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*Submitted Via Electronic Transmission*

April 4, 2014

Mary Nichols  
Chair  
California Air Resources Board  
1001 I Street  
Sacramento, CA 95812

Re: *Northern California Power Agency Comments on Proposed Amendments to the Cap-and-Trade Program Regulation – 15-Day Changes*

Dear Mary:

On March 21, 2014, the California Air Resources Board (CARB) released the Modified Text (15-Day Changes) to the Proposed Amendments to the Cap-and-Trade Program Regulation released in September 2013<sup>1</sup> and presented to the CARB Board (Board) on October 25, 2013. The Northern California Power Agency<sup>2</sup> (NCPA) appreciates the opportunity to provide these comments to the Board on the latest proposed amendments to the Cap-and-Trade Program Regulation (Regulation).

**I. INTRODUCTION AND SUMMARY OF RECOMMENDATIONS**

NCPA and its member agencies have been active participants in CARB's rulemaking to develop and implement the Cap-and-Trade Program (Program). NCPA appreciates CARB's ongoing efforts to work with stakeholders to refine the regulatory language and address issues

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1 On September 4, 2013, CARB released the *Notice of Public Hearing to Consider Amendments to the California Cap on Greenhouse Gas Emissions and Market-Based Compliance Mechanisms* and a *Staff Report: Initial Statement of Reasons (ISOR)*, to which the proposed amendments were included as *Appendix E: Proposed Regulation Order* (Proposed Amendments).

2 NCPA is a not-for-profit Joint Powers Agency, whose members include the cities of Alameda, Biggs, Gridley, Healdsburg, Lodi, Lompoc, Palo Alto, Redding, Roseville, Santa Clara, and Ukiah, as well as the Bay Area Rapid Transit District, Port of Oakland, and the Truckee Donner Public Utility District, and whose Associate Member is the Plumas-Sierra Rural Electric Cooperative.

that have arisen during the implementation of the Program. As noted in comments on the Proposed Amendments, it is important that the Program continue to be administered and operated in a manner that will allow the State to meet its greenhouse gas (GHG) emission reduction goals, while ensuring that electrical distribution utilities (EDU) complying with the Regulation are able to continue to provide safe, reliable, and reasonably priced electricity to California residents and businesses, and not impede their ability to comply with other State and Federal mandates.

During the October 2013 Board meeting, the Board reviewed the Proposed Amendments to the Regulation,<sup>3</sup> and identified several areas for further deliberation and potential revision in Resolution 13-44.<sup>4</sup> On January 31, staff released a Discussion Draft that set forth a number of proposed revisions to address the issues identified in Resolution 13-44. NCPA appreciates staff's consideration of the informal comments submitted by parties on the Discussion Draft, and the fact that the 15-Day Changes reflect many of the concerns raised by stakeholders. To a large degree, the 15-Day Changes are responsive to the concerns raised by NCPA and others that some of the Proposed Amendments were not needed to improve the functionality of the Program, and rather, would have resulted in greater administrative burdens and compliance costs for covered entities. The key issues addressed herein are summarized below.

- Language regarding the disclosure of employees is significantly improved, but further refinements are needed to ensure clarity, and the need for the disclosures may be negated by the absolute prohibition on employee registration as voluntarily associated entities (section 95830(c)(1)(I));
- New provisions regarding surrender of compliance instruments properly recognizes the implications associated with designating freely allocated allowances directly into an EDU's compliance account (section 95856(h)(4));
- The 15-Day Changes address unreasonable constraints on an entity's ability to participate in the auction based on changes that occur 30 days prior and 15 days after the auction (section 95912(d)(5));

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3 On September 4, 2013, CARB released the *Notice of Public Hearing to Consider Amendments to the California Cap on Greenhouse Gas Emissions and Market-Based Compliance Mechanisms*, and a *Staff Report: Initial Statement of Reasons (ISOR)*, to which the proposed amendments were included as *Appendix E: Proposed Regulation Order (Proposed Amendments)*.

4 Resolution 13-44, October 25, 2013: Draft <http://www.arb.ca.gov/regact/2013/capandtrade13/res13-44.pdf>; Attachment A to Resolution 13-44: <http://www.arb.ca.gov/regact/2013/capandtrade13/attacha.pdf>.

- Corrections and clarifications regarding the applicability of the RPS Adjustment improve the functionality of these provisions (section 95852(b)(4)); and,
- The definition of Cap-and-Trade Consultants and Advisors should be narrowly tailored to address articulated concerns (sections 95914(c)(3), 95923).

Furthermore, NCPA notes that:

- Provisions addressing cost containment are welcome (section 95913(f)(5)), and NCPA looks forward to CARB's further review and development of even more robust cost containment protections that represent a suite of measures, and
- The Proposed Amendments properly clarify permissible disclosures of auction-related information under limited circumstances (section 95914(c)(2)(C)).

## II. COMMENTS ON THE 15-DAY CHANGES

### **Section 95830(c)(1)(I) – Employees with Compliance Instrument Trading Information.**

CARB has expressed a desire for greater information regarding individuals with knowledge of market strategies. The 45-day Proposed Amendments added Section 95830(c)(1)(I) to define the scope of employment the rule was targeting, and require additional reporting and disclosure rules. Like many stakeholders, NCPA expressed concerns regarding the breadth of the definition set forth in the Proposed Amendments. NCPA appreciates the recognition of these concerns that are reflected in the revisions in the 15-Day Changes that attempt to limit the scope of the employee's responsibilities relevant to the Program and CARB's reporting requirements. However, NCPA urges the Board to direct that further refinements and clarifications be added to the definition. The intent of this section, as described by staff, is to ensure that CARB has a list of employees with control over decisions regarding the disposition and acquisition of compliance instruments. In response to concerns raised by stakeholders, the Board directed staff to refine the definition. As set forth in the 15-Day Changes, the section would require entities to report "names and contact information for all persons employed by the entity **with knowledge of an entity's market position (current and/or expected holdings of compliance instruments and current and/or expected covered emissions).**"

This language is preferable to the language set forth in the 45-day Proposed Amendments because it strikes the vague reference to anybody "in a capacity giving them access to

information on compliance instrument transactions or holdings . . . ,” and narrows the scope of the request. NCPA remains concerned, however, that defining all of the individuals “with knowledge of an entity’s market position” could be problematic without a more detailed definition of “market position,” especially as it pertains to “current and/or expected covered emissions.” Information regarding current or expected covered emissions is commonly reported publicly by compliance entities and various agencies. Furthermore, it is very easily ascertained from publicly available knowledge. The definition should be carefully crafted to ensure that the employees with “knowledge” is limited to those individuals that have access to tracking system account information, compliance instrument procurement, and emissions obligations.<sup>5</sup> NCPA urges the Board to direct that section 95830(c)(1)(I) be revised to read:

“names and contact information for all persons employed by the entity **with knowledge of both an entity’s market position (which includes both current and/or expected holdings of compliance instruments and current and/or expected covered emissions) and tracking system account information that is not publicly available.**”

These clarifications would ensure that the definition is not so vague as to cover employees that have knowledge of market information simply by virtue of the fact that the information at issue is publicly available. Furthermore, NCPA believes that CARB should monitor implementation of this provision to ensure that it is not unduly burdensome for registered entities.

Finally, given other proposed revisions to the Regulation, this section may no longer be needed to address CARB’s concerns. In light of the fact that the 15-Day Changes includes a proposed new section (95814(a)(7)) that disallows all employees of covered entities from registering as voluntarily associated entities, NCPA believes that the additional reporting relevant to this specific class of employees is unnecessary and should be removed entirely.

#### **Section 95852(b)(4) – RPS Adjustment**

NCPA supports the proposed revisions to the Regulation that confirms the ability of EDUs to utilize the RPS Adjustment as intended. Revisions to section 95852(b)(4) now specifically reference the state’s RPS program, change the timing for retirement of RECs, and

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<sup>5</sup> In Resolution 13-44, staff was directed to revise the language regarding disclosure of Cap-and-Trade Contractors and Advisors to “limit this disclosure requirement to contractors that have access to tracking system account information, compliance instrument procurement, and emissions obligations.” NCPA believes that this same standard should be used to guide disclosure of employees under section 95830.

note that such retirement is “**for the year** in which the RPS adjustment is claimed,” rather than “in the year.” These changes better reflect the interrelationship between the Cap-and-Trade Program and the RPS program, better capture the intent of the provision as noted in the original Final Statement of Reasons, and should be adopted. In order to better address the functionality of the RPS programs, however, the provisions linking REC retirement to the MRR reporting deadline should be removed.

As the program matures, NCPA urges CARB to review the language in subsequent rulemakings to ensure that the stated intent of the provision is carried out and that the regulatory language does not have the unintended consequence of adversely impacting covered entities’ ability to comply with the RPS requirements or result in additional cost burdens for EDU ratepayers.

#### **Section 95856(h)(4) – Retirement of Compliance Instruments and Prohibitions on Use of Allowance Value**

NCPA supports the proposed addition of section 95856(h)(4) to the Regulation. The addition of section 95856(h)(4) addresses the concerns raised by POUs that CARB’s predetermined order of allowance withdrawals could technically put EDUs that designated freely allocated allowances directly into their compliance accounts in contravention of the prohibitions on the use of allowance value set forth in section 95892.<sup>6</sup> While the POUs had recommended creating rules that would allow covered entities to designate the order in which allowances would be retired, new 95856(h)(4) would address this concern by ensuring that POUs are not “forced” into a violation of the provision prohibiting the use of allowance value for sales into the ISO.

New section 95856(h)(4), which provides: “**An electric distribution utility will not be in violation of section 95892(d)(5) when the Executive Officer retires compliance instruments, if the electric distribution utility has a sufficient quantity of eligible compliance instruments not allocated pursuant to section 95870(d) in its compliance account, at the time the timely surrender of compliance instruments by a covered entity is due pursuant to section 95856, that is at least equal to its compliance obligation for any**

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<sup>6</sup> See *Comments of the Northern California Power Agency on Proposed Amendments to the Cap-and-Trade Program Regulation*, pp. 7-8, dated October 23, 2013; see also *Comments of the Northern California Power Agency on January 31, 2014 Discussion Draft*, pp. 3-4, dated February 14, 2014.

**transactions for which the use of allocated allowance value is prohibited under section 95892(d)(5).**” should be adopted for inclusion in the Regulation.

### **Section 95912(d)(5) – Timing of Information Changes Relevant to Auction Participation**

Revisions in the 15-Day Changes to section 95912(d)(5) recognize the overly restrictive constraints that the Proposed Amendments would have had on auction participation. As previously drafted, the restrictions that section 95912(d)(5) placed on an entity’s ability to both operate its core businesses and comply with the Regulation were unduly burdensome, and in some instances, completely outside the control of the covered entity; business changes should not preclude a covered entity from purchasing or selling allowances in the auction. As set forth in the 15-Day Changes, entities need not fear that already-completed allowance transactions may be invalidated due to changes that occurred within 15 days following the completion of an auction. NCPA also supports the revisions that reduce the scope of information that is subject to updating and that could potentially disqualifying a covered entity from participating in an auction due to changes 30 days prior to the auction.

### **Section 95923 – Definition of Cap-and-Trade Consultants and Advisors**

Throughout this rulemaking process, staff has sought to expand the definition and related disclosure requirements associated with individuals and companies providing entities registered in the Compliance Instrument Tracking System Service (CITSS) with guidance regarding the Cap-and-Trade Program. As noted in earlier oral and written comments from several stakeholders, it is important that the ultimate definition adopted by the Board not be so expansive as to create an entire bureaucracy dedicated to tracking these consultants and advisors. As revised in the 15-Day Changes, the definition of Cap-and-Trade Consultants and Advisors properly strikes a requirement to provide a brief description of the work to be done by the consultants and advisors. The definition, however, has also been expanded to invoke the conflict of interest provisions applicable to verification bodies and offset verifiers pursuant to Section 95979(b)(2) of the Regulation and section 95133(b)(2) of the Mandatory Reporting Regulation (MRR).

Section 95923(a) now defines a Cap-and-Trade Consultant and Advisor as a person or entity that is not an employee of an entity registered in the Cap-and-Trade program, but is providing the services listed in section 95979(b)(2) of the Cap-and-Trade Regulation or section 95133(b)(2) of the Mandatory Reporting Regulation in relation to the Cap-and-Trade Program or MRR, specifically for the entity registered in the Cap-and-Trade Program . . .” This language is tempered from what was in the Discussion Draft by the inclusion of “*in relation to the Cap-and-Trade Program or MRR,*” but still encompasses a broad range of individuals and companies. NCPA appreciates CARB’s recognition that the definition was too far reaching, and supports the qualification that the individuals and companies must be specifically employed to provide those services relevant to the Cap-and-Trade Program or MRR. In Attachment A of Resolution 13-44, staff noted that they would “*coordinate with stakeholders to craft regulatory language to limit this disclosure requirement to contractors that have access to tracking system account information, compliance instrument procurement, and emissions obligations.*” As currently drafted, even with the limiting language, the proposed definition of Cap-and-Trade Consultant and Advisors reaches beyond those individuals and companies that “*have access to tracking system account information, compliance instrument procurement, and emissions obligations.*” Accordingly, NCPA urges staff to continue to monitor this requirement, and in the event that it appears to result in the submission of unnecessary information or disclosures, revisit the requirements in a subsequent review of the Regulations.

#### **Section 95914(c) – Revised Definition of Auction Advisor**

Section 95914(c)(3) changes the definition of “auction advisor” to incorporate the broader “Cap-and-Trade Consultant or Advisor, as defined in section 95923.” As proposed, this section now reads “if an entity participation in an auction has retained the services of a Cap-and-Trade Consultant or Advisor, as defined in section 95923, regarding auction bidding strategy, then . . .” As set forth in the Discussion Draft, the definition was unduly broad, in that it would have invoked the myriad other consultants and advisors defined in section 95923, rather than just those individuals/companies that are providing advice specific to auction bidding strategies. NCPA fully supports further refining the Cap-and-Trade Consultant and Advisor definition under this section to specifically apply only to those individuals/companies providing

bidding advice, and application of the provisions of section 95914(c)(3)(C) to those individuals/companies that are providing bidding advise.

### **Section 95921 – Conduct of Trade**

The 15-Day Changes present several significant revisions to the provisions of section 95921 regarding Conduct of Trade and includes two new definitions associated with it: section 95802(a)(138) “expected settlement date” and section 95802(a)(139) “expected termination date.” The changes also include different rules for transactions through December 31, 2014 (including penalties associated with failure to meet timely transfers) and transactions beginning after January 1, 2015. It is difficult to reconcile the proposed revisions with all of the current practices that are part of the CITSS, and it does not appear that all of these changes have been fully worked through their practical application. To the extent that the proposed changes alter existing CITSS and common business practices, compliance entities and others registered in CITSS should have an opportunity to more thoroughly assess the implications and potential conflicts or shortcomings of the proposed changes prior to adoption by the Board. NCPA is also concerned with the implementation implications of imposing penalties for transactions that are not completed within 3 days, as proposed in section 95921(a)(3).

### **Section 95814(a) – Outright Prohibition on Employees Becoming Voluntarily Associated Entities**

Newly proposed section 95814(a)(7) provides: **“An individual employed by an entity subject to the requirements of MRR or the Cap-and-Trade Program is not eligible to register as a voluntarily associated entity.”** Since CARB intends to restrict all employees of covered entities from registering as voluntarily associated entities, the need to report additional information regarding employees with knowledge of trading instruments (see Section 95830(c)(1)(I)) appears to be unnecessary, and therefore, should be removed. NCPA also urges the Board to direct that the regulatory language be further refined to apply the restriction to individuals employed by “covered entities or opt-in covered entities,” as that language is more certain than “subject to the requirements of MRR or the Cap-and-Trade Program.”



### **Section 95814(a) – Cap-and-Trade Consultants and Advisors Registering as Voluntarily Associated Entities**

The 15-Day Changes create internal inconsistencies in the Regulation relevant to the ability of Cap-and-Trade Consultants and Advisors (CTCAs) to register as voluntarily associated entities. Section 95814(a)(3) includes a list of individuals that can register as voluntarily associated entities if they submit a notarized letter from their employer consenting to the registration. New language in section 95814(a)(3) adds employees of entities “providing consulting services as described in section 95923” to this list. This addition, however, is at odds with language in section 95814(a)(6) that includes cap-and-trade auction advisors in the list of individuals that are *not* eligible to register as voluntarily associated entities, with no reference to the qualifier added to section 95814(a)(3). Prior to adoption, the language must be revised to clarify the extent to which CTCAs may register as voluntarily associated entities, including whether or not the prohibition is intended to apply only to CTCAs who provide advice on bidding strategies, as defined in 95914 (formerly “auction advisors”).

### **Section 95812(f) – Entities that Cease Operations**

Section 95812(f) addresses the treatment of freely allocated allowances for covered entities that cease operations. NCPA appreciates the revisions that specifically reference a “covered entity” ceasing operations rather than the previous language that referenced an entity that “receives a direct allocation of allowances pursuant to section 95870.” In order to ensure that there is no potential for ambiguity in this section, NCPA urges the Board to direct that an additional, minor modification be added to this language to reflect the prior oral assurances that this provision applies only to the industrial sector allocations and not EDUs.<sup>7</sup>

### **Section 95913 – Cost Containment.**

The 15-Day Changes do not further refine the proposed amendments regarding ways in which to control the price of allowances for covered entities in the event that the price of allowances exceeds the highest tier of the Allowance Price Containment Reserve. NCPA concurs with the many and diverse interests that support the cost containment provisions of

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<sup>7</sup> See October 25, 2013 Hearing Transcript, p. 189.

section 95913(f)(5), and also urges Staff to begin looking at further cost containment matters prior to the third compliance period.

**Section 95914(c)(2)(C) – Permissible disclosures of auction-related information under limited circumstances.**

NCPA supports the language in new section 95914(c)(2)(C) of the Proposed Amendments recognizing that there are instances under which auction bidding information may be disclosed. This new section correctly authorizes the release of information that would have otherwise been prohibited under 95914(c)(1), and is properly amended to allow for limited exceptions to the restrictions on disclosure of auction-related information consistent with the CARB's existing Regulatory Guidance Document.

**III. CONCLUSION**

NCPA appreciates that reviewing the operation implications of the Program and making necessary revisions to the Regulation is a laborious and time-intensive exercise. However, in order to ensure that the Program operates as intended, and serves as an effective tool to facilitate the reduction of GHG emissions in California, it is necessary to continually review the Regulation, and when appropriate, amend the Regulation to facilitate implementation of the Program. NCPA urges the Board to consider the comments set forth herein, and make the additional, minor corrections to the Regulations. Please do not hesitate to contact the undersigned or Scott Tomashefsky at 916-781-4291 or [scott.tomashefsky@ncpa.com](mailto:scott.tomashefsky@ncpa.com) if you have any questions regarding these comments.

Sincerely,



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