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to Draft Conceptual Permitting Roadmap

Additional submitted attachment is included below.



YUROK TRIBE

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VIA E-MAIL
February 10, 2023

California Energy Commission
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RE: Draft Conceptual Permitting Roadmap, 17-MISC-01 California Offshore Renewable Energy docket

Aiy-ye-kwee Chair Hochschild and Honorable Commissioners,

The Yurok Tribe (“Tribe”) respectfully submits this comment to the California Energy Commission’s (“Commission”) draft conceptual permitting roadmap. The Yurok Tribe is the largest federally recognized tribe in California, with more than 6,400 enrolled members. The Ancestral Lands of the Yurok Tribe extend unbroken within and along the coast of the Pacific Ocean (including usual and customary offshore fishing areas) from Damnation Creek, its northern boundary, to the southern boundary of the Little River drainage basin, and unbroken along the Klamath River, including both sides and its bed, from its mouth upstream to and including the Bluff Creek drainage basin.

The Tribe is concerned that the Commission’s draft conceptual permitting roadmap encourages local, state, and federal agencies to make decisions potentially affecting the Tribe’s Ancestral Lands without meaningful participation by the Tribe in such decisions. A decision by local, state, and federal agencies to form joint review panels or other interagency groups for the purpose of streamlining permitting risks creating a legal vacuum wherein no one agency is legally charged with engaging in consultation or otherwise seeking the Tribe’s meaningful participation. To avoid this undesirable outcome, the Yurok Tribe advises that the final permitting roadmap express the following:

California agencies, through Executive Orders N-15-19 and B-10-11, are required to engage in government-to-government consultation with California Native American tribes regarding policies that may affect tribal communities. Furthermore, it is the policy of the Newsom Administration “to seek opportunities to support California tribes’ co-management of and access to natural land

that are within a California tribe’s ancestral land and under the ownership or control of the State of California.”

The federal Indian trust responsibility, which all federal agencies owe to federally recognized tribes, applies to all agency decisions. Although individual agencies have their own tribal consultation policies, the trust responsibility pervades all federal decisionmaking, including decisionmaking between multiple agencies.

These federal and state responsibilities have a number of implications for the offshore wind permitting process:

First, any state agency’s participation in a joint review panel or other interagency group formed for the purpose of streamlining offshore wind permitting necessarily is a policy that may affect tribal communities, and presents an opportunity to support—or suppress—California tribes’ co-management of lands within tribes’ ancestral lands. As such, agencies must consult tribes if choosing to do so. Likewise, any decision by a federal agency to join and participate in a joint review panel must be consistent with the trust responsibility *at the beginning* of any process aimed to form such a group, and *well before* making a decision to join or not join such a group. Moreover, each agency should be transparent and timely in its communications with tribes regarding any decision to participate in a joint review panel and provide an explanation of how the agency’s decision is consistent with its obligations to tribes.

Second, any decision by a federal agency as a participant on a joint review panel must be consistent with the trust responsibility, and any decision by a state agency must satisfy its obligations to tribes; thus, any state or federal agency on a joint review panel has a duty to consult with the Tribe regarding any such decision that affects the interests of tribes. Any federal agency’s participation in a joint review panel must not compromise its trust, and no federal agency should assent to a decision by a joint review panel of which it is a part that violates this trust responsibility. It cannot be assumed that a decision by a joint review panel comprised of agencies each of which individually has obligations to tribes necessarily will be made with tribes’ best interests in mind—it may be, as is always the case in joint decision making, that compromises must be made. Agencies must not compromise on their obligations to tribes through their participation in a joint review panel.

Third, the federal trust responsibility and the state’s obligations apply to any decision by a joint review panel which acts with authority of one or more federal and state agencies. The Tribe appreciates CEC’s recommendation that a “venue” be provided “for tribes . . . separate from and in addition to legally required tribal consultation”; however, CEC must take a step further and insist that any panel have the same duty to consult tribes government-to-government as its component agencies. Likewise, any panel has a duty to act consistently with the trust responsibility

and in furtherance of the state's obligations to tribes, and to clearly communicate with tribes regarding its decisions. Consultation by each component agency of a joint review panel shall not substitute for the panel's duty to consult, especially with regard to any decision that implicates the obligations to tribes of multiple agencies.

Fourth, no decisions regarding a joint review panel's composition, authority, and operating rules, should form without meaningful input from affected tribes, as such decisions are integral to co-management, and have direct bearing on the panel's ability to fulfill its trust obligations. It is preferred that the Tribe have the opportunity to be a member of any panel that will have the authority to make decisions affecting the Yurok Ancestral Lands, as co-management is best achieved through equal sharing of power. But in any case, it is vital that the Tribe be meaningfully involved, in decisions regarding the membership and powers of any joint review panel that will have authority to make decisions potentially affecting the Yurok Ancestral Lands.

Fifth, no decision regarding whether and how to coordinate NEPA and CEQA review shall be acceptable without meaningful input from federally recognized and California Native American Tribes. The draft conceptual permitting roadmap suggests that a primary function of joint review panels will be to carry out coordinated environmental review under the National Environmental Policy Act and the California Environmental Quality Act. Thus, any such panel will have the responsibility of fulfilling both NEPA and CEQA's requirements to tribes. It is therefore necessary that any decision to vest authority to conduct coordinated review in a joint review panel, or how such review shall be conducted, should require meaningful input from tribes. Furthermore, Council on Environmental Quality regulations require consideration of whether a tribe should be a lead or co-lead agency. Thus, no decision regarding whether and how to coordinate NEPA and CEQA review should occur without consideration of whether the Tribe should be a joint lead agency or cooperating agency.

Sixth, it is essential that any joint review process satisfy all of NEPA and CEQA's requirements with regard to tribes, including, but not limited to: meaningful consultation with tribes traditionally and culturally affiliated with the geographic area of a proposed project; consideration of the effects of a proposed project on tribal cultural resources; meaningful coordination with tribes regarding actions with potential effects on tribal lands, resources, or areas of historic value; consideration of potential violations of tribal laws protecting the environment in determining the significance of an effect of a proposed action; invitation of tribes to participate in the scoping process; consideration of tribal requests to set time limits on any constituent part of the review process. Any joint review which fails to afford all of the protections to tribes granted under both laws shall be inadequate.

The Yurok Tribe is appreciative of the Commission's consideration of the foregoing comments.

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Joseph L. James

Chairperson, Yurok Tribe