creation of carbon credits, in the form of carbon reserve tones (CRTs) issued by the Climate Action Reserve. "The goal of this protocol is to ensure that the net GHG reductions and removals caused by a project . . . may therefore be reported to the Climate Action Reserve (Reserve) as the basis for issuing carbon offset credits (called Climate Reserve Tonnes, or CRTs)."[40]

The Board's adoption of the Protocol thus will lead to creation and accumulation of carbon credits by forest projects—credits that will be banked and traded as either allowances or offsets in either compliance or voluntary markets for carbon. Put simply, it is more than reasonably foreseeable that every ton of carbon credited to a forest project under the Protocol will be emitted—rather than controlled—at some point, somewhere else. As with the PM10 offsets that the Court of Appeal set aside in *California Unions*, this type of emissions trading is the whole point of the Protocol. "Otherwise, why adopt the rule?" *California Unions*, 2009 Cal. App. LEXIS 1746 at *32.

[39] Protocol § 6.2.1.1.
[40] Protocol § 1.

The design of the Protocol—and the credibility of emission reductions embodied in carbon credits issued under the Protocol—are therefore critical in ensuring that these markets do not lead to increases in greenhouse gas emissions. CEQA demands that the Board engage in a good-faith effort to disclose, analyze, and mitigate the effects of its decisions. Yet the Board adopted the Protocol without any information or analysis regarding the ultimate environmental consequences of creating this particular pool of carbon credits.

1. The Board's Adoption of the Protocol Will Encourage Allowances and Offsets, Foreseeably Resulting in Greenhouse Gas Emissions in Compliance Markets.

The Board's adoption of the Protocol represents a critical "first step" toward granting allowances for early voluntary greenhouse gas reductions as part of AB 32's compliance scheme. Health & Saf. Code § 38571; *see also California Unions*, 2009 Cal. App. Lexis 1746 at *25 (adoption of offset rule was "first step" toward approval of underlying activity). CEQA demands that the Board examine the environmental consequences of taking this first step *now*, before giving impetus to the Protocol in a way that could foreclose alternatives and mitigation measures. *See, e.g.*, *Save Tara*, 45 Cal. 4th at 134-35, 138-39; *Fullerton*, 32 Cal. 3d at 795-98; CEQA Guidelines § 15004(b)(2)(B).

Under the Board's AB 32 Scoping Plan, credits accrued pursuant to Board-approved methodologies may be used either as "offsets" or "allowances," ultimately available for purchase by emitters who otherwise might be required to control their emissions directly.[41] If those methodologies are flawed—i.e., if the emissions reductions resulting in tradable credits pursuant to those methodologies are not credible—greenhouse gas credits predicated on those methodologies will not adequately offset greenhouse gas emissions.[42] In any event, credits accrued pursuant to the Protocol and used as offsets or allowances will, by definition, permit actual emissions of greenhouse gases. CEQA requires that such impacts be assessed before approval, not after.

Furthermore, AB 32's cap-and-trade system is not the only "compliance market" for Protocol credits. The Resources Agency, currently considering revisions to the CEQA Guidelines governing analysis and mitigation of greenhouse gas emissions, has specifically stated that credits based on Board-adopted forest project protocols likely will be viewed as sufficient project-level mitigation for climate change impacts.[43] The San

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[41] *See* AB 32 Scoping Plan at 30, 36-37, 68-69, App. C.

[42] *See generally* Gorte and Ramseur, *Forest Carbon Markets: Potential and Drawbacks*, Cong. Research Svc. Report No. RL34560 (July 3, 2008) (attached as Ex. 18).

[43] Cal. Resources Agency, *Initial Statement of Reasons for Regulatory Action: Proposed Amendments to the State CEQA Guidelines Addressing Analysis and Mitigation of Greenhouse Gas Emissions Pursuant to SB97* (July 2009) at 41-42 (attached as Ex. 19) ("As a practical matter, where a mitigation program or measure is consistent with protocols adopted or approved by an agency with regulatory authority to develop such a program, a lead agency will more easily be able to demonstrate that off-site mitigation

Joaquin Valley Unified Air Pollution Control District has proposed a greenhouse gas offset program that also relies on Board-adopted protocols.[44] At the individual project level, therefore, it is reasonably foreseeable that Protocol credits will ultimately translate into real emissions of greenhouse gases—emissions that might have been reduced or avoided had the credits not been available.[45]

By adopting the Protocol, the Board dramatically limited its ability to consider other alternatives. The Board's adoption of the Protocol will induce reliance on its provisions by private entities. The recent Sierra Pacific Industries/Equinox agreement previously discussed is an excellent example. Forest landowners and others will be encouraged by the Board's endorsement of the Protocol to undertake forest projects largely because of the potential future value of Board-approved carbon offsets and allowances under AB 32 and other compliance schemes.[46]

Public agencies, in turn, will be encouraged to accept carbon offsets created under Board-certified programs as real, effective mitigation measures for greenhouse gas emissions. Accordingly, even if the Board theoretically could assess the Protocol's impacts and improve its standards in conjunction with adopting regulations governing a cap-and-trade system under AB 32, doing so would undermine the settled expectations of forest project participants, investors, holders of Reserve credits, lead agencies, and project proponents relying on Reserve offsets for mitigation. Simply put, if the Board were to change the rules a few months from now, upon a full examination of the Protocol's environmental consequences, it would risk depriving Reserve credits of much or all of their value. As a practical matter, therefore, the Board has effectively committed itself to the adopted version of the Protocol without undertaking the analysis required by CEQA. *See Save Tara*, 45 Cal. 4th at 138-39. The only remedy for this violation is to rescind adoption of the Protocol *now*, before too many private individuals and public agencies take action in reliance on their provisions.

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will actually result in emissions reductions. Examples of such protocols include the [Board-approved] forestry protocols . . . .").

[44] San Joaquin Valley Unified APCD, *Proposed Amendments to Rule 2301* (Sept. 17, 2009) § 4.5.5 (attached as Ex. 20).

[45] *See* U.S. Gov't Accountability Office, *Carbon Offsets: The U.S. Voluntary Market is Growing, but Quality Assurance Poses Challenges for Market Participants*, No. GAO-08-1048 (Aug. 2008) at 8 (attached as Ex. 21) ("it is often cheaper for regulated entities to pay for offsets than to make reductions themselves. . . . However, any use of offsets for compliance that lack credibility would undermine the achievement of the program's goals.").

[46] SPI Press Release at 1 ("The transaction will consist of a series of projects focused on *compliance-ready carbon offsets* registered under the recently approved Climate Action Reserve (CAR) forest protocol Version 3.0.") (emphasis added).

2. The Board's Adoption of the Protocol Will Encourage Trading in Voluntary Markets, Foreseeably Resulting in Further Greenhouse Gas Emissions.

Even in advance of AB 32's cap-and-trade regulations, the Board's adoption of the updated Protocol will greatly increase the value of carbon credits issued according to its provisions. CRTs issued under the Protocol are intended for commercial trade on the current voluntary carbon market, and futures trading in CRTs is already occurring on the Chicago Climate Futures Exchange.[47] According to the Protocol itself, "[a]dherence to the Reserve's high standards ensures that emissions reductions associated with projects are real, permanent and additional, *thereby instilling confidence in the environmental benefit, credibility and efficiency of the U.S. carbon market*."[48] The Board's own staff report confirmed that private trading of CRTs is one of the core purposes of the Protocol. "The forest carbon accounting methods in the updated Forest Project Protocol represent accurate and conservative methods that generate real, additional, permanent, and verifiable forest carbon credits *for the voluntary market*."[49]

The Board's adoption of the Protocol adds to the commercial value of the CRTs issued under this protocol, and thereby provides economic incentives for qualifying projects. Again, Sierra Pacific Industries' announcement of a multi-million dollar deal with Equator LLC, to sell tradable carbon credits using the newly adopted Protocol, perfectly illustrates this point. In the press release announcing the agreement, Sierra Pacific Industries quoted David Brand, Managing Director of New Forests, Inc., an international forestry investment management and advisory services firm, as stating that. "*[t]he endorsement of the CAR Forest protocols by ARB provides some clarity to investors who want to help develop carbon offset supply from forests.*"[50]

The Board's endorsement of the Protocol will thus foreseeably lead to private offset transactions—transactions that will encourage or otherwise facilitate emissions of greenhouse gases. The courts have recognized that public agency endorsements may provide a legally significant impetus to private activities. *See County of Amador v. City of Plymouth*, 149 Cal. App. 4th 1089, 1104-05 (2007) (noting that city's letter of support for tribe's casino proposal lent momentum to the project). Here, the Board has done much more than simply write a letter in support of private action. It has granted the Protocol a stamp of official legitimacy, signaling to the carbon markets that CRTs accumulated under the Protocol will have reliable market value. This is an action with environmental consequences—consequences that the Board failed to consider before adopting the Protocol.

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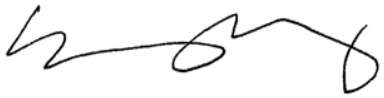
[47] Chicago Climate Futures Exchange, *CCFE® Futures on CCAR CRT™ Emission Offsets* (2009) (attached as Ex. 22).
[48] Protocol § 1 (emphasis added).
[49] CARB Staff Report at 1 (emphasis added).
[50] SPI Press Release at 2 (emphasis added).

For all of the foregoing reasons, the Center urges the Board to rescind its adoption of the Protocol immediately, and to refrain from any further action regarding this or other protocols pending full compliance with CEQA.

Sincerely,



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cc: Sen. Fran Pavley, Chair, Committee on Natural Resources and Water
Assembly Member Nancy Skinner
Assembly Member Jerry Hill
Assembly Member Tom Ammiano
Assembly Member Dave Jones
Assembly Member Julia Brownley
Assembly Member William Monning