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**Re: State action needed to remove two roadblocks to pairing
carbon projects with conservation easements:**

(1) Innocent third parties, such as conservation easement holders, face liability for carbon project reversals due to the broad definition of "Forest Owner," joint and several liability, and vague negligence standard.

(2) Cap-and-Trade buffer pool credit reductions meant to encourage land conservation through conservation easements are not attainable in practice due to interagency conflict between ARB and WCB and impossible timing constraints.



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Ladies and Gentlemen:

The California Council of Land Trusts has prepared this letter to highlight two roadblocks interfering with implementation of the Cap-and-Trade Program with respect to conservation easements, despite statutory and legislative intent.

The California Council of Land Trusts represents over 150 nonprofit conservation organizations with thousands of members throughout California. Our mission is to conserve California's extraordinary land and water resources through a strong network of land trusts with one cohesive voice across urban and rural communities. One of the primary conservation tools that many of our member organizations use to preserve land in this state is the perpetual conservation easement, enabled by California Civil Code Sections 815 – 816. Conservation easements are a type of property right used to permanently protect lands from subdivision, development, overharvesting, or other environmental degradation.

Land conservation is one of the key strategies for battling climate change and the rate of conservation must increase exponentially given the crisis facing us.¹ Forest conservation, in particular, is crucial: Forest pathways, including improved forest management and avoided conversion, offer more than two-thirds of the cost-effective natural climate solutions needed to keep warming to below 2 degrees Celsius,² and natural forest management of privately held forests has the second largest maximum mitigation potential.³

¹ Intergovernmental Panel on Climate Change, *Climate Change and Land: an IPCC special report on climate change, desertification, land degradation, sustainable land management, food security, and greenhouse gas fluxes in terrestrial ecosystems*, at Sections 1.3.2, 4.1.5, 4.8, Table 4.2, approved August 6, 2019 (<https://www.ipcc.ch/report/srccl/>);

² Griscom, *Natural Climate Solutions*, Proceedings of the National Academy of Sciences of the United States of America, October 31, 2017, 114 (44) 11645-11650
<https://www.pnas.org/CONTENT/114/44/11645>

³ Fargione, *Natural Climate Solutions for the United States*, Science Advances, November 14, 2018, Vol. 4 no. 11, <https://advances.sciencemag.org/CONTENT/4/11/EAAT1869>, citing Van Winkle, *US Forest Sector Greenhouse Mitigation Potential and Implications for Nationally Determined Contributions* (RTI Press, 2017).



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California's Cap-and-Trade Program is a key component of the State's battle against climate change. It has generated billions in funding for climate change programs, and was the linchpin in helping the State meet its 2020 greenhouse gas reduction goals early. However, one area in which the Cap-and-Trade Program has not attained such success is the pairing of carbon projects with conservation easements. Large landscape conservation is one of the goals of the Cap-and-Trade Program and it is logical to pair carbon projects with conservation easements as complementary natural climate solutions.

We have encountered two significant roadblocks in pairing Cap-and-Trade projects with conservation easements to increase large landscape conservation. First, the Cap-and-Trade program places undue responsibility for carbon project reversals on innocent third parties, such as conservation easement holders, because of the overly broad definition of Forest Owner and the overly vague definition of intentional reversal. Second, the program's buffer pool credit reduction for qualified conservation easements is impossible to obtain, both because of an impasse between ARB and WCB regarding conservation easement wording and because of unrealistic timing constraints. These unexpected obstructions were likely not envisioned by the legislative members who adopted A.B. 32 to implement the Cap-and-Trade Program, and the obstructions are chilling our state's ability to effectively use carbon projects and conservation easements as compatible tools to combat climate change and loss of forestland.⁴

We request that the California Air Resources Board ("ARB") factor the information from this letter into the next Protocol and remove the roadblocks by regulation or guidance interpreting the existing Protocols. We further request that ARB and the State Wildlife Conservation Board ("WCB") compromise to find mutually acceptable conservation easement wording so that buffer pool credit reductions will be available for WCB-funded working forest conservation easements that are paired with carbon projects. These actions by ARB and WCB will provide certainty and support an active and robust compliance offset

⁴ For a detailed, academic analysis of the roadblocks to using conservation easements and carbon projects complementarily, see Jess R. Phelps & David P. Hoffer, *California Carbon Offsets and Working Forest Conservation Easements*, 38 UCLA J. Envtl. L. & Pol'y __ (forthcoming 2020). A copy is available upon request.



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program. We welcome further discussion with you to find more detailed solutions to the issues highlighted in this letter. The California Council of Land Trusts is uniquely positioned to weigh in on these matters due to our work at the intersection between carbon projects and conservation easements.

A. Overview of Conservation Easements and Carbon Projects as Financing Tools for Timberland Preservation

California has targeted timberland preservation, both from development and from maximal harvest, as a key goal, as advised by the draft *Natural and Working Lands Implementation Plan* issued in April 2019 and ARB's publication, *California's 2017 Climate Change Scoping Plan*. Conservation nonprofits likewise support this goal and, in furtherance of timberland preservation, the Cap-and-Trade Program specifically incorporates three forest protocols for the generation of carbon credits.

Conservation easements and carbon projects can be used as two complementary financing tools to both (1) limit subdivision and development of timberland and (2) limit timber harvest to sustainable levels and increase carbon stocks. So long as the funds are not double-counted and the carbon value is attributable to any timber rights reserved to the landowner under the conservation easement, combination of these two tools is an excellent antidote to the dual threat of increased subdivision and increased harvest on timberlands. This combination also leverages private capital towards conservation and allows limited public funding to go further, working in concert to achieve conservation and carbon goals at a greater scale.

To let either of these tools rust in the woodshed without being fully utilized to meet the State's carbon and climate change goals would be wasteful. Organizations such as Trust for Public Land, Save the Redwoods League, and Pacific Forest Trust are negotiating with timberland owners to limit development and timber harvest rights to preserve the State's natural and working forests. To protect the conservation values on the subject properties, the organization must either purchase the property or acquire a conservation easement. Conservation easements are often preferred over outright purchase because the purchase price tends to be much reduced and because the carrying costs of owning the land will



remain with the landowner, while the conservation organization will only undertake monitoring and enforcement duties under the easement.

Combining a conservation easement with a carbon project opens up more sources of funding: If the easement restricts harvest to a certain level and the landowner agrees to restrict timber harvest *further* via a carbon project, then the funding for that additional timber restriction will come through the carbon market, rather than government grants and charities, thereby spreading the cost between funding sources. Further, combining the tools creates a stronger web of enforcement mechanisms that strengthen the long-term effectiveness of both the carbon project and the conservation easement, reducing the risk of reversal or violation.

However, the California Council of Land Trusts has identified several roadblocks to the successful marriage of conservation easements with carbon projects.

B. Broad Ownership Definition and Excessive Liability Exposure on Carbon Project Land.

First, it is difficult for carbon project proponents and easements holders to understand the types of activities that will give rise to liability under the Cap-and-Trade Program. ARB's Regulations for the Cap-and-Trade Program (the "Regulations") and the Protocols adopted by ARB for Forestry Offset Credits (individually, a Protocol, and collectively, the "Protocols") states that the "Forest Owner" will be liable for any intentional reversals under a carbon project and will be required to purchase and retire offset credits based on the metric tons lost due to the reversal. The Protocols define Forest Owner broadly to include most conservation easement holders and all access easement holders.

California's Cap-and-Trade Program implemented at California Health & Safety Code Section 38500 *et. seq.* (the "Cap-and-Trade Statute") is silent on reversals and the Regulations and the Protocols do not specifically address the allocation of liability for intentional reversals between Forest Owners. Instead, the Regulations and 2015 Protocol state that the "Forest Owner(s)" of a project



will be responsible for purchasing replacement credits for intentional reversals, which implies joint and several liability between all Forest Owners.

The Regulations and the Protocols also do not provide a reasonable standard of care to differentiate between an unintentional reversal and an intentional reversal. Notwithstanding the use of "intentional" in the phrase "intentional reversal," the Regulations set the liability threshold for intentional reversals at "negligence," which is overly vague and inclusive. If the property owner fails to check the oil in a car and the car catches on fire and causes a forest fire, is the owner negligent for pulling to the side of the road when the car caught on fire? Or for failing to check the oil? If the answer is yes, the owner is negligent, then is a conservation easement holder jointly liable with that driver for causing an intentional reversal?

As explained further below, the broad definition of Forest Owner combined with joint and several liability and the vague and high standard of care, pose insurmountable difficulties for conservation easement projects.

1. The Definition of Forest Owner is Too Broad and Includes Conservation Easement Holders

It is important to identify any and all "Forest Owners" for any particular carbon project since a Forest Owner must comply with all requirements of the Protocol and the Cap-and-Trade Statutes and Regulations, and will be responsible for any intentional reversal of the carbon project. The Regulations and the Protocol do not contain a clear standard for what constitutes an intentional reversal. Regulation § 95802 provides a general negligence standard by defining intentional reversal as that caused by the "forest owner's negligence, gross negligence, or willful intent."

Worst case, this means that if one Forest Owner intentionally overharvests or is negligent and causes a catastrophic fire or takes any other action deemed by the ARB to be an intentional reversal, then any other Forest Owner of the same property will be jointly liable with the first Forest Owner and the second Forest Owner must purchase and retire new offset credits in the amount of metric tons reversed if the first Forest Owner fails to do so. (*See* 17 CCR § 95983.)



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The 2015 Protocol defines "Forest Owner" to mean "the owner of any interest in the real (as opposed to personal) property involved in a forest offset project, excluding government agency third-party beneficiaries of conservation easements."

The definition goes on to state that, "[g]enerally, a Forest Owner is the owner in fee of the real property involved in a forest offset project. In some cases, one entity may be the owner in fee while another entity may have an interest in the trees or the timber on the property, in which case all entities or individuals with interest in the real property are collectively considered the Forest Owners..."

Including the fee title owner and any timber rights holders as a Forest Owner makes sense given the parties' ability to control the land through *active* management. However, the definition *also* includes any other entity that holds a real property interest in the property (except for government agency third-party beneficiaries of conservation easements). This broad definition creates joint and several liability for project compliance and intentional reversals for all the following entities, in addition to the fee title owner and timber rights holders:

- Non-government agency third-party beneficiaries of a conservation easement (i.e., tribes and nonprofit third-party beneficiaries)
- Government agencies that directly hold a conservation easement
- Tribes that directly hold a conservation easement
- Nonprofits that directly hold a conservation easement
- Holders of utility easements on the property (e.g., PG&E, AT&T)
- Holders of access easements on the property (e.g., CalTrans, a neighbor using the property's private road, or an open space district with a trail easement)
- Tenants and licensees of the property
- Mineral rights holders
- Water rights holders

Most of these parties are not actively managing the land. Indeed, a conservation easement holder likely will only access the land once per year to monitor the property, unless more frequent access is necessary due to a violation under the easement. The conservation easement holder will not have the right to



remove trees, construct improvements, or undertake any of the typical actions associated with land management.

The term "Forest Owner" should be narrowed so that it does not include all holders of any real property interest in the property. More accurately allocating liability based on wrongdoing would encourage greater responsibility and accountability for actions taken on the property by any specific individual, protect the innocent conservation organizations who are partners with the State and the public in trying to protect the property, and reduce barriers for greater implementation across the State. To hold a neighboring access easement holder or a conservation easement holder liable for an intentional reversal caused by the fee title owner when the easement holder is not even present on the property would be absurd, but joint and several liability potentially leads down that path and deters land trust from engaging in conservation easements paired with carbon offset projects. Allocation of liability based on the specific negligence of any particular party (potentially including an easement holder) would be better policy.

2. Public Access Easements Also Are Chilled by Joint and Several Liability and Vague Negligence Standard

Aside from the threat of liability faced by any holder of a conservation easement on a carbon project, this issue also is particularly relevant for conservation deals because, often, large forest projects that include working forest conservation easements will include a public access trail on a portion of the property. It is also relevant to the sale of carbon project property to public agencies, which is frequently a strategy employed in complex conservation transactions (dubbed "takeouts"). Generally, public access is required to obtain public funding for the purchase of a conservation easement or public lands, because public funders prioritize property that will provide some direct public enjoyment of the preserved land.

Joint and several liability cuts both ways in this scenario: with a public access easement, the *landowner* and *timber rights holder*, instead of the easement holder, are now faced with increased reversal risk due to the public access rights granted to the easement holder. As described in the preceding section, if a Forest Owner



"negligently" causes a fire, all of the Forest Owners potentially will be responsible for purchasing new Offset Credits to reimburse the buffer credit pool for that reversal.

Joint and several liability in the public access scenario raises some important questions. If a member of the public is walking on a public trail and tosses a cigarette butt that causes a conflagration, will that negligence be imputed to the property owner? To the public access easement holder? Will they both be responsible for purchasing new Offset Credits? Is permitting public access *per se* negligent? How closely must the owner or easement holder supervise the members of the public while they are on the protected property? The vagueness of the liability standard – and the costly penalty – have killed more than one public access project that would have been paired with a conservation easement on carbon project land.

To address this interpretational gap, fairly allocate liability, and promote these public-private partnerships to both preserve timberland and provide the public with access to open space, ARB should provide (1) guidance allocating negligence for public access to only the public access easement holder and the individual accessing the property, and (2) minimum standards for public trail management that will shield the public access easement holder and the landowner. It would also be helpful if the term "intentional reversal" captured only intentional actions, as opposed to negligent actions, to properly allocate liability on a more rational basis.

3. Subsequent Division of Property Ownership Is Problematic

Joint and several liability also poses a problem for subsequent divisions of the property, which is not adequately addressed in the Protocols and the Regulations. Currently, upon the separation of ownership, the new owner is deemed a Forest Owner, the old owner continues to be a Forest Owner, and they are jointly liable for an intentional reversal on any portion of the project's footprint – even if the reversal takes place on the "other" Forest Owner's portion. Separation of ownership is likely to happen for large tracts of timberland and this is another barrier to participation some potential offset project participants that are encumbering their properties with a conservation easement.



A process should be developed for project proponents to modify the project and baseline upon property division, perhaps with an acreage cap⁵ to prevent excessive splintering of carbon projects.

C. Despite State's Intent, Projects Protected by Conservation Easements Cannot Take Advantage of Reduced Buffer Pool Obligation

Another area of concern is the virtual impossibility for a conservation easement to be characterized as "qualified" under any of the Protocols, contrary to regulatory intent indicating a desire to pair conservation easements with carbon projects.

Unfortunately, carbon projects can be quite costly to implement and often the numbers do not justify undertaking the project. Fortunately, the State has provided an incentive to offset these costs in the Improved Forest Management Protocols. If a conservation easement is "qualified" under the applicable Protocol, the landowner will receive extra offset credits available as buffer pool credits, which can bridge the gap and encourage a landowner to undertake the full conservation deal. But, we are unaware of any carbon project paired with a conservation easement that has benefited from the reduced buffer pool diversion, indicating that this component of the Protocol has failed.

1. Conservation Easements Should Warrant a Buffer Pool Credit Reduction

The buffer pool is basically a form of insurance implemented in ARB's Cap-and-Trade Regulations. The buffer pool is a holding account administered by ARB, in which forest offset credits are deposited from each project to buffer against losses caused by unintentional reversals. The amount of credits required to be deposited from each project depends on the project, but will inevitably reduce the total number of credits received and monetized by the project

⁵ One possibility is to mirror a conservation easement's subdivision restrictions, which share the same objective.



proponent. If the project is coupled with a qualified conservation easement, then the number of credits required to be diverted to the buffer pool can be reduced.

Reducing the number of buffer credits diverted to the buffer pool from conservation easement properties makes sense because a conservation easement property is less risky than a non-conservation easement property given this additional layer of protection. A conservation easement on working timberland will require the property to be monitored and inspected at least once per year by the easement holder, bringing in additional third-party oversight and helping to mitigate against landowner actions that may increase reversal vulnerability with inappropriate management. In addition, the forest management plan required by the Protocols will receive third party review, support, monitoring, and enforcement from the easement holder. However, not just any conservation easement will give rise to a reduced buffer pool obligation: the conservation easement must be "qualified."

2. What Makes a Conservation Easement "Qualified" for a Buffer Pool Reduction?

The concept of a qualified conservation easement first appeared in the Compliance Offset Protocols, and is not a creature of statute or regulation. It is defined in the 2015 Protocol as "a conservation easement that explicitly refers to the requirements of the regulation and this protocol and apply [sic] to current and all subsequent forest owners for the full duration of the forest project's life." To be qualified, the easement:

"must be granted by the owner in fee to a qualified holder of a conservation easement in accordance with the conservation easement enabling statute of the state in which the project is located; be perpetual in duration; and expressly acknowledge that ARB is a third-party beneficiary of the conservation easement with the right to enforce all obligations under the easement and all other rights and remedies, including standing as an interested party in any proceeding affecting the easement, conveyed to the holder of the easement."



3. The Problem: Conservation Easement Projects Are Never Qualified for Buffer Pool Reductions

There are three primary reasons for this failure: (a) interagency conflict between ARB and WCB, (b) timing issues related to verification, and (c) timing issues related to phased easements.

(a) Interagency Conflict Between ARB and WCB

As mentioned above, the current Protocol requires any qualified conservation easement to “expressly acknowledge that ARB is a third-party beneficiary of the conservation easement with the right to enforce all obligations under the easement and all other rights and remedies, including standing as an interested party in any proceeding affecting the easement, conveyed to the holder of the easement.”

WCB will not permit this language in any easement receiving funding from WCB, unless ARB agrees to “subordinate” its third-party enforcement rights to WCB’s enforcement rights. It is unclear what it means to subordinate an enforcement right: Arguably, each agency should have its own right to enforce and intervene, irrespective of another agency’s right to enforce and intervene. To our knowledge, WCB has not required this “subordination” from any other state funders that are third-party beneficiaries named in a WCB-funded conservation easement, such as the State Coastal Conservancy, Resources Agency, Department of Forestry and Fire Protection, and Department of Fish and Wildlife.

ARB will not agree to the subordination language because the Protocol does not contemplate subordination to another agency.

This jurisdictional dispute between WCB and ARB is perplexing. Resolution may require external intervention by the Governor’s Office or Resources Agency if the State wishes to utilize conservation easements as a resource to reduce GHG emissions via its Cap-and-Trade Program. Because most conservation easements over working forests with a carbon project component will involve WCB funding due to the size and cost of these projects, this inter-agency disagreement has



chilled the ability to qualify virtually any conservation easement for a buffer credit reduction.

(b) Timing Issues Related to Project Verification and Easement Recording

If the conservation easement is not recorded during the carbon project's initial reporting period, then it will not qualify for that reporting period. This is a problem because the initial reporting period provides the biggest flush of credits and full verification for the initial reporting period (and credit issuance) will not take place until *after* the initial reporting period. The project proponent must therefore record a permanent conservation easement referring to – and reduce its purchase price in reliance on – a carbon project that it has no assurances will come to fruition.

Currently, initial verification can take from 9 months to 13 months to complete following project commencement, but it can only begin after the initial reporting period has ended. The acreage or the project footprint can change throughout the verification period and are not required to be certain during the initial reporting period. So, the number of credits issued is not finalized until verification is complete. Why, then, can the conservation easement not be recorded during the initial verification period? If the credits are in flux, then the buffer pool reduction can also be in flux for that same period of time.

Of the only two conservation easements we are aware that were able to escape the jurisdictional battle between ARB and WCB (by predating it), one failed to qualify on this timing point because its conservation easement recorded after the end of the initial 6-month reporting period, but before the verification was complete.⁶

The timing barrier serves as a material bar to sequencing a working forest conservation easement and a forestry-based carbon offset project. Conservation

⁶ The other conservation easement failed to qualify because it excluded a small portion of the project area. This is another issue entirely that begs the question of why the buffer pool credit reduction cannot be proportionately allocated.



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easements take a long time to develop and negotiate. If a conservation easement and carbon project are being developed simultaneously, a mechanism should be created to permit the conservation easement to qualify even if it is not recorded in the overly narrow reporting period window. ARB should have flexibility to work with landowners and easement-holders, with sufficient assurances that the working forest conservation easement will be entered into within some reasonable period of verification and will ensure additionality,⁷ to allow for better alignment between these two funding streams – which is critically important to ensuring that these conservation finance tools are collectively available.

At the very least, if credits are available retrospectively to prior reporting periods once a project has been verified, then, buffer pool credits also should be available retrospectively where the conservation easement is recorded during the verification period.

(c) Working Forest Easements Are Typically Phased

Timing constraints also present challenges for phased working forest conservation easements. Phasing in a conservation easement over an entire project area is a strategy often utilized by land trusts and timberland owners to allow for the conservation of these lands to happen over time. As some of these forest properties can be sizable and require substantial funding for the purchase of a working forest conservation easement, multiple annual funding cycles may be required if relying on public financing. Phasing does not work with a carbon project, though, because the qualified easement must cover the entire project area.

There are likely a number of ways that ARB could address its legitimate concerns regarding timing and parcel configuration while also ensuring that these easements are ultimately conveyed over the entire project area, such as (1) requiring a signed purchase or option agreement and/or expanding the time horizon for these projects to actually be finalized or receive post-verification credits and (2) prorating the buffer credit reduction based on the percentage of project area covered by each particular easement.

⁷ Additionality requirements are discussed in the Regulations at section 95973(a)(2).



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Granting ARB the discretion to deem a series of phased conservation easements "functionally equivalent" to a qualified conservation easement could be another solution. A parallel scenario exists in the context of certain tribe-held property interests: Because the regulations and the Protocol are silent in that situation, ARB is able to exercise discretion and has declared certain tribe-held property interests to be "functionally equivalent" to a qualified conservation easement, permitting the project to receive a buffer credit reduction even though this type of property interest is not a "qualified conservation easement."

Any steps in this direction for conservation easements generally would help to maximize the opportunities for both tools to work together in a mutually beneficial manner and on a larger landscape scale, which is crucial to use land conservation efforts effectively and efficiently in the battle against temperature rise.

D. Conclusion

Offset projects, particularly those involving lands the size and scale of the forest holdings that are candidates for large working conservation easements, present a unique opportunity to facilitate working land conservation while also addressing the State's climate-related goals. Based on the collective experience of the California Council of Land Trusts' members, it is impossible to achieve currently, due to unclear liability exposure for intentional reversals, the timing issues in the Protocols, and the jurisdictional standoff between ARB and WRB. Timely and effectively addressing these issues may prove to be a significant step towards meeting the State's climate objectives as well as securing the future of the State's forest economy and working landscape. The California Council of Land Trusts is available to explore and propose solutions to these issues and welcomes further dialogue with the state agencies charged with fighting climate change.



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Sincerely,

A handwritten signature in blue ink, appearing to read "Ane Deister". The signature is fluid and cursive, with a prominent initial "A" and "D".

Ane Deister
Executive Director
California Council of Land Trusts

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