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Chairman TAC 10/25/07
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October 9, 2007

Via Facsimile and U.S. Mail

Honorable Chairperson Mary Nichols and Honorable Members
California Air Resources Board
1001 I Street
Sacramento, CA 95812

ORIGINAL: Board Clerk
Copies: Executive Officer
Chair

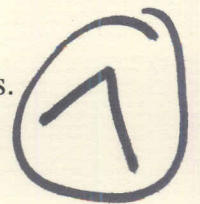
Re: Forest Project Protocol—The Important Role of Conservation Easements

Dear Chairperson Nichols and Members of the Board:

We write on behalf of the Pacific Forest Trust to address an important element of the California Climate Action Registry's ("Registry") proposed Forest Project Protocol, California Climate Action Registry, *Forest Project Protocol*, Version 2.1 (Sept. 2007) ("Protocol"), which the Air Resources Board ("Board") will consider endorsing at its October 25th meeting. Specifically, we write to underscore the importance of the Protocol's reliance on conservation easements to ensure that forest projects achieve permanent carbon emission reductions and environmental co-benefits (collectively "forest project benefits"). We understand that some stakeholders, and possibly members of the Board, may have questions or concerns about the use of conservation easements.

Shute, Mihaly & Weinberger LLP has extensive experience representing land trusts, public agencies, and other organizations that create and hold conservation easements. It is our opinion that a well-designed and implemented conservation easement is the best mechanism available to provide reasonable certainty that the carbon emission reductions achieved by forest projects under the Protocol will be permanent. Accordingly, we believe that the Board should endorse the Protocol's use of conservation easements.

This letter begins with a general introduction to conservation easements. We then discuss the advantages of easements for ensuring the permanence of forest



project benefits. Finally, we address some common misconceptions about the use of easements in this context.

I. Conservation Easements and the Protocol

A. The Protocol's Requirement of a Perpetual Conservation Restriction

In 2002, the Legislature adopted SB 812, which directed the Registry to develop the forestry protocols. 2002 Cal. Stat. ch. 423. In doing so, the Legislature required that

Forestry activities that are reported as a participant's emissions results, or a part thereof, shall occur on forestland that is permanently dedicated to forest use through a restriction, granted in perpetuity, on the use that may be made of real property that is consistent with the conservation purposes listed in Section 170(h)(4)(A)(ii) and (iii) of Title 26 of the United States Code.

2002 Cal. Stat. ch. 423, § 2 (codified at Health & Saf. Code § 42823(d)(2)). The Protocol implements this provision of SB 812 by requiring that property on which forest projects are undertaken be subject to a "perpetual easement" restricting the use of the property in perpetuity and requiring forest restoration in the event of loss due to natural disturbance. *See* Protocol at 16-17.

B. An Overview of Conservation Easements

An easement is a nonpossessory interest held by one party in land owned by another party. In the 1970s, California adopted a statutory framework authorizing the creation and enforcement of conservation easements.¹ *See* Civ. Code §§ 815-816. The "perpetual easements" referred to in SB 812 and in the Protocol itself would include easements adopted under the conservation easement statute.²

¹ A statute was likely necessary to create perpetual conservation easements. The benefit of an easements may be "appurtenant" to another parcel of property, such as where a right of way easement provides access to an adjacent property, or "in gross," where the benefit is held by a person rather than being attached to property. At common law, easements "in gross"—including conservation easements—would not bind subsequent owners of the property subject to the easement. *See* Andrew Dana & Michael Ramsey, *Conservation Easements and the Common Law*, 8 Stan. Envtl. L.J. 2, 12-14 (1989).

² Conservation restrictions other than the easements authorized by the statute may also qualify under SB 812. As a practical matter, however, such restrictions are likely to be

A conservation easement restricts the use of land “to retain land predominantly in its natural, scenic, historical, agricultural, forested, or open-space condition.” Civ. Code § 815.1. So long as the easement satisfies this statutory conservation purpose, the precise terms of the easement are up to the parties creating the easement. The easement’s limitations on the use of property are designed to be perpetual. *Id.* § 815.2(b). To guarantee that the easement’s protections are perpetual, the easement “runs with the land,” meaning that future owners of the property remain bound by its terms though they were not themselves signatories to the document that created the easement. *Id.* §§ 815.1, 815.7(a).

The easement may be held only by a non-profit organization, governmental entity, or federally recognized Indian tribe. *Id.* § 815.3. In addition to imposing general and specific limitations on the use of the property, easements typically empower the easement holder to monitor the landowner’s use of the property to ensure that the easement is not being violated. *See, e.g.,* Elizabeth Byers & Karin Marchetti Ponte, *The Conservation Easement Handbook* (2d ed. 2005), at 366 (model easement; “Holder is hereby granted the right to reasonable entry and access to the Protected Property for inspection and monitoring purposes and for enforcement of the terms of this easement”). If necessary, and always as a last resort, the easement holder may go to court to enforce the terms of the easement. Civ. Code § 815.7. The easement holder may seek an injunction to prevent violations of the easement or impairment of the values it protects and may obtain damages for any harm done to those “scenic, aesthetic, or environmental value[s]” of the property. *Id.* The prevailing party in such a lawsuit may also obtain its attorneys’ fees. *Id.* § 815.7(d).

II. The Advantages of Including Conservation Easements in the Protocol

The Protocol explains the rationale for requiring conservation easements for forest projects as follows:

The purpose of the easement requirement is twofold. The easement acts as a legal guarantee that a project’s existing and additional forest carbon stocks can remain protected in perpetuity by requiring forest practices that protect and encourage additional carbon stocks. If a natural disturbance resulted in the loss of forest carbon, the easement terms would facilitate the restoration

rare because of the legal difficulties in ensuring their perpetual duration. *See supra* note 1. Accordingly, we assume for purposes of this letter that the “perpetual easement” used to comply with the Protocol’s permanence requirement will be a conservation easement adopted under Civil Code section 815 *et seq.*

of the forest and as a result, carbon stocks. The easement also facilitates environmental co-benefits, since it must be consistent with the open space and natural habitat terms of the Internal Revenue Code, as stated above.

Protocol at 17 (footnote omitted). Stated otherwise, conservation easements ensure the permanence of forest project benefits. The following sections explain in greater detail how some of the features of conservation easements and the entities that hold them will ensure the permanence of forest projects' achievements.

A. Monitoring and Enforcing Compliance

To ensure that forest project benefits are permanent, use of the project property must be monitored over the long term and attempts to undo those benefits must be prevented. The Protocol and SB 812 provide a monitoring and enforcement mechanism by requiring that the conservation elements of forest projects be enshrined in conservation easements.

As noted above, conservation easements can be monitored and enforced by the easement holder. *See* Civ. Code § 815.7. Because they may hold many easements over large areas of land, land trusts and government agencies that hold conservation easements must develop expertise in efficiently monitoring compliance with those easements. By necessity, monitoring cannot be too intrusive, because micro-managing lands subject to easements would be enormously resource-intensive.

If monitoring reveals a potential easement violation, the easement holder must decide how best to help the landowner return to compliance. Again, by necessity, easement holders' enforcement efforts tend not to be heavy handed. Where they find potential violations, they typically work with the landowner to try to address the problem. More formal and aggressive enforcement measures are a very last resort. In a nationwide survey, 209 land trusts reported 498 conservation easement violations, but only *six* of those violations—approximately one percent—were resolved by a court. *See* Jessica E. Jay, *Land Trust Risk Management of Legal Defense and Enforcement of Conservation Easements: Potential Solutions*, 6 *Envtl. Lawyer* 441, 458 (2000). Similarly, despite the fact that the California conservation easement statute has been in place since the 1970s, there is not a single published California judicial decision in a conservation easement enforcement case.

Easement holders have several incentives to work cooperatively with landowners to resolve compliance problems. First, more formal enforcement measures, such as litigation, tend to be very expensive. As not-for-profit corporations or budget-restricted government entities, easement holders typically lack the resources necessary

for protracted litigation. Second, because these organizations rely heavily on landowners' voluntary contributions of easements, *see* Civ. Code § 815 (noting the legislative purpose of the statute to "encourage the voluntary conveyance of conservation easements to qualified nonprofit organizations"), they cannot afford to be viewed in the community as meddlesome micro-managers or litigious busybodies.

Nevertheless, the easement statute gives easement holders the power to enforce the easement in a lawsuit seeking injunctive and/or damages relief. The implicit threat of litigation as a last resort to enforce an easement may play an important deterrent role. Litigation may occasionally be necessary to ensure that a landowner cannot continue to violate an easement with impunity.³

B. Binding Subsequent Landowners

Some might assume that a landowner who voluntarily undertakes a forest project covered by the Protocol will do so in good faith and not thereafter attempt to use the property in a way that causes loss of forest project benefits. If so, monitoring and enforcement might not be a significant concern with respect to those landowners.⁴ Regardless, however, that assumption clearly does not apply to *subsequent* owners of the property. Many subsequent owners will have different priorities for the land and lack the commitment of the original landowner to protect forest project benefits. *See* Jay, *supra*, at 457. Indeed, in a review of nineteen published judicial opinions (nationwide) involving conservation easements or similar conservation restrictions, in all but two, the party subject to the easement or restriction was a subsequent landowner rather than the original party to the restriction. *See* Melissa K. Thompson & Jessica E. Jay, *An Examination of Court Opinions on the Enforcement and Defense of Conservation Easements and Other Conservation and Preservation Tools: Themes and Approaches to Date*, 78 Denver U. L. Rev. 373 (2000), at 375.

³ This firm is presently litigating one of those rare enforcement actions. *See Sonoma Land Trust v. BBRRBR LLC*, Sonoma County Superior Court No. SCV-239392 (filed September 22, 2006). The plaintiff land trust filed suit (along with the California Coastal Conservancy) only after nearly ten years of attempts to work with the landowner were unsuccessful in achieving compliance with the easement.

⁴ In fact, we think this assumption is too optimistic. Without suggesting that many landowners would attempt to skirt the restrictions they agreed to, it is still likely that some will encounter changed circumstances or other reasons to seek to avoid those restrictions.

To ensure that subsequent landowners do not cause losses of the benefits achieved by the original landowner's forest project, the original landowner's commitment must be binding on all subsequent landowners. The conservation easement statute explicitly provides that the easement "runs with the land" and binds subsequent landowners to the terms of the easement. Civ. Code §§ 815.1, 815.7(a). Accordingly, if necessary, the easement holder can enforce the easement against subsequent owners.

C. Notice to Subsequent Landowners

A conservation easement must be recorded. Civ. Code § 815.5. Accordingly, the easement will appear in the chain of title for the property, and a subsequent purchaser of the property will have notice of the perpetual limitations on the use of the property. Even if landowners were required by law to adhere to limitations on the use of forest project property, some subsequent owners of the property might be ignorant about the legal requirements applicable to the property and attempt to use the property in ways inconsistent with permanent protection of forest project benefits. By contrast, where a property is subject to a conservation easement, subsequent purchasers will be notified of the limitations on use of the property when the purchaser performs title research for the property. Notice to subsequent purchasers thus prevents inadvertent loss of the benefits achieved by the project.

D. Clarity of Easement Restrictions

Although the clarity of land use restrictions in easements will vary from easement to easement based on the text of the instruments that created them, in general the easement provides the landowner with a roadmap to the permitted and prohibited uses of the property. Indeed, land trusts' experience with conservation easements has taught them to be as specific as possible in describing the land uses that are allowed or disallowed under the easement. *See* Thompson & Jay, *supra*, at 409. As a result, the landowner has fairly clear guidance about what it can and cannot do with its property. Like the notice provided by recordation, the explicitness of conservation easements reduces the risk that forest project benefits will be inadvertently lost.

III. Responses to Common Concerns

We understand that some stakeholders involved in the Protocol process have concerns about the use of conservation easements. Many of these concerns appear to be based on common misconceptions about how easements operate or would operate in this context.

A. Easements Need Not Prohibit Productive Use of a Property

Some appear to believe that a conservation easement necessarily prohibits all productive economic use of the subject property. Far from it. In fact, many easements are specifically designed to protect working landscapes. As just a few examples, the Marin Agricultural Land Trust has used agricultural conservation easements to great effect in ensuring that working family farms in western Marin County remain in production instead of being converted to other uses. *See Marin Agricultural Land Trust*, <www.malt.org>. The California Rangeland Trust does the same thing with ranchlands, preserving the productive use of those lands for ranching. *See California Rangeland Trust*, <www.rangelandtrust.org>. In both cases, one of the principal purposes of the easement is preserving a particular economic use of property and its associated way of life.

In essence, a conservation easement is nearly a blank slate. The limitations on the use of the property are dictated by the terms of the easement, so the easement can be drafted by the parties to allow or disallow a wide variety of uses. The only restriction on the range of possible uses allowed are the conservation purposes in the California statute—“preservation of land in its natural, scenic, agricultural, historical, forested, or open-space condition,” Civ. Code § 815—and in the Internal Revenue Code—“the protection of a relatively natural habitat of fish, wildlife, or plants, or similar ecosystem[or] the preservation of open space (including farmland and forest land) where such preservation is . . . for the scenic enjoyment of the general public, or . . . pursuant to a clearly delineated Federal, State, or local governmental conservation policy,” 26 U.S.C. § 170(h)(4)(A). These purposes plainly prohibit wholesale conversion of land to urban uses, but they leave a broad swath of discretion to the parties in establishing what uses will be allowed to continue on the property.

Further, by our reading, the Protocol does not contemplate that an easement imposed on a forest project property will prohibit all use of the property. Rather, the intention appears to be that use will be limited in such a way as to augment stored carbon, such as by extending the time to harvest to allow trees to accumulate more carbon. The Protocol acknowledges that, depending on the kind of forest project implemented, the property will continue to remain in productive use for forestry purposes, though the allowable forest practices may be restricted.

B. A Simple Contract Is Not an Adequate Substitute for an Easement

Some have suggested that forest project benefits could be protected by requiring the landowner to enter an ordinary contract that limits future use of the

property. Such a contract would be inadequate to ensure the permanence of forest project benefits.

A contract creates personal rights and obligations as between the parties to the contract. Unlike a conservation easement, a contract does not create a property right in either party. This has important ramifications for the Protocol. First, because contractual rights and obligations are personal—they attach to the individuals who sign the contract, not to particular properties—future owners of a property generally will not be bound by the contract. As noted previously, the conservation easement statute responds to that very problem and ensures that the easement will “run with the land” to bind successive property owners. As also noted above, binding successive owners is crucial to ensure that forest project benefits are protected in perpetuity.

Second, while property rights may be enforced by issuance of an injunction (as the conservation easement statute explicitly provides, Civ. Code § 815.7), contractual rights typically are enforceable *only* in an action for damages. In other words, where a conservation easement applies to a property, the easement holder may obtain a court order forbidding the landowner from taking action to violate the easement. By contrast, a party holding a contractual right may be unable to obtain an injunction and instead must accept only monetary damages for the breach of contract. Money is a poor substitute for the carbon sequestration and environmental co-benefits provided by Protocol-compliant forest projects. In some (and perhaps many) cases, uses of a property that would eliminate forest project benefits—such as conversion to residential use—would be sufficiently lucrative that the landowner might violate the contract knowing that she could pay the required damages and still reap a substantial profit.

C. Easements Would Be Effective in Securing Carbon Stocks

Some may argue that conservation easements would do little good in preserving carbon stocks, perhaps because they would allow some extractive forest uses to continue. In fact, by preventing wholesale conversion of forest land to urban uses, the easement would ensure that (1) existing carbon stocks are not eliminated so as to release stored carbon, and (2) that the forest continues to sequester additional carbon over time. Although extractive use may continue, the Protocol’s requirement of additionality means that the easement would prohibit some forest practices that otherwise would lead to the loss of sequestered carbon. The easement also would require reforestation—and restoration of carbon stocks—after natural disturbance. Protocol at 17. As described elsewhere throughout this letter, the easement enshrines the Protocol’s requirements in a form that will allow those requirements to be enforced over time.

Chairperson Nichols and Members of the Board

October 9, 2007

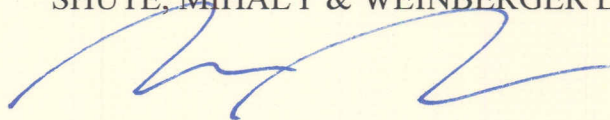
Page 9

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In sum, we think conservation easements are an important component of the proposed Protocol, to ensure that forest project benefits are preserved in perpetuity. We welcome any questions you may have about our analysis.

Very truly yours,

SHUTE, MIHALY & WEINBERGER LLP



MATTHEW D. ZINN

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