WINROCK INTERNATIONAL

American Carbon Registry

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California Air Resources Board
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Dear Dr. Cliff,

Thank you for this opportunity to comment on the July 2013 discussion draft *Proposed Amendments to the California Cap-and-Trade Program*.

ACR has appreciated the opportunity to serve as an Offset Project Registry and Early Action Offset Program since December 2012. We commend your staff for their tireless efforts to make the offset program work smoothly and to provide timely answers to a broad range of technical, legal and regulatory questions posed by OPOs, APDs and other market participants.

Overall we believe the discussion draft amendments provide many useful clarifications. We have organized our comments into six topics where we believe changes may be needed, followed by a list of more minor items where additional clarification could be useful. Where we have suggested specific alternate wording, our suggested deletions are in double strikethough (to distinguish from ARB deletions in single strikethrough) and our suggested additions in double underline (to distinguish from ARB additions in underline).

1. **Responsibilities delegated to APD**

§95974(a)(2) indicates that OPOs may delegate to an APD responsibility for performing <u>all</u> the requirements of certain sections of the regulation. Combined with the deletion from §95974(a) of "the Offset Project Operator must identify to ARB or an Offset Project Registry the rights and responsibilities they are assigning or delegating to an Authorized Project Designee," this suggests that OPOs must either delegate all, or no, responsibilities to an APD. This may present some challenges for project development.

First, in the forest projects we have seen to date, on the Designation of APD form generally APDs have taken on responsibilities for §95975 through §95981.1 (listing, monitoring, reporting, verification and issuance), but not §95983 (reversals) nor §95985 (invalidation). The revised language in §95974(a)(2) would allow OPOs to retain responsibility for §95985 invalidation, but not §95983 reversals. It is unlikely that APDs will be willing to take from Forest Owners the long-term responsibility for reversals, particularly intentional reversals in §95983(c), since APDs don't own or control project lands. Requiring them to do so, or else not allowing OPOs to use APDs, will likely create a significant obstacle to project development. We suggest amending §95974(a)(2) to read:

> The Offset Project Operator may delegate responsibility to the Authorized Project Designee for performing or meeting <u>all</u> the requirements of sections 95975, 95976, 95977, 95977.1, 95977.2,

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95980, 95980.1, 95981, and 95981.1, ~~95983,~~ and, where specifically identified, sections 95983, 95985, and 95990, ~~where specifically identified~~ on behalf of the Offset Project Operator.

This shifting of §95983 to after "where specifically identified" would be appropriate if ARB intends to allow APDs to be delegated responsibility for functions §95975 through §95981.1 without being required to take on responsibility for reversals. However, if ARB's intent is that responsibility for reversals should always remain with the Forest Owner, then §95983 should simply be removed from §95974(a)(2) and from the Designation of APD form.

On invalidation, §95985(e)(3) indicates that ARB will identify the OPO and APD in the case of invalidation, but §95985(h) indicates that in the event the party identified in §95985(e)(2) is no longer in business, the OPO will be required to replace invalidated credits. This section does not suggest any circumstances in which the APD will be required to replace invalidated credits. Does ARB intend that, in the event the party identified in §95985(e)(2) is no longer in business, invalidation liability must rest with the OPO? Or can the OPO further delegate invalidation liability to their APD? If not, §95985 should be omitted from §95974(a)(2) and from the Designation of APD form.

We raise here two additional issues that have been brought to our attention by APDs, but may be resolved through the regular process of clarification in weekly calls:

- The current requirement that an OPO must designate an individual of the APD as Primary Account Representative or Alternate Account Representative in its CITSS account, before the APD may act on behalf of the OPO or submit any documentation to the OPR and ARB – now formalized in §95974(a)(2)(B) – has appeared problematic to some APDs and OPOs. Many OPOs wish to use the services of APDs, not just as consultants but wishing the APD to submit documents and communicate with OPR and ARB on their behalf, yet be reluctant to give an APD essentially full access to their CITSS account, particularly in the case that the OPO has multiple projects that have generated ARBOCs in that account and the APD is only involved in some of them.
- Some OPOs and APDs have requested the ability to define more specifically which responsibilities are being delegated, rather than delegating whole sections of the regulation. For example, an OPO may wish to delegate preparation and submission of listing documents to the APD, with the OPO retaining responsibility for the listing attestations in §95975. Similarly for §95976, the OPO might wish to delegate responsibility for reporting to the APD and have the APD submit the OPDR, but still as OPO make the attestation in §95976(d)(7). Some of the responsibilities within these sections may be responsibilities an APD feels they cannot legally or financially take on. Yet for many projects to move forward, it is crucial that OPOs have access to the services of a carbon project investor or developer with experience and technical expertise, serving as the liaison to OPR and ARB and not just as a consultant.

2. Scope of regulatory compliance

In §95973(b), language has been added "In addition, offset projects must also fulfill all local, regional, and national *environmental and health and safety* regulatory requirements that apply based on the offset project location *and that directly apply to the offset project*, including as specified in a Compliance Offset Protocol. Offset projects are not eligible to receive ARB or registry offset credits for GHG reductions or GHG removal enhancements if the offset project is not in compliance with regulatory requirements *directly applicable to the offset project*" (italics added).

The intent of this change is unclear, particularly as it relates to ODS and livestock projects where it is possible for situations to occur in which there is regulatory noncompliance that occurs in a different part

of the facility or farm, unrelated to and not affecting the offset project itself. This will also be the case for mine methane projects, once the Mine Methane Capture protocol is adopted, since mines are subject to many regulatory requirements that would not necessarily affect the methane capture project. Is the new §95973(b) wording intended to reduce the scope of the regulatory compliance review to environmental and health and safety regulatory requirements, rather than all regulations, and to regulations "directly applicable to the offset project"? This wording seems to limit the scope of the regulatory compliance review, however it also says "including as specified in a Compliance Offset Protocol," which in the ODS protocol would include all regulatory noncompliance regardless whether related to environmental and health and safety regulations and regardless whether directly applicable to the offset project. Which wording would take precedence?

3. Listing and CITSS registration for Tribes

ACR has already communicated with ARB on the requirement that Tribal projects have their limited waiver of sovereign immunity in place before being allowed to list with an OPR. Tribes and APDs have argued that because this waiver takes a significant amount of time to negotiate – both on the Tribal government's side, understanding and becoming comfortable with their obligations under the Regulation, and on ARB's side – projects should be allowed to list with an OPR, and even monitor and verify if they choose, while the waiver remains in negotiation. The rationale is that ARB needs enforcement authority over Tribes as sovereign nations, as provided by a limited waiver of sovereign immunity, but only needs this authority to be in place when ARBOCs are issued. Allowing Tribes to move forward with the steps prior to ARBOC issuance while negotiating the waiver would help these projects move more quickly to crediting once the waiver is in place; not allowing this creates a disadvantage for Tribal projects relative to other projects.

In the discussion draft, §95975(l) continues to stipulate that the waiver must be in place "before offset projects located on the categories of land specified in section 95973(d) can be listed with ARB or an Offset Project Registry." In addition a new section §95830(b)(4) stipulates that "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," i.e. prior to being able to open a CITSS account. OPRs may not approve listing forms until ARB has confirmed an active CITSS account for the OPO.

In addition, §95975(h) now requires that "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." This could make it very difficult for Tribal projects to qualify, since negotiating the waiver may occupy much of that year.

Most Tribal projects ACR has seen to date are IFM projects. For Tribal IFM projects that use an easement or transfer of property ownership as the Offset Project Commencement date, the commencement date may have occurred some months before the Tribe decides to pursue a carbon project, so part of the allowed year could already have passed. The Tribe will then need to become familiar with the Regulation and its obligations; consider the implications of a limited waiver of sovereign immunity; secure Bureau of Indian Affairs (BIA) approval or documentation that BIA approval is not required, with BIA under no obligation to respond quickly; initiate and conclude negotiations with ARB on the limited waiver; and submit the detailed IFM listing form to an OPR – *all within one year*. Meanwhile for Tribal IFM projects using the date of submittal of listing information to an OPR as the Offset Project Commencement date, these projects would not be able to submit listing information until they have concluded waiver negotiations and established a CITSS account, and once they list, will have to wait at minimum another

six months to submit an OPDR and begin verification due to the minimum six-month Initial Reporting Period.

Taken together, all these requirements make it more difficult for Tribal projects to qualify and to reach ARBOC issuance than non-Tribal projects. We suggest ARB reconsider allowing Tribal projects to take earlier steps in the process – CITSS registration and listing on an OPR – while the waiver remains in negotiation, provided good faith efforts are being made by the Tribe to move that waiver forward. This could be accomplished by amending 95975(l) to read:

> 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 require deleting the new requirement in §95830(b)(4), or else clarifying that registration pursuant to §95830 is not required prior to listing with an OPR or ARB, but is required prior to issuance of ARBOCs.

If this is not possible, we suggest ARB give Tribal projects one year to list after their limited waiver is in place, by amending §95975(h) to read:

> 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."

In this way Tribes would be treated the same as other projects in that once they have met the §95975(l) requirements not faced by other projects, they have one year to achieve listing.

4. Additional requirements for Tribes

ACR, in collaboration with Tribes and APDs working with Tribes, has communicated with ARB on the language in §95973(d) and §95975(l). Please see our letter of November 1, 2012. In brief, we have argued that:

a) ARB should drop from §95973(d) the third category, "land that is owned by any person, entity, or tribe, within the external borders of such Indian lands," since for such lands (allotment lands, lands owned in fee by individual Indians, and private lands owned by non-Indians within the borders of a reservation), Tribes could not waive sovereign immunity and such landowners could subject themselves to ARB's enforcement authority without a Tribal waiver.

b) ARB should consider amending §95975(l)(1) to make clear that ARB can enforce the obligations of Tribes through specific performance or monetary damages, but excluding punitive or other exemplary damages.

c) ARB should consider amending §95975(l)(1) to make the venue for legal disputes a California state court "or a court of competent jurisdiction in the state of California."

The second change we think is in essence addressed through the new language in §95975(l)(1), "except for purposes of relief under this limited waiver, Tribes shall be treated in the same manner as a California public entity under California Government Code sections 818 and 818.8."

We continue to feel that the inclusion in §95973(d) of "land that is owned by any person, entity, or tribe, within the external borders of such Indian lands" is not needed and not consistent with the limited jurisdiction Tribal governments have over private lands owned by Indians and non-Indians within the

external boundaries of reservations. Tribes would not be able to waive sovereign immunity for such lands. ARB would not need a waiver of sovereign immunity in order to enforce offset contracts with such landowners. Including them in §95973(d) will likely disqualify such lands from the offset program, since these landowners will not be able to secure a waiver of sovereign immunity from Tribal governments that do not have the authority to grant such a waiver. §95973(d)(3) should be deleted.

5. Invalidation liability assigned to Forest Owner

The changes to §95985(h), combined with the deletion of §95985(i), make the assignment of invalidation liability the same for all offset project types, rather than assigning the replacement responsibility for invalidated credits on forest offset projects to the Forest Owner. (Note that §95985(e)(3) still indicates ARB will identify "for forest offset projects the Forest Owner(s)," which could be deleted if no longer relevant.) We suggest ARB clarify when the requirement assigning replacement responsibility for invalidated ARBOCs to the "parties identified pursuant to section 95985(e)" goes into effect. Will this apply only to ARBOCs issued to forest projects after the date the amended regulation becomes effective, but invalidation liability will remain with the Forest Owner for any ARBOCs issued prior to the effective date of the amended regulation? Also, will early action offset credits issued prior to the effective date of the amended regulation but converted to ARBOCs after that date maintain assignment of invalidation liability to the Forest Owner? We suggest ARB insert additional text clarifying this point.

6. Aggregation and verification for agricultural projects

ACR has participated in a series of conversations with ARB staff, both directly and through the Coalition on Agricultural Greenhouse Gases (C-AGG), about how aggregation and verification rules might best be designed for the Rice Cultivation protocol and potential future agricultural protocols. We understand ARB is considering these issues and may include text in the Rice Cultivation protocol addressing them. However, it may be necessary to include corresponding amendments in the Regulation itself, unless the existing provisions in the Regulation are judged sufficient for agricultural projects. ACR believes the existing provisions may not be sufficient to control costs, reduce risk and uncertainty, due to fundamental differences between the existing approved protocols and ARB's first protocol for production agriculture.

We can envision several potential models for aggregation and verification:

1. **Farmer as OPO:** Each farmer, potentially enrolling multiple fields, would be an OPO. Multiple OPOs designate the same aggregator as APD, and this APD attempts to negotiate a "volume discount" with the Verification Body to reduce overall costs. Each farm is treated as a separate project and meets the regulatory requirements for verification, including a site visit annually (or under §95977(b), once every two Reporting Periods, but in that case receives no credits until the end of two Reporting Periods). Each farm has its own Offset Verification Statement so farms are not put at risk of an adverse statement by the actions of another farmer. Credits are issued to the account of each farmer.

    a) A variation on the above, with the new text in §95977(b) allowing verification to be deferred indefinitely if zero emission reductions are achieved in a Reporting Period. This is useful in case some participating fields generate no credits, or rice is not grown in a given year, but does nothing to improve the financial profile of projects.

    b) Based on the rules for forest projects, allowing full verification with site visit to be deferred up to six Reporting Periods, with annual desk audits resulting in credit issuance

and a true-up at the full verification. This would allow some credits to be issued in intervening years based on a desk audit.

2. **Forest projects model**: The forest protocol allows multiple Forest Owners to designate a single Forest Owner as OPO, in which case potentially multiple landholdings can combine into a single project, within specified geographic constraints. Multiple farmers could designate one farmer the OPO, who could then select an APD if desired. The farmer chosen as OPO would be issued all credits and would have to distribute revenues among participating farmers. However, this has been difficult in practice for forest projects, due to contractual and other issues. We think it may be equally or more difficult for agricultural projects due to farmland renting and leasing.

3. **Aggregate model:** The entire group of participating farmers, each with one or more fields enrolled, is treated as a single aggregated project. (This is how aggregated projects are treated on ACR, CAR, and in the Alberta Offset System.) Regulatory requirements for verification are met by the project as a whole; fields are chosen for site visits (or other verification techniques) through random and/or risk-based sampling, and not all fields must be visited over the chosen verification interval. Crediting is to the aggregator, serving as OPO or APD, and the aggregator distributes revenues through contracts with participating farmers. If the aggregator serves as OPO, every farmer would need to have a contract with the aggregator giving the aggregator "legal authority to implement the offset project" (definition §95802(a)(179)). The aggregate has one Offset Verification Statement, so farms are at some risk of an adverse statement due to the actions of another farmer; however, rules could be written to allow the aggregator to replace non-performing or non-compliant fields prior to verification.

In the development of our rice protocol, as with all our protocols, ACR sought an approach that would incentivize maximum participation by farmers while ensuring verifiability and environmental integrity. We see potential problems with models 1 and 2 above. Model 1, requiring the farmer to act as OPO, may be difficult to administer especially considering that many farm fields are farmed under a rental or lease arrangement shorter than the invalidation timeframe (and should ARB approve in the future an agricultural protocol crediting soil carbon sequestration, the timeframe and responsibility for reversals would also have to be considered). Even if an APD selected by multiple OPOs could secure cost savings from a Verification Body, the requirement of every farm being visited over the chosen verification interval and receiving a separate Offset Verification Statement and verification report may cause transaction costs to exceed revenues. Meanwhile Model 2 would require all participating farmers to contractually designate one farmer as OPO, which we expect they may not be willing to do (as Forest Owners have been reluctant to do in practice).

Thus we think Model 3, allowing the aggregator to serve as OPO and crediting at the level of large aggregate projects, may be the most streamlined and cost effective approach. It could be the best option for reducing structural uncertainty in model-based GHG reductions. If ARB feels such a model would be more enforceable if aggregators were required to undergo some level of accreditation and hold professional liability insurance, this could be accomplished through an amendment such as that proposed by the Environmental Defense Fund; though we have some hesitation that this could create a barrier for some types of organizations – farmer associations, irrigation districts, Resource Conservation Districts, etc. – that would otherwise be well positioned to serve as aggregators for their farmer members.

We think Model 3 could be accomplished through a surgical amendment to the definition of OPO and/or APD in §95802(a), indicating that an Aggregator may serve as OPO or APD, and inserting a definition of

Aggregator. Corresponding amendments would need to be made elsewhere, e.g. in §95977 regarding verification.

7. Additional comments

The following are more minor issues where ACR suggests clarifications, or simply indicates our support:

- New language in §95856(h) allows regulated entities to retire more than the 8% offset quantitative usage limit in years not concluding a compliance period, provided this is trued up in the year following a compliance period such that the 8% quantitative usage limit remains for the compliance period overall. While not allowing regulated entities to "carry over" unused offset usage to the following compliance period, we think this will provide useful flexibility.
- §95975(f) requires OPRs to review the offset project listing information submitted pursuant to section 95975(e) for completeness within 15 calendar days of receiving it. We do not expect this to be a problem, but we note that if the information is incomplete and the OPR requests corrections or additional information, the 15-day period should restart (in part since timeliness of submitting corrections is in the control of the OPO/APD, not the OPR).
- §95975(h) requires that "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." We think in general this requirement will be manageable, though could be challenging for forest projects for which some time has already elapsed since the Offset Project Commencement date. Also note our comment above recommending more time be given to projects on Tribal lands, to allow for the lengthy waiver negotiation process, unless ARB changes the requirement that the limited waiver of sovereign immunity be in place prior to CITSS registration and listing.
- §95975(o) contains new rules governing the transfer of offset projects between OPRs. §95975(o)(1) states that, in the event an OPO or APD transfers a project listed with an OPR to another OPR, "the Offset Project Registry that originally listed the offset project must change the offset project listing status on its registry system to 'Delisted ARB Project'." We are unclear on the intent of this requirement, and believe it may cause more confusion than clarity since currently the flexibility exists to list a project on more than one OPR at a time as long as no credits are issued by more than one OPR for the same Reporting Period. For example, a project could be listed and be issued credits on one OPR, but decide to list with another OPR for a new Reporting Period. It would not make sense for the project listing status to be changed to "Delisted ARB project" on the first OPR since the project remains listed and may still hold Registry Offset Credits on the first OPR. Furthermore, there may be other reasons that a project is delisted besides transferring to another OPR, and ARB may want to have the listing status of a project delisted for any reason to be public as "Delisted ARB project." For example, a project may list with a compliance protocol and revert to Early Action (even on the same OPR). Or a project may list, but not meet a deadline for reporting or verification and become ineligible for crediting. Or a project may simply list and later decide to withdraw. Since there are various scenarios in which a project would be considered a "Delisted ARB Project," and this new status will require an update to current registry platform functionality, we propose to work directly with ARB to clearly define the registry status specifications and documentation requirements for projects that terminate listing with an OPR or Early Action Offset Program.

- Another potential source of confusion could arise in §95975(o)(1)(C), which states "The new Offset Project Registry must retain the listing date and all listing information as approved by the original Offset Project Registry. If the offset project has not undergone initial verification, the Offset Project Commencement date may change as a result of verification activities." How would this requirement be applied to IFM projects that use the date of submittal of listing information as the Offset Project Commencement date? It is unclear how the commencement date could change if the original listing date must be retained. Perhaps some clarification for IFM projects should be inserted here.
- §95975(o)(2) states that "The Offset Project Operator or Authorized Project Designee may not make changes to the listing documentation pursuant to section 95975(l)." Is the intent here that Tribal projects may not make changes to their limited waiver of sovereign immunity if they switch OPRs? It seems unlikely that Tribes would seek to do this, but the intent could be made more clear.
- §95977(d) now gives 11 months, rather than 9, after the conclusion of a Reporting Period for the Offset Verification Statement to be received by ARB or an OPR. This is useful, particularly for forestry projects.
- §95980.1(d)(2) requires that, in the event an OPR requests additional information prior to registry offset credit issuance, the OPO, APD or Verification Body must provide this information within 10 calendar days of the request. We think projects this close to credit issuance will have a strong incentive to provide the additional information quickly, but we do not see a need to limit their time to do so, in case the additional information requested by the OPR requires more time to collect.
- §95990(c)(5)(E) is a placeholder for new early action quantification methodologies in rice cultivation or mine methane capture, and §95990(c)(3)(B) extends to January 1, 2015 the deadline for listing of early action projects under these protocols. We support this extended deadline for new early action quantification methodologies to provide sufficient time for projects in development under these methodologies to list with an Early Action Offset Program.

Please feel free to contact me (nmartin@winrock.org or 703.842.9500) or Belinda Morris, ACR California Director (bmorris@winrock.org or 916.520.8628) with any questions.

Sincerely,

Nicholas Martin
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