

April 4, 2014

California Air Resources Board
1001 I Street
Sacramento, CA 95814

RE: March 21, 2014 Notice of Public Availability of Modified Text and Availability of Additional Documents and Information

To Whom it May Concern:

Thank you for the opportunity to comment on the noticed proposed 15-day changes to the Cap and Trade Regulation.

New Forests is a funds management company that manages over \$2 billion in capital for sustainable timberland and environmental markets investment. Through multiple fund vehicles, we are currently developing over 111,000 acres of forest carbon offset projects for the California cap and trade system, and we are a leading supplier of forest carbon offsets to the California compliance carbon market.

Our comments on the proposed 15-day changes are:

- Sections 95973(b) and 95985(c)(2). **Recommendation: restore the pre-15 day amendment language to 95973(b) to create a clearly defined threshold for a breach of law that prevents offset issuance, and amend 95985(c)(2) to avoid a problematic inconsistency with 95973(b) that could place ARB in the situation of issuing an offset credit and then immediately invalidating it.**
 - **Section 95973(b).** The 45-day amendments added *“In addition, an offset project must also fulfil all local, regional, and national environmental and health and safety laws and regulations that apply based on the offset project location and that directly apply to the offset project, including as specified in a Compliance Offset Protocol. The project is in regulatory compliance if the project activities were not subject to enforcement action by a regulatory oversight body during the Reporting Period. An offset projects is not eligible to receive ARB or registry offset credits for GHG reductions or GHG removal enhancements for the entire Reporting Period if the offset project is not in compliance with regulatory requirements directly applicable to the offset project during the Reporting Period.”*
 - This created a clear safe harbor rule, in which offset credits could be issued unless the offset project activity was in breach of directly applicable environmental, health or safety law or regulation that led to an enforcement action by a regulatory oversight body during the Reporting Period. However, the 15-day changes amended the second sentence to read *“The project is out of regulatory compliance if the project activities were subject to enforcement action by a regulatory oversight body during the Reporting Period”*, which eliminates the safe harbor, as this new sentence will be read as simply enumerating one of many possible ways for offset projects to be out of regulatory compliance.

- Without a safe harbor that clearly defines when a breach of a health/environmental/safety law or regulation is material enough and applicable enough to prevent offset issuance, ARB will find itself in the position of either (a) denying issuance of offsets for very minor or technical breaches of applicable laws and regulations that have no relation to the project activity and achieved carbon sequestration/emissions reduction; or (b) subjectively deciding on a case by case basis that minor or technical legal breaches should not be grounds for denying offset issuance, but without the support of any clear language in the regulation that would allow for such issuance. For example, if a logging subcontractor on a forest carbon project area is found by a regulatory agency to not be wearing a hardhat or other required safety equipment part of the workday, and this violates OSHA regulations, should offsets not be issued for the applicable reporting period? If a water board in California issues a letter to a landowner requiring improvements to stream crossings on roads recently damaged by flood within a forest offset project area, should offsets not be issued for the applicable reporting period? There are many instances where regulatory agencies charged with overseeing compliance with health, environmental and safety regulations issue letters noting minor breaches and requiring a regulated entity to implement a remedial action, but without instituting any formal legal proceedings or fine or other enforcement action. Do such letters constitute a breach that prevents offset issuance? After the 15-day amendments, it would seem that such letters would prevent issuance. **We recommend deleting the 15-day changes to “The project is in regulatory compliance if the project activities were not subject to enforcement action by a regulatory oversight body during the Reporting Period.”**
- **95985(c)(2).** Regardless of whether the 15-day amendments to 95973(b) are retained or abandoned, the language is inconsistent with Section 95985(c)(2), which states that one ground for invalidation of offsets is if “the offset project activity and implementation of the offset project was not in accordance with all local, state, or national environmental and health and safety regulations during the Reporting Period for which the ARB offset credit was issued.”
 - Section 95973(b), prior to the 15-day amendments, would not deny offset issuance unless there was a breach of an environmental, health, or safety law or regulation that applies based on the offset project location and directly applies to the offset project and that leads to an enforcement action by a regulatory oversight body. After the 15-day amendments, Section 95973(b) would not deny offset issuance unless there was a breach of such a law or regulation that apply based on the offset project location and directly apply to the offset project.
 - However, Section 95985(c)(2) as drafted is grounds for invalidating an offset if the offset project activity was not in accordance with *all* local, state, or national environmental and health and safety regulations, regardless of whether they apply based on the offset project location, regardless of whether they directly apply to the offset project, and regardless of whether they lead to an enforcement action by a regulatory oversight body.
 - Thus, if ARB lets the existing inconsistencies stand between 95973(b) and 95985(c)(2), ARB could find itself in the position of being required by the regulation to allow the issuance of an offset and then immediately invalidate it.

For example, an offset project could be in breach of an environmental or safety law that does not directly apply to the offset project: 95973(b) would allow the issuance of an offset in this situation but 95985(c)(2) would require that offset to be invalidated. Under the pre-15 day language of 95973(b), an offset project could be in technical/minor breach of an environmental or safety law, but not subject to an enforcement action by a regulatory agency: the pre-15 day 95973(b) language would have allowed the issuance of an offset in such a situation, while 95985(c)(2) would require invalidation in the same situation.

- **Therefore, in light of the 15-day and 45-day changes to 95973(b), we recommend that 95985(c)(2) be amended to read “the offset project activity and implementation of the offset project was not in accordance with all local, state, or national environmental and health and safety laws and regulations that apply based on the offset project location and that directly apply to the offset project during the Reporting Period for which the ARB offset credit was issued. The project shall be deemed in compliance with such environmental and health and safety laws and regulations if the project activities were not subject to enforcement action by a regulatory oversight body during the Reporting Period.”**
- **Section 95977.1(b)(3)(M).** We support the addition of the double underlined text that clarifies that *“The offset verification team shall use professional judgment in the determination of correctable errors, including whether differences are not errors but result from truncation or rounding”*. This section also requires the OPO/APD to make “all possible improvements”, however, and **we recommend that the above sentence be amended to state “The offset verification team shall use professional judgment in the determination of possible improvements and correctable errors. . .”**
 - A negative OVS should not be issued for uncorrected typos or grammatical errors or similar minor errors; the verifier should be able to use professional judgment to decide whether a change is really an improvement.
- **Section 95978(e).** The 15-day changes define direct supervision of technical experts to mean an accredited verifier’s physical presence or availability within four hours of travel time. In the forest carbon context, technical experts are employed by verifiers to conduct data checks on forest inventory. The data checks in sequential sampling can require weeks of time. There are not many accredited verifiers at this time.
 - Requiring an accredited verifier to remain within four hours of a technical expert conducting a sequential sampling data check is: (a) unnecessary, as technical experts are employed in the forest carbon due to their expertise in field forest inventory techniques, are trained by accredited verifiers according to clear criteria, and can take photos or video of any unusual situation to send to an accredited verifier for decisions; (b) expensive, and will drive up verification costs significantly with no similar improvement in accuracy; and (c) personally problematic for accredited verifiers of forest projects – as more forest projects enter verification, they could conceivably be

- required to spend much of the year in motels within four hours of an active sequential sampling data check.
- **We recommend amending this language to require accredited verifiers to be available within one hour via telecommunications to address any questions raised by the technical expert. In the forest carbon context, technical experts could then carry cell or satellite phones and send photos or videos to accredited verifiers from the field with questions. Verifiers could respond immediately. Direct supervision would be maintained without requiring accredited verifiers to remain within four hours of a technical expert who may be spending weeks in a remote area working on a data check.**
 - **Section 95977.1(a)** has been amended to read *“An Offset Project Operator or Authorized Project Designee may contract with a previous verification body or offset verification team member(s) only if at least three consecutive Reporting Periods have been verified by a different verification body or offset verification team member(s) before the previous verification body or offset verification team member(s) is selected again”*.
 - In the forest carbon context, one could conceivably contract with verifier X for verification in year 1 and 2 of a project, and then with verifier Y to truncate the invalidation period to 3 years. Under this language the OPO/APD would not be able to contract with verifier X again until the project had been verified for at least three consecutive reporting periods by verifier Y, even though verifier X has only verified the project twice.
 - **We recommend amending the language in Section 95977.1.(a) to make clear that the rotation requirement only applies to situations in which an OPO/APD has previously contracted with a verification body for 6 consecutive Reporting Periods.** The language could be modified as follows (changes in bold):
 - An offset project shall not have more than six consecutive Reporting Periods verified by the same verification body or offset verification team member(s), unless otherwise specified in section 95977.1(a)(1) or (a)(2). An Offset Project Operator or Authorized Project Designee may contract with a **(delete: previous)** verification body or offset verification team member(s) **(add: with which they have previously contracted for six consecutive Reporting Periods)** only if at least three consecutive Reporting Periods have been verified by a different verification body or offset verification team member(s) before the **(delete: previous)** verification body or offset verification team member(s) **(add: with which they have previously contracted for six consecutive Reporting Periods)** is selected again, unless otherwise specified in section 95977.1(a)(1) or (a)(2).

While we recognize that ARB will only respond to comments on the 15-day changes, we were not able to submit comments for the 45-day comment period, and we are therefore submitting comments here on the 45-day changes as well in case they are useful. Our comments on the 45-day changes are:

- **Section 95974(a)(2)** is amended to read: “The Offset Project Operator may delegate responsibility to the Authorized Project Designee for performing or meeting all the requirements of sections 95975, 95976, 95977, 95977.1, 95977.2, 95980, 95980.1, 95981, 95981.1, ~~95983~~, and, where the APD is specifically identified, the requirements in sections ~~95983~~, 95985, and 95990, ~~where specifically identified~~ on behalf of the Offset Project Operator.
 - For clarity, **we recommend amending this to read “and, optionally and in addition, where the APD is specifically identified, the requirements in sections 95983, 95985, and 95990.”**
 - This clarification makes it clearer that OPOs and APDs can contractually decide on a case by case basis as to whether the APD is accepting liability for reversal and invalidation risk.
 - If ARB only allows OPOs to designate APDs if the APDs also accept liability for reversals and invalidation (which are in the case of forestry more in the control of the OPO than the APD), there may be very few APDs, increasing the number of regular interactions by ARB and the OPRs with first-time or one-time OPOs developing their first or only project.

Thank you for considering our comments.