Carbon Projects and Working Forest Conservation in California

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I. INTRODUCTION

In 2006, California passed Assembly Bill 32, the Global Warming Solutions Act, which set ambitious goals for the state to reduce carbon emissions with the aim of dramatically curtailing the levels and impacts of anthropocentric-driven climate change.[1] In 2011, the state added a cap-and-trade component to its efforts to reduce carbon emissions, which placed an upper bound on emissions in California, and required regulated emitters to comply with these reduction mandates.[2]

As part of this cap-and-trade structure, California's system allows regulated emitters to purchase a limited number of offsets to meet a portion of their overall reduction requirements.[3] Although there are a number of protocols for creating various types of offsets, forestry-based California carbon offsets ("forestry-based CCOs") have accounted for the majority of offsets produced.[4] Generally speaking, forestry-based CCOs require a forest landowner to restrict harvesting to sequester carbon.[5] These harvest restrictions can have additional environmental benefits beyond the targeted carbon sequestration goals, such as preventing forest fragmentation and reducing the development threat to carbon-encumbered properties.[6] As a result, many conservationists view forestry-based CCOs as an increasingly important source of funding for securing the protection of working lands.[7]

This article provides a working summary of how forestry-based CCOs, and a similar and complementary conservation tool, working forest conservation easements ("WFCE"), operate. This article then briefly examines how these tools might work in concert to maximize both carbon and conservation gains in California and beyond.[8]

II. WHAT IS A FORESTRY-BASED CCO?

A forestry-based CCO is essentially a long-term commitment by a forest landowner to forego timber harvesting, at least in part, and to instead sequester carbon.[9] In exchange for the owner's commitment (typically one hundred years in California's regulated market and forty years in the voluntary market), the forest owner will receive a number of forestry-based CCOs commensurate with the volume of carbon sequestered, which the owner can sell to third parties who wish to offset their carbon impacts.[10] Currently, there are two ways that forestry-based CCOs are generated and sold by forest landowners: through the voluntary market or through regulatory/compliance markets.[11]

A. The Voluntary Market

The voluntary market functions where there are no legal requirements for the purchaser who is offsetting emissions

to do so.[12] An example of this is the Vermont Land Trust's recent facilitation of the sale of carbon offsets from aggregated forest landowners in northern Vermont to Amazon, to meet a portion of the company's voluntary climate and sustainability-related goals.[13] Other efforts by individuals and industry to use the voluntary market to offset their carbon impacts include buying carbon credits to offset the negative climate effects of air travel.[14] While the voluntary market is becoming an important source of funding for climate mitigation efforts, particularly in light of increasing corporate sustainability goals, this article will focus on the regulated market in California.[15]

B. The California Regulatory/Compliance Market

The regulatory or compliance markets are designed to fulfill a legal obligation, and involve the selling of carbon offsets to regulated emitters.[16] An example of this is the regulatory market created by California's cap-and-trade system.[17] California's regulatory market generally imposes more stringent requirements than the voluntary market, which have historically resulted in higher prices per compliance offset created than in the voluntary market.[18] In the California market, an emitter is currently allowed to use offsets to meet 8 percent of its total emission reduction requirements.[19] This percentage will change in 2021 (for the period from 2021–2025) and allow emitters to use offsets to account for 4 percent of their emissions; these percentages will then go back up to 6 percent for the period from 2026-2030.[20] Legislative changes to the cap-and-trade program in 2017 now require that half of an emitter's offsets must be sourced from projects that have a direct California environmental benefit.[21] This increasing focus on California-specific environmental benefits is likely to create an additional premium for projects determined to have a direct environmental benefit to the state versus other forestry-based CCOs, such as protecting a forest in Maine.

Though there are a variety of different protocols for creating California offsets, ranging from urban forestry initiatives to agricultural methane capture and destruction projects, this article focuses on forestry-based CCOs.[22] In California, there are currently three ways to create a forestry-based CCO: (1) afforestation/reforestation projects (restoring forest cover); (2) avoided conversion projects (preventing forested land from being transitioned to a more intensive land use); and (3) improved forest management ("IFM") projects (increasing carbon sequestration on an existing forest by restricting harvest levels above a region's common practice).[23] IFM projects are the most prevalent to date as many forest landowners have been willing to comply with harvest limitations to generate incremental revenue from carbon sequestration.[24] Rather than explain the mechanics of creating a carbon project through the ultimate issuance of offsets from the California Air Resources Board ("ARB"), this article focuses on the environmental attributes of such projects. It is also worth briefly mentioning that, to date, the transaction costs associated with developing a regulatory carbon project tend to shift the market's focus towards larger projects (typically requiring over 5,000 acres to be considered viable).[25]

C. Attributes of a Forestry-Based CCO

There are three primary components of a forestry-based CCO project: (a) maintaining or increasing carbon stocks during the lifecycle of the carbon project; (b) ensuring sustainable harvesting of the property; and (c) monitoring and verifying ongoing compliance with ARB's requirements.

1. Maintaining the Carbon Stocks/Benefits

In maintaining the sequestered carbon, the primary objective is ensuring the durability of the carbon emission reductions secured by a carbon offset, which is secured in a few ways.[26] California carbon projects have a one hundred-year duration.[27] Not surprisingly, ARB has a strong commitment to ensuring that the carbon benefits are actually secured for this period.[28] One of the primary ways that ARB seeks to ensure project permanence is through the creation of a buffer pool.[29] When a new carbon project is approved by ARB and the offsets are issued, the project proponent is required to contribute a certain percentage of its offsets to the buffer pool, typically 10 percent to 20 percent of the total offsets.[30] This buffer pool is designed to account for the unintentional loss of carbon sequestration benefits, such as loss due to wildfire, or to account for the loss of forest carbon benefits through no fault of the project proponent.[31] As the risk of such losses in a carbon project declines, credits in the buffer pool are released and sold.[32] Similarly, there is also a mechanism for dealing with intentional reversals, where the project proponent takes intentional action that causes loss of carbon sequestration benefits or sells the underlying land to a new owner who does not wish to continue with the project. These actions result in penalties, requiring the owner to replace the carbon offsets that have been lost.[33]

2. Ensuring and Monitoring Sustainable Harvesting

A forestry-based CCO, for projects where commercial logging will continue, specifically requires a forest management plan that meets certain criteria, including certification under

SFI®, ATFS®, or FSC® third-party standards, or meeting other similar requirements, and which limits, for certain forests, even-aged harvests to fewer than forty contiguous acres on the protected forestland.[34] These harvesting restrictions dovetail with the carbon sequestration benefits (restricting harvest levels generally) to promote better forest health for the working forest.

3. Monitoring and Verifying Ongoing Compliance

Last, a forestry-based CCO project will be both monitored and verified to confirm that the forest owner is fulfilling its obligations and the project is also meeting its carbon sequestration objectives.[35]

While the primary objective of the forestry-based CCOs is to sequester carbon to meet climate-related goals, these projects can also provide a number of other environmental benefits by requiring improved forest management and higher stocking levels (which can provide additional habitat), reducing the level and frequency of harvest, and ensuring that these lands stay generally forested and are not converted to other land uses.[36]

III. WHAT IS A WORKING FOREST CONSERVATION EASEMENT?

A conservation easement is generally defined as a voluntary agreement between a landowner and an easement holder (a governmental agency or a qualified non-profit organization) whereby the landowner relinquishes certain rights to develop, encumber, or otherwise modify the land in favor of the easement holder.[37] To use the traditional "bundle of sticks" analogy for property ownership, "we can describe the landowner as taking a stick out of her bundle and giving it to someone else"—the easement-holder—who agrees to monitor and enforce the terms of the conservation easement during its term.[38] A conservation easement can be designed to protect a wide range of resources—including wetlands, farms, historic structures, and forests.[39] One of the hallmarks of WFCEs generally is that a WFCE may perpetually protect a targeted resource or variety of resources, allowing an easement holder to secure the protection of working lands without the obligations of fee ownership.[40]

In the forest protection arena, a conservation easement may be either donated or, particularly for larger forest protection projects, purchased from the landowner.[41] Federal programs facilitate many of these transactions, including the Forest Legacy Program, through the U.S. Forest Service, and increasingly, the Regional Conservation Partnership Program, through the Natural Resources Conservation Service, both of which are administered by the United States Department of Agriculture.[42]

Overall, WFCEs generally attempt to strike a balance between environmental protection and commercial objectives. Here, both the "working forest" and the "conservation" elements from the term "working forest conservation easement" are important. On the working forest side of the ledger, WFCEs allow for continued harvest, although limited by the express terms of the conservation easement.[43] Continued harvest activity allows a property's timber resources to contribute to the local wood products economy and to preserve local jobs, which are often vital to rural economies.[44]

From a conservation perspective, WFCEs prevent development, restrict forest fragmentation, and can also require or impose affirmative management obligations, such as compliance with approved harvest plans or certification programs.[45] Some WFCEs go even further to include no-cut zones, public access requirements, and other targeted species and habitat-related objectives.[46] Many of these outcomes are quite similar to those advanced or secured by forestry-based CCOs, which may lead to the added benefits of layering or stacking these tools to maximize the conservation benefits of the measures used across the working landscape.[47]

IV. HOW CAN THESE TOOLS EFFECTIVELY WORK TOGETHER?

There is potentially strong alignment between forestry-based CCOs and WFCEs, and potential for these tools to work in concert to maximize California's efforts to lower carbon emissions and to secure additional conservation benefits.[48] Both forestry-based CCOs and WFCEs require a landowner to comply with long-term land use restrictions, generally allow some degree of sustainable harvesting activity, and include monitoring and enforcement obligations by the regulatory agency or easement holder to ensure ongoing compliance over a long period.

Combining these tools requires sensitivity to the objective that the same public benefits are not essentially paid for twice so, in a way, the common features of these tools can be both a strength and challenge in trying to layer WFCEs and forestry-based CCOs.[49] This article will touch upon two of the primary roadblocks: (1) timing considerations and (2) WFCE deed terms.

A. Timing Considerations

The timing and sequencing of a carbon and WFCE project can be critical. The timing challenges of the project hinge upon: (1) whether the WFCE is already in place, (2) whether the WFCE is proceeding in parallel with the carbon project, or (3) if a forest landowner is trying to preserve flexibility to convey a WFCE in future years.

1. Lands Already Protected by a WFCE

Lands that are already protected by a WFCE may be enrolled in a carbon project. The issue potentially to making such an effort viable from a carbon perspective is that the impact of the existing WFCE will be factored into determining the baseline.[50] Generating additional carbon sequestration benefits will require going beyond the restrictions of the WFCE, which may not be practicable or generate enough forestry-based CCOs to make the project economically viable. As a result, a landowner or carbon project developer needs to closely examine the terms of the WFCE before proceeding too far into project development.

2. Parallel Protection Efforts

For lands that are not protected by a WFCE, but are intended to be conserved in concert with a carbon project, there is a narrow path and an important timing constraint. Under the California protocol, to be a qualified conservation easement, the WFCE must be recorded within one year of the project's start date.[51] Qualification of the conservation easement is essential from an economic perspective as it will be considered for both the carbon baseline and for the required contribution to the buffer pool.[52] The timing constraint is particularly challenging in that it requires a property owner to convey an easement before the initial issuance, which may result in a landowner assuming the risk that the project will ultimately not yield the expected carbon offsets.[53] The conveyance of a WFCE is not reversible, and if the project fails to meet the timing requirements, the WFCE will be deemed a preexisting legal mandate and reduce the number of CCOs available for the project.[54] These timing attributes also have an impact on larger working land transactions in that, given the economic scale, these transactions are often phased, or the conservation funders may protect certain components of a larger property over a period of years to fundraise or leverage public funds as funds become available over multiple funding cycles.[55] Given the practical considerations in planning a carbon project, this type of phasing is not easily accomplished and further complicates efforts to pair these tools.

3. Post-Carbon WFCE Conveyances

Last, if a forest landowner wants to maintain the flexibility to convey a WFCE post-carbon issuance, interest from conservation funders may be diminished or non-existent if the funders determine that the land is already sufficiently protected by the terms of the carbon encumbrance. It may still be possible to sell a WFCE post-issuance to a conservation organization or governmental agency, but the price and types of protections sought will be dictated somewhat by the specific characteristics of the land base and the pre-existing protections and restrictions already in place.

B. WFCE Terms

Beyond timing challenges, the requirements of the WFCE also matter. There is a degree of flexibility in designing a WFCE, depending upon the organization acquiring it, the funding source(s), and the goals of the landowner.[56] Many organizations, not surprisingly, have their own views on what a WFCE should require as well as what language should be utilized to protect the conserved lands. This creates problems, or at least challenges, for many larger projects where different funding streams and tools are being used together on a single land base. It is not surprising then that conservation-focused landowners and conservation organizations trying to pair WFCEs and forestry-based CCOs are facing similar issues or challenges regarding carbon projects.

Currently, there is an apparent divide between the California Wildlife Conservation Board (a significant funding source for the purchase of California WFCEs) and ARB as far as what language is acceptable for a qualified conservation easement under the protocol, which has frustrated efforts to layer these tools in concert.[57] In designing a carbon project where both tools are being considered, the terms of the various requirements from funders has to be considered to avoid alignment issues or conflicts, particularly when there are a variety of correlated, but not directly linked, conservation objectives.

V. CONCLUSION

Despite challenges, there is the potential for California's cap-and-trade system and its use of forestry-based CCOs to provide both substantial carbon sequestration benefits and conservation benefits, particularly when layered with WFCEs that can help secure the permanence that ARB is seeking to achieve with respect to the carbon being sequestered.[58] A group of conservation advocates (the California Council of Land Trusts) recently provided ARB with a white paper

addressing many of the primary issues that have limited the ability of conservation organizations to use these tools in concert.[59] For now, for attorneys representing forest landowners, conservation NGOs, and carbon developers, caution is recommended when helping to design the legal structure of these transactions to ensure that the critical climate and conservation objectives are both being appropriately considered and addressed.

Endnotes

* Jess Phelps may be contacted at jphelps@lymetimber.com, 603.643.3300. David Hoffer may be contacted at dhoffer@lymetimber.com, 603.643.3300. An expanded treatment of many of the issues addressed in this article was originally published as Jess R. Phelps & David P. Hoffer, *California Carbon Offsets and Working Forest Conservation Easements* (2020) 38 UCLA J. Envt'l L. & Pol'y 61.

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