



YUROK TRIBE

190 Klamath Boulevard • Post Office Box 1027 • Klamath, CA 95548



July 31, 2013

Mary Nichols, Chairperson
Air Resources Board
1001 "I" Street
Sacramento, CA 95814

RE: Comments to draft revisions of California Cap and Trade regulations

Aiy-yu-kwee':

The Yurok Tribe welcomes the opportunity to provide these comments to the Air Resources Board (ARB) regarding the Cap and Trade regulatory revisions. The Yurok Tribe appreciates ARB's continued efforts to address Tribal concerns with the Cap and Trade regulations.

Limitation on Exemplary Damages

The Yurok Tribe supports the proposed revision to section 95975(l)(1). The revised language referencing California Government Code section 818 makes it clear that Tribes are not liable for punitive or exemplary damages to the same extent as California government entities. In addition, a Tribe will not be held liable for an employee's misrepresentation. This language recognizes Tribes' status as independent sovereign governments.

Tribal Lands

ARB is not proposing any changes to section 95973(d). The Yurok Tribe recommends deleting subparagraph (3) in its entirety. As defined, Indian lands primarily refers to lands held in trust for a Tribe by the United States. As drafted, section 95973(d)(3) appears to seek a limited waiver of sovereign immunity for projects on lands *within* trust lands. Indian lands are not coextensive with an Indian Reservation. It is unclear what lands would be considered to lie "within the external borders" of trust lands. Even assuming the regulations specified a waiver for a project located within a Reservation, it is inappropriate. Reservation lands may be owned by individual Indians, non-Indian individuals, a Tribal or non-Indian corporation, or any other number of possibilities. A Tribe would refuse to give a limited waiver of sovereign immunity in any of these cases because enforcement of the Cap and Trade regulations is between that entity and ARB. ARB would seek enforcement against the entity, not the Tribe.

Unintentional Impediments To Tribal Projects

Revised section 95975(h) inadvertently creates a barrier to Tribal projects. It requires that offset projects list within one year of Offset Project Commencement. If project commencement is the date of listing, then this does not create a problem. However, if commencement is, for example, the date of land acquisition signaling a change in management, then the Tribe must negotiate the waiver
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with ARB within one year from acquisition. A limited waiver is negotiated between a Tribal government and the State of California and the decision to enter into a waiver is a political decision by the Tribe. ARB is not required to respond to a proposed limited waiver within a certain amount of time, and a Tribe generally must make this decision in accordance with its public meeting policies. Consequently, the negotiation could extend many months. It could lead a Tribe to forgo a project simply because there was insufficient time to negotiate the waiver. Imposing a one-year limitation on such an important political decision also could force premature decisions. Furthermore, section 95975(l)(3) requires input from the U.S. Bureau of Indian Affairs, which is under no obligation to respond within a specified timeframe. This places timeliness of listing outside of the control of either ARB or a Tribe. Non-tribal projects do not face these additional hurdles.

The revised section 95830(b)(4) creates further impediment and delay for Tribal projects. Section 95975(a) requires that an Offset Project Operator prior to listing must register with CITSS. Revised section 95830(b)(4), however, prevents a Tribe from getting a CITSS account unless it provides a limited waiver. This necessarily means that a Tribe can only register with CITSS after it has provided a limited waiver, but still within one year of project commencement. CITSS registration is a multi-step process and the time required to register—combined with the time required for a Tribe to negotiate a limited waiver—unfairly prejudices listing of Tribal offset projects.

The Yurok Tribe presents three options to address this. The preferred option is to revise section 95975(l) to state that “In addition to meeting the listing requirements in sections 95975(c)(1) through (5), Tribes must meet the following requirements before offset projects located on the categories of land specified in section 95973(d) can be ~~listed with ARB or an Offset Project Registry pursuant to this section~~ issued credits pursuant to section 95980 or 95981.” This would allow the limited waiver negotiation to progress concurrently with project verification. There is little or no risk to ARB in this delay. Until a project is registered, a project is not enforceable. A limited waiver prior to registration ensures that ARB can enforce Cap and Trade obligations for Tribal projects for the life of those projects.

This revision would have to be in conjunction with clarifying that a CITSS account is not required prior to listing for Tribal projects. Section 95830(b) should state: “An entity seeking to list an offset project located on the categories of land in section 95973(d) must demonstrate the existence of a limited waiver of sovereign immunity entered into pursuant to section 95975(l) prior to registering pursuant to this section. Registration pursuant to this section is not required prior to listing an offset project with ARB or an Offset Project Registry, but is required prior to the issuance of credits pursuant to section 95980 or 95981.” Such a revision ensures a Tribe has a CITSS account prior to project registration, but permits listing and verification to move forward while the Tribe and ARB negotiate a limited waiver.

A second option is to revise the language of section 95975(h). It would state “For offset projects with an Offset Project Commencement date on or after January 1, 2015, the Offset Project Operator or Authorized Project Designee must list the offset project with ARB or an Offset Project Registry within one year of Offset Project Commencement, or within one year of meeting the requirements of section 95975(l), whichever is later.” With this revision, a Tribe would have to satisfy the general listing requirements, including securing a CITSS account, within one year of providing the limited waiver.

A third option is to revise section 95975(h) to state: “For offset projects with an Offset Project Commencement date on or after January 1, 2015, the Offset Project Operator or Authorized Project Designee must list the offset project with ARB or an Offset Project Registry within one year of Offset Project Commencement, except ARB may grant an extension in order to meet the requirements of section 95975(l). If, after January 1, 2015, the Offset Project Operator or Authorized Project Designee does not list the offset project within one year of Offset Project Commencement, unless an extension is granted, it will be ineligible to be listed under a Compliance Offset Protocol . . .” This language permits an extension when necessary to secure the limited waiver, gather BIA input, or finalize CITSS registration. ARB would maintain control and discretion to grant an extension for good cause.

APD Designation as a CITSS Account Representative

The Yurok Tribe’s final concern with the draft revisions is not specific to Tribal projects. Under the revised section 95974(a)(2)(B), an Authorized Project Designee (APD) must be registered as an account representative for the Offset Project Operator (OPO). An OPO may, however, have multiple projects that involve various contractual and confidentiality commitments. By specifying that an OPO designate an APD as a CITSS account representative, ARB would inadvertently force an OPO to either violate confidentiality or not use an APD. For example, the Yurok Tribe has multiple offset projects in various stages of development. Only one of these projects has an APD. The Yurok Tribe cannot give the APD access to certain information for another project due to confidentiality concerns. There appears no reason that the APD needs or should have access to OPO CITSS information not specific to that APD’s project, regardless of whether there are contractual confidentiality obligations. Unfortunately, CITSS is not able to distinguish between projects. The revised section 95974(a)(2)(B) should be deleted.

The Yurok Tribe appreciates the opportunity to provide these comments and looks forward to working with the Air Resources Board to continue to ensure that Tribal concerns are adequately addressed. Should you have any questions, please contact our Staff Attorney Nathan Voegeli at 707-482-1350 ext. 1408 or email nvoegeli@yuroktribe.nsn.us.

Sincerely,

A handwritten signature in blue ink, appearing to read "T. O'Rourke, Sr.", with a stylized flourish at the end.

Thomas O'Rourke, Sr.
Chairperson, Yurok Tribe