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Comment on April 28 Permitting Roadmap

Additional submitted attachment is included below.



YUROK TRIBE

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VIA E-MAIL
May 10, 2023

California Energy Commission
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RE: 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”) Assembly Bill 525 Offshore Wind Energy Permitting Roadmap (“Permitting Roadmap”), in anticipation of the Commission’s consideration of the Permitting Roadmap at the May 10, 2023 Commission business meeting. The Yurok Tribe is the largest federally recognized tribe in California, with more than 6,500 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 previously submitted a comment to the draft conceptual permitting roadmap on February 10, 2023, and now renews the concerns expressed therein, as well as proposes alternatives and additional considerations for offshore wind permitting and regulation.

I. THE COMMISSION SHOULD RECOMMEND EXAMPLES OF TRIBAL CO-STEWARDSHIP AS PERMITTING MODELS

The Tribe finds that the latest Permitting Roadmap does not propose any options for evaluating permits for offshore wind energy projects potentially affecting the Tribe’s Ancestral Lands that would allow for meaningful participation by the Tribe. The Permitting Roadmap advocates for the use of interagency agreements as the lynchpin of efficient and effective offshore wind permitting, and puts forth several existing examples of interagency cooperation, including the Renewable Energy Action Team and the Bay Restoration Regulatory Integration Team, as potential models. However, despite the Commission’s recommendation that any offshore wind permitting process “[p]rovide a venue for tribes . . . to engage publicly with agency staff and

principals and to provide input into the agency processes,” the Commission did not put forth any examples of tribal co-stewardship or co-management. Further, none of the Commission’s proposed models provide an avenue for meaningful tribal participation, much less tribal decisionmaking authority. To remedy this omission, and in the spirit of Commission Resolution 23-0302-09, the Tribe recommends the Commission develop and ultimately support additional options which specifically incorporate elements of the Bears Ears Intergovernmental Cooperative Agreement, and which consider the many other co-stewardship agreements between federal agencies and tribes to allow for true co-stewardship of the Tribe’s offshore and coastal Ancestral Lands with respect to offshore wind energy projects.

The Bears Ears Intergovernmental Cooperative Agreement (“Bears Ears Agreement”) is a cooperative agreement between federal agencies and tribes for the management of the Bears Ears National Monument. On October 8, 2021, President Biden issued Proclamation 10285, which, in addition to setting the current boundaries of the monument, directed the Bureau of Land Management an agency under the Department of the Interior, and the U.S. Forest Service, an agency under the Department of Agriculture, to jointly manage the monument and to prepare and maintain a management plan for all Federal lands within the boundaries of the 1.36 million-acre monument for the purpose of protecting and restoring the monument objects. On June 18, 2022, representatives of the Bureau of Land Management, and the Department of Agriculture, and the Bears Ears Commission, consisting of elected officers of five federally recognized tribes, executed the Bears Ears Agreement.¹

The authority for the agreement came from Section 307(b) of the Federal Land Policy and Management Act of 1976, as amended, 43 U.S.C. §§ 1701 et seq., which provides that the Secretary of the Interior may undertake programs of resource management through Cooperative Agreements. Notable provisions in the agreement include that the parties agree to:

- Cooperate in land use planning, including preparation of a monument management plan and travel management plan for Bears Ears, as well as subsequent, implementation-level decision-making.
- Cooperate in program development (including education and interpretation about species, Tribal uses, and other monument objects), resource protection and public land access concerning Bears Ears.
- Engage on an ongoing basis in joint dialogue, knowledge-sharing and learning programs for BLM and USFS managers and professional staff, Tribal officials, and other appropriate parties to address critical resource management, Tribal

¹ In doing so, the parties recognized that: “[t]he Departments are responsible for managing Federal lands and waters and are thereby charged with the highest responsibility to protect Tribal interests and further the nation-to-nation relationship with Tribal Nations. The Departments recognize and affirm that the special relationship between the United States and Tribal Nations is an integral part of each Department's responsibilities in managing Federal lands.”

and agency program priorities, and a shared awareness of the Tribal context of the landscape, including the need to protect both visible and sacred Tribal uses and activities, as well as monument objects and other resources.

- Coordinate, consult, and engage regularly on resource management priorities and joint management opportunities within the monument [on an annual, quarterly, and regular basis].
- Cooperatively seek additional partnerships, funds, and authorities to achieve shared Tribal and Federal land management goals.
- Take all reasonable measures to protect information regarding sacred sites, traditional ceremonies and other rituals from disclosure in order to prevent damage or desecration.

The Bears Ears Agreement is instructive for the Commission in its preparation of a permitting roadmap for offshore wind energy in California for a number of reasons. First, the Agreement points to a source of authority sufficient to allow for tribal co-stewardship of lands and resources impacted by offshore wind energy facilities. While the Tribe insists that it has ultimate authority and jurisdiction over its unceded land and ocean territory, we recognize that relevant actors are operating pursuant to federal and state law. Without conceding this point, it is worth noting that the authority used to establish the Bears Ears Agreement, the Federal Land Policy Management Act of 1976, is applicable to the Department of the Interior, which houses both the Bureau of Ocean Energy Management (BOEM) and Bureau of Safety and Environmental Enforcement (BSEE). BOEM and BSEE thus have authority under the Act to enter into cooperative agreements with other agencies and tribes to undertake programs of resource management. BOEM is tasked with leasing federal lands on the Outer Continental Shelf and NEPA review of facilities constructed and operated on such lands. BSEE is tasked with safety and environmental oversight, compliance, and enforcement for offshore wind facilities. Thus, BOEM and BSEE, under the Federal Land Policy Management Act of 1976 to may enter into cooperative agreements with tribes and other agencies to undertake programs of resource management in connection with leasing and NEPA review of Outer Continental Shelf lands, as well as safety and environmental oversight, compliance, and enforcement.

Moreover, the Department of the Interior, the Department of Agriculture, and the Department of Commerce are signatories to Joint Secretarial Order 3403, which commits those Departments and their respective agencies to pursuing collaborative and cooperative agreements with tribal nations. Therefore, pursuant to the Federal Land Policy management Act of 1976, as well as Joint Secretarial Order 3403, several federal agencies involved in offshore wind energy regulation and associated environmental protection in California housed within these departments—BOEM, BSEE, NMFS, USFWS—are empowered to enter into cooperative agreements with tribes for co-stewardship of offshore waters and lands, and their associated natural resources.

Second, the agreement provides a robust framework for robust tribal co-stewardship. The agreement commits the federal parties to “cooperate” with the tribal parties in land use planning, implementation-level decisionmaking, and program development. This requires agencies actually assent to tribal preferences in decisionmaking, rather than merely to consider tribal views, as is the minimum required by CEQA, NEPA, NHPA, and other statutes. Specifically, the agreement obligates the agencies to seek tribal input on a number of agency decisions, such as preparation of the monument management plan, travel management plan, and existing discretionary uses and activities. The agreement also requires that the federal parties cooperate with the tribal parties in seeking additional partnerships, funds, and authorities to achieve shared Tribal and Federal land management goals. This creates an affirmative obligation on the part of the federal parties to build on the existing partnership, rather than putting the onus on the tribes to assert their needs and pursue resources. Additionally, the agreement creates a detailed consultation schedule with specific triggers and topics of discussion, thereby necessitating federal parties communicate vital decision points and other important information to the tribal parties. These are just a few of the attributes of the Bears Ears Interagency Cooperative Agreement that facilitate actual tribal co-stewardship. The formation of one or more interagency agreements with these attributes would greatly improve the process for permitting and regulating the offshore wind energy industry in California.

Third, the agreement sets out a communication plan that is centered around tribal needs. The Agreement requires agencies notify the tribes *prior to* the initiation of any planning or implementation-level project. This requirement gives tribes time to prepare and respond to the initiation of a project, rather than being forced into a reactionary position. The agreement also requires the agencies to provide a schedule allowing the tribes to provide input as a part of each *internal review stage* and before the final decision is issued. Incorporating tribal input at each internal review stage greatly increases the ability of tribal priorities to actually shape the final decisions. Finally, the agreement requires that the agencies give the tribes a written explanation of any decision not to incorporate tribal feedback into a planning document, such as a draft or final EIS, at least 30 days prior to issuance of the document, and that the agencies meet with the tribes regarding the explanation if the tribes so request. This requirement creates a greater degree of agency accountability. Any interagency agreement for the permitting of offshore wind energy generation in California should aim to provide a similar communication plan that affords maximum transparency and opportunity to weigh in on decisions.

The Bears Ears Intergovernmental Cooperative Agreement is just one of several models of tribal co-stewardship in which the federal government is engaged. In November 2022, the Departments of Interior and Agriculture released their first annual reports on tribal co-stewardship, pursuant to Joint Secretarial order 3403, enumerating twenty new co-stewardship agreements and sixty other agreements with tribes in various stages of review. The Yurok Tribe encourages the CEC to utilize these agreements to understand the array of authorities, policies, and tools available to allow for true tribal co-stewardship of the Tribe’s coastal and offshore waters, lands, and natural resources with respect to the development of the offshore wind energy.

Regardless of whether the Commission ultimately chooses to recommend one particular permitting model, or rather to offer a menu of models to state and federal legislatures and agencies to consider, the Tribe firmly believes that *any* model recommended *must* integrate tribal input not only into its decisionmaking processes, but decisions themselves. The Tribe does not at this time propose a model for offshore wind permitting which holistically integrates tribal decisionmaking, given the short amount of time available between the publication of the Permitting Roadmap and the May 10, 2023 business meeting, as well as the immensity of resources and expertise required to generate such a model. Rather, the Tribe would encourage the Commission to integrate concepts from the Bears Ears Intergovernmental Cooperative Agreement highlighted above, and conduct a thorough review of other federal-tribal cooperative agreements to identify other provisions which could support tribal co-stewardship of offshore waters, lands, and natural resources. With so many resources available, there is no reason to consider options for permitting and regulating the offshore wind energy industry that do not involve meaningful tribal input in decisionmaking.

II. THE TRIBE SUPPORTS THE PREPARATION OF PROGRAMMATIC EIRS FOR OFFSHORE WIND ACTIVITIES ALONG THE NORTH COAST

The latest Permitting Roadmap recommends the preparation of programmatic EIRs, as one potential option for coordinating environmental review associated with offshore wind activities. As a general matter, the Yurok Tribe is supportive of this idea. The Tribe has repeatedly expressed concerns that the full range of environmental impacts associated with offshore wind along the north coast have not been adequately addressed up to this point, and that the cumulative effect of multiple projects is not being taken into consideration from a planning perspective. Furthermore, the Tribe is acutely cognizant of the reality that project-level environmental review too often fails to consider the cumulative effects of similar existing and future projects, and even when such considerations are made, the momentum for an individual project to be approved often overpowers the countervailing need to prevent the additional effects that project will have on the environment.

The Yurok Tribe believes one or more programmatic EIRs for offshore wind activities could be one piece of a broader, tribal co-stewardship solution to the potential environmental harms of offshore wind. “An advantage of using a program EIR is that it can “[a]llow the lead agency to consider broad policy alternatives and program wide mitigation measures at an early time when the agency has greater flexibility to deal with basic problems or cumulative impacts.”² A programmatic EIR would better account for the cumulative effects of individual floating wind projects on the environment.³ Additionally, a programmatic EIR could facilitate large-scale marine spatial planning on the north coast, taking the geospatial component of various uses and environmental needs into account at a stage where such uses and needs can be protected, rather than at the project stage, when the location of an individual project has already been proposed.⁴

² *In re Bay-Delta etc.* (2008) 43 Cal.4th 1143, 1169 (citing Cal Code Regs. tit. 14, § 15168).

³ *See* Cal. Code Regs. tit. 14, § 15168(b)(2).

⁴ *See id.* at § 15168(b)(1).

Finally, a programmatic EIR could provide a baseline understanding of environmental conditions, allowing the effects of individual projects assessed at the project EIR stage to be more accurately and comprehensively contextualized into a broader analysis of the impacts of offshore wind activities on the environment.

However, the Yurok Tribe does not support the utilization of a programmatic EIR to avoid needed environmental review, and fully expects that a programmatic EIR will comport with relevant precedent. For example, the project description for a programmatic EIR must include an accurate and stable project description. “A project description that gives conflicting signals to decision makers and the public about the nature and scope of the project is fundamentally inadequate and misleading.”⁵ Thus, a programmatic EIR for north coast offshore wind activities must provide a comprehensive analysis of anticipated environmental impacts of such activities, without purporting to provide project-level detail. Moreover, the Yurok Tribe expects that any programmatic EIR will include mitigation measures appropriate to a programmatic level of environmental review. Proposed mitigation measures, or the decision to defer formulation of mitigation measures to the project-EIR stage, must be supported by substantial evidence.⁶ Finally, the Tribe believes that a permitting scheme which utilizes a programmatic EIR without allowing for tribal co-stewardship and shared permitting authority would not be adequate to address tribal concerns, and urges the Commission not to recommend such a scheme.⁷

The Yurok Tribe is committed to ensuring the Commission ultimately recommends a path for offshore wind permitting that is truly inclusive of tribes and tribal communities and appreciates the Commission’s consideration of these comments.

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Chairman, Yurok Tribe

⁵ *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 84.

⁶ *See Cleveland National Forest Foundation v. San Diego Assn. of Governments* (2017) 17 Cal.App.5th 413.

⁷ Nothing in this comment should be construed to indicate the Tribe’s support of, or opposition against SB 286, a bill currently under consideration in the California Senate on offshore wind generation.