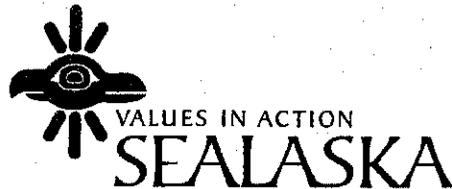


Nicholas van Aelstyn

16-8-4



September 22, 2016

Via Hand Delivery

Clerk of the Board
California Air Resources Board
1001 I Street
Sacramento, CA 95812

Re: Comments of Sealaska Corporation on the Proposed Amendments to the Cap-and-Trade Regulation Regarding Forest Offset Projects

Dear Chairwoman Nichols and Members of the Air Resources Board,

Thank you for the opportunity to comment on the proposed amendments to the Cap-and-Trade Regulation, 17 Cal. Code. Regs. § 95800 *et seq.* (the "Regulation" or "CTR"). Overall, we commend the California Air Resources Board ("ARB") for undertaking these amendments, which in large part provide necessary clarifications and improvements, particularly as they relate to forest offset projects. Offset projects have provided the Cap-and-Trade Program with a flexible mechanism by which to ease the burden of compliance on the regulated community, while incentivizing environmental stewardship outside of California and Québec. We are excited to participate in the program, and look forward to helping to shape the forest offset program for the benefit of California, as well as our shareholders, our region and the global environment.

Sealaska Corporation is the Alaska Native Regional Corporation for Southeast Alaska, established pursuant to the Alaska Native Claims Settlement Act (ANCSA). We represent the interests of roughly 22,000 shareholders of Tlingit, Haida and Tsimshian Indian descent. Under ANCSA, Sealaska secured ownership of approximately 360,000 acres of forest land in Southeast Alaska. We have engaged in natural resources development on a majority of our land holdings, predominately in the area of timber harvest and management for second growth. While we have engaged in natural resources development, Sealaska does see the benefit of participating in the Cap-and-Trade program to provide long-term environmental benefits to our region and beyond.

We strongly support California's commitment to addressing climate change by both reducing GHG emissions and sequestering GHGs. Forest offset projects made possible by the Program enable millions of tons of carbon to be sequestered while also providing critical co-benefits to native peoples in rural Alaska, allowing them to sustain their traditional culture and way-of-life and protect the environment that they have called home for some ten thousand years. As noted above, in general we believe that most of ARB's proposed amendments will improve the CTR and the Offset Program in particular. We also want to call attention to several proposed changes that we

specifically support as making real improvements. That said, we also believe that certain adjustments will better effectuate the goals of the amendments and provide those with forest offset projects better guidance as to the Program's operation. We offer these stakeholder comments in a spirit of support and hope that ARB may find them helpful.

1. We Welcome ARB's Amendment of the Regulatory Compliance Requirement, though More Clarification is Needed.

ARB's clarification in proposed Appendix E of what activities may offend the regulatory compliance requirement set forth in CTR Sections 95973(b) and 95985(c)(2) is a much needed improvement. Specifically, Section (d) of Appendix E brings into the Regulation the commonsense notion that only those activities that actually affect carbon stocks in a forest offset project should be considered for the regulatory compliance requirement. While Appendix E provides much needed clarity, its utility is diminished by the ambiguities in Section 95973(b) that remain unaddressed. The proposed text of CTR Section 95973(b) reads:

Local, Regional, State, and National Regulatory Compliance and Environmental Impact Assessment Requirements. An Offset Project Operator or Authorized Project Designee must fulfill all local, regional, state, and national requirements on environmental impact assessments that apply based on the offset project location. In addition, an offset project must also fulfill all local, regional, state, 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 considered out of regulatory compliance if the project activities were subject to enforcement action by a regulatory oversight body during the Reporting Period, although whether such enforcement action has occurred is not the only consideration ARB may use in determining whether a project is out of regulatory compliance.

The troublesome ambiguity lies in the sentence with the highlighted "and," an ambiguity that is underscored by the somewhat open-ended language that is proposed at the end of the provision. We believe that the correct reading of the sentence with the highlighted "and" is that compliance is required at the risk of invalidation only with those legal requirements that *both* apply to the project location *and* are directly applicable to the offset project. This is consistent with the thrust of Appendix E's focus on *project* activities, and also with the language now proposed for inclusion in CTR Section 95973(b)(2) that also focuses on *project* activities.

However, the provision remains a bit ambiguous. The "and" sentence also can be read to require compliance with legal requirements that apply to the project location *in addition to* those legal requirements that directly apply to the project itself. Under this interpretation, the violation of, say, a local reporting requirement that is not applicable to the offset project activities but that does apply to the project location could invalidate an

entire reporting period's worth of ARBOCs. Such a result would be draconian, especially if it occurs during the initial years of a forest offset project, which is when most of its credits are earned.

In a previous rulemaking addressing section 95973(b), ARB explained that the section only applied to project activities, and went so far as to state "[r]egulatory conformance is intended to be limited to project activities."¹ However, to our knowledge ARB has never directly addressed the ambiguity identified above. We therefore request that ARB reaffirm its interpretation that CTR Sections 95973(b) and 95985(c)(2) as amended mandate compliance at the risk of invalidation only with those legal requirements that directly apply to project activities, thereby making Appendix E the meaningful and helpful addition to the Regulation that it is intended to be.

2. We Welcome the Expanded Reporting Deadline for Submitting a Project's First Offset Project Data Report.

ARB's proposal to expand the reporting deadline for the first offset project data report ("OPDR") for a project is a significant improvement over the CTR's current deadlines. Extending the deadline for the submittal of the first OPDR from 24 to 28 months in order to allow a full 24 months of data to be included, giving the project operator four months to prepare the report itself, is both prudent and practical. Many of the ARBOCs generated by a project likely will occur within the first reporting periods, and allowing projects to capture these credits during the initial phase without having to wait for another reporting period will enhance the timely generation of ARBOCs for use within the Cap-and-Trade Program. It also will facilitate annualized reporting periods.

3. We Welcome the Proposed Allowance of Late-Filed Offset Project Data Reports to Satisfy the Continuous Reporting Requirement.

Allowing a tardy OPDR to satisfy the continuous reporting requirement found in proposed CTR Section 95976(d) provides much needed breathing room in what may otherwise be a fairly drastic provision. Forest projects with vast acreages such as many of those in Alaska will require a lengthy, dedicated effort to ensure that all of the information included in the OPDR is complete and accurate. Given the size of the task for these large projects, there is a chance that a report may not be timely submitted. We thus appreciate ARB's clarification as to what will happen if such an event does occur.

4. Adding Overestimations Due to the Use of Approved Growth Models to the Definition of Intentional Reversal is Inappropriate.

ARB's proposed definition of "intentional reversal" appears to alter what was previously the touchstone of determining the status of a reversal – that is, whether the reversal was "caused by a forest owner's negligence, gross negligence, or willful intent . . ." CTR Section 95802(a)190. A forest owner that so causes a reversal is, appropriately in our view, responsible for replacing the requisite amount of ARBOCs. *Id.* at 95983(c)(3). However, the proposed definition of "intentional reversal" now includes

¹ ARB Final Statement of Reasons (May 2014) at 867 (*available at* <https://www.arb.ca.gov/regact/2013/capandtrade13/ctfsor.pdf>); *see also id.* at 628 and 1026.

those reversals that are “caused by approved growth models overestimating carbon stocks.” Proposed CTR Section 95802(a). It is difficult to understand how using a growth model approved by ARB is tantamount to “negligence, gross negligence, or willful intent.”

It would be far more appropriate to treat as unintentional any reversal due to an overestimation of carbon stocks that results from the use of an approved growth model and not negligence or worse. Such an overestimation may not be the result of an Act of God such as disease and wildfires, the examples cited in the current definition of “unintentional reversal,” but they are the result of well-intentioned human acts that cause a reversal just as the intentional setting of a back burn, the exception cited in the definition of “intentional reversal.” In both instances, the reversals are the result of acts by persons other than the forest owner. The forest owner should not be held responsible for the acts of others in positions of authority as if she was guilty of negligence, gross negligence, or willful intent. In short, overestimations that result from the use of an approved growth model should be treated as unintentional and not intentional reversals. We therefore respectfully suggest the following modifications to the proposed amendments to CTR Section 95802(a) (italicized words are those already proposed by ARB; our proposed additions are underlined):

“Intentional Reversal” means any reversal, except as provided below, which is caused by a forest owner's negligence, gross negligence, or willful intent, including harvesting, development, and harm to the area within the offset project boundary, ~~or caused by approved growth models overestimating carbon stocks~~. A reversal caused by an intentional back burn set by, or at the request of, a local, state, or federal fire protection agency for the purpose of protecting forestlands from an advancing wildfire that began on another property through no negligence, gross negligence, or willful misconduct of the forest owner is not considered an intentional reversal but, rather, an unintentional reversal. *Receiving Adverse Offset Verification Statements on two consecutive offset verifications after the end of the final crediting period will be considered an intentional reversal.*

* * *

“Unintentional Reversal” means any reversal, including wildfires or disease that is not the result of the forest owner's negligence, gross negligence, or willful intent, including a reversal caused by approved growth models overestimating carbon stocks. *In the case of a wildfire, only trees identified as dead or dying, in the post-event inventory, as a result of the fire will be removed from the project's inventory and compensated from the Forest Buffer Account minus any salvage harvest accounted for under long-term storage.*

5. We Welcome ARB's Proposed Amendment Extending the Timeline for Conducting a Post-Unintentional Reversal Carbon Stock Estimate.

Because it is not hard to foresee a situation in which it would be necessary, we welcome ARB's proposal to expand the timeline to complete a post-unintentional reversal carbon stock estimate. ARB's proposed section 95983(b)(1) will allow 23 months for such a carbon stock estimate to be conducted. Depending on the acreage involved in such a reversal, providing a complete and accurate carbon estimate may take a significant amount of time. This is especially true for many of the forest projects in Alaska where the acreages are vast. We also welcome as reasonable and practicable ARB's proposal to toll the requirement of submitting an offset project data report while this carbon estimate is being completed.

6. We Support the Purpose of ARB's Proposal Regarding Required GHG Emission Reductions But it Should Be Broadened to Include Jurisdictions Other than California and Linked Jurisdictions.

ARB staff has explained that it "is proposing clarification that if a law, regulation, or legally binding mandate to limit GHG emissions that directly applies to an offset project goes into effect during the crediting period of a project, then the project may continue to receive ARB offset credits for the remainder of their crediting period, but may not renew their crediting period." Initial Statement of Reasons (August 2016) (the "ISOR") at 56. We support the spirit of this proposal to protect the expectations of those that have made financial investments in the generation of ARBOCs. Protecting such expectations ensures the continued participation of entities willing to undertake the significant effort and expenditure required to develop compliance offset projects.

However, the regulatory language proposed by ARB does not fully support the purpose identified in the ISOR. Proposed CTR Section 95973(a)(2)(G) speaks only to situations where a GHG reduction requirement "comes into effect *in California or in a linked jurisdiction.*" It does not address what happens with offset projects in jurisdictions such as Alaska. Thus, to account for those jurisdictions outside of California and linked jurisdictions, we respectfully propose the following modification to proposed CTR Section 95973(a)(2)(G):

If any law, regulation, or legally binding mandate requiring GHG emission reductions or GHG removal enhancements comes into effect ~~in California or in a linked jurisdiction pursuant to section 95943~~ the jurisdiction where the offset project is located during an offset project's crediting period, then the offset project is eligible to continue to receive ARB offset credits for those GHG emission reductions and GHG removal enhancements for the remainder of the offset project's crediting period, but the offset project may not renew that crediting period. If an offset project has not been listed prior to the law, regulation, or legally binding mandate going into effect, or the law, regulation, or legally binding mandate goes into effect before the offset project's crediting period renews,

then only emission reductions or removal enhancements that are in excess of what is required to comply with those laws, regulations, and/or legally binding mandates are eligible for ARB offset credits.

This modification will ensure that offset projects in all jurisdictions are treated equally under the Cap-and-Trade Program, and will incentivize the continued participation of entities outside of California and linked jurisdictions.

7. ARB's Proposal to Require Forest Owners to Replace Invalidated Offset Credits in the Forest Buffer Account Should be Improved.

Proposed CTR Sections 95985(h)(3) and (i)(3) require the Offset Project Operator (which for a forest offset project is the forest owner) to replace 50% of any ARBOCs are located within the Forest Buffer Account ("FBA") that have been invalidated. Although at first blush it seems logical that these credits would need to be replaced, the proposed requirement actually does not make sense in the context of the regulatory scheme as a whole.

Under the current Regulation, the only invalidated ARBOCs that must be replaced are those that have been used and thus are in a retirement account. CTR Sections 95985(h) and (i). ARBOCs in the FBA, however, have not yet been used. They have not been surrendered to meet a compliance burden, but rather are placed in the FBA to serve as insurance against unintentional reversals. ARBOCs that have been invalidated pursuant to CTR Section 95985(c) reflect a determination that the credits never should have been issued in the first place – and if they had not been issued, then there would have been no need to insure them against reversal. ARB's proposed requirement that only half of the invalidated ARBOCs in the FBA be replaced appears to be a concession that these credits really do not truly need to be replaced. If not, why is ARB only solving half the problem? (The ISOR does not address the 50% replacement rate.)

We suggest that if ARB wishes to require the replacement of invalidated ARBOCs in the FBA, then to be consistent with the rest of the Regulation the number to be replaced should be tied to the number of credits that have been retired from the FBA. This could be done by administering the FBA in such a way that an equal percentage of credits present in the FBA from each offset project are used to compensate for an unintentional reversal. This equalizes the risk of invalidation with the requirement to replace credits retired from the FBA across all forest offset projects, which would harmonize better with the general insurance goals of the FBA. While we do not anticipate ever being in a position where the invalidation provisions affect us, ensuring the integrity of the Program as a whole can only benefit all involved.

Conclusion

Many of the proposed amendments take steps in the right direction for ensuring the long-term integrity of the forest offset projects. With a few minor adjustments, and further input from the stakeholders involved, we believe that many of the issues addressed in the rulemaking may be resolved to the benefit of the Cap-and-Trade Program, its stakeholders and the global environment. Once again, we salute California

for its commitment to addressing climate change, a commitment that we share, and we thank you for your consideration of these comments. Thank you for the opportunity to provide comments on behalf of Sealaska Corporation and our 22,000 Alaska Native shareholders. We look forward to continuing to work with ARB regarding this important program.

Sincerely,



Jaeleen J. Araujo
V.P. General Counsel & Corporation Secretary
Sealaska Corporation