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Submitted Via Electronic Transmission

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Dr. Steven Cliff
Chief, Climate Change Program Evaluation Branch
California Air Resources Board
1001 I Street
Sacramento, CA 95812

Re: *Comments of the Northern California Power Agency on July 15 Discussion Draft re Proposed Changes to the Cap-and-Trade Program Regulations*

Dear Steve:

On July 15, the California Air Resources Board (CARB) released proposed *Discussion Draft re Proposed Changes to the Cap-and-Trade Program Regulations* (Discussion Draft). The Northern California Power Agency[1] (NCPA) appreciates the opportunity to provide these comments to CARB regarding potential revisions to the Cap-and-Trade Program Regulation (Regulation).

These comments are provided in the interest of clarifying provisions regarding covered entities' responsibilities under the Cap-and-Trade program and helping to ensure the success of the program. NCPA supports the proposed changes to the regulation that would (1) clarify rules regarding disclosure of bidding information, (2) allocates allowances to suppliers of natural gas, (3) provides for an additional source of allowances in the allowance reserve account, and (4) clarifies the definition of resource shuffling. NCPA is concerned that some of the proposed revisions, like those that require additional registration for employees of covered entities and disclosure of contractor information, as well as shortening the time to complete emissions verifications, are unnecessary and would only result in greater administrative burdens and compliance costs for covered entities. In these comments NCPA offers suggestions for

1 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.

clarifying the intent of the regulation with regard to utilization of the RPS adjustment, providing greater clarity on the surrender of compliance instrument and allocation of allowances to electrical distribution utilities, and additional measures to facilitate the containment of allowance prices.

COMMENTS ON PROPOSED CHANGES

RPS Adjustment

The RPS Adjustment is an important element of the compliance obligation calculation for first deliverers of electricity that are also subject to California's renewable portfolio standard (RPS) requirements. NCPA appreciates CARB's recognition of the interaction between the RPS program and the Cap-and-Trade program, both of which play critical roles in California's green-energy future. However, to be meaningful, the RPS Adjustment must be drafted so that it takes into account the State's RPS program requirements, as those requirements are set forth in Public Utilities Code Section 399.11, et seq., and implemented by the California Public Utilities Commission (CPUC) and California Energy Commission (CEC). Accordingly, NCPA urges the Commission to propose amendments to the provisions of section 95852(b)(4)(B) to clarify the rules governing when the RPS Adjustment may be claimed, in light of the fact that the associated renewable energy credit (REC) may not be retired in the same year that the electricity is generated and imported.

Proposed revisions in section 95852(b)(4)(B) of the Discussion Draft require the entity to retire the REC "*during the same year ~~in~~ for which the RPS adjustment is claimed*." It is not clear from this language, however, that CARB is disassociating the generation from the requirement to retire the REC. If that is indeed the case, there must be some clarification regarding how this will be tracked and reconciled with the requirements of the Mandatory Reporting Regulation (MRR). Under the MRR, covered entities must report emissions for all imports that occurred within the previous calendar year; this information forms the basis for the entity's annual compliance obligation. As currently drafted, it appears that the MRR would require the utility to have retired the REC to report the RPS Adjustment, which does not specifically address the electricity import. Electric utilities should be able to utilize the RPS Adjustment for the Cap-and-Trade program without having to demonstrate that the REC was retired in the same calendar

year, as this would constrain the utility's ability to plan and optimize its RPS portfolio under the RPS program.

As the FSOR noted, at the time the Regulations were adopted, the CPUC and CEC were still working on implementing the provisions of Senate Bill X1-2, and the CEC was concurrently working on revisions to its RPS Eligibility Guidebook, which governs myriad aspects of the state's renewable energy program. Since CARB adopted the Regulations, the CPUC has moved forward with defining the RPS program requirements for CPUC-jurisdictional entities, and the CEC has adopted both the Seventh Edition of the RPS Eligibility Guidebook and the RPS Enforcement Regulations for POUs.[2] NCPA urges CARB to look closely at the provisions of the RPS programs, including the RPS Enforcement Regulation, and particularly, to recognize that there are significant undesirable consequences and adverse impacts associated with constraining the ability of electric utilities to fully utilize the value of their RECs.

Disclosure of Auction-Related Information

NCPA supports the language proposed in new section 95914(c)(2)(C) of the Discussion Draft recognizing that there are instances under which auction bidding information may be disclosed. This new section properly authorizes the release of information otherwise prohibited under 95914(c)(1) under the following conditions:

> (A) When the release is to other members of a direct corporate association not subject to auction participation restriction or cancellation pursuant to section 95914(b),
>
> (B) When the release is to an auction bid advisor whose activity has been disclosed to the Executive Officer pursuant to section 95914(c)(3).
>
> (C) When the release is made by a publicly-owned utility only as required by public accountability rules, statute, or rules governing participation in generation projects operated by a Joint Powers Authority or other publicly-owned utilities.
>
> (D) When the release is by an electric distribution utility of information regarding compliance instrument cost and other disclosures specifically required by the California Public Utilities Commission. In the event of a disclosure pursuant to this section, the electricity distribution utility must provide the specific statutory reference to ARB that requires the disclosure of the information.

These changes reflect certain clarifications and rationales set forth in Chapter 5 of the Regulatory Guidance Document, and are necessary to ensure that the Regulations do not inadvertently impede the ability of covered entities to comply with existing rules governing their

2 The POU RPS Enforcement Regulations were submitted to the Office of Administrative Law on July 18, 2013, and will likely be effective on October 1, 2013

existing obligations. Including these distinctions in the Regulation also acknowledging the fact that disclosure of certain auction-related information amongst these related entities does not provide an unfair advantage to any one entity, nor does it enhance the likelihood of market manipulation. The Regulation should be amended to allow for exceptions to the restrictions on disclosure of auction-related information consistent with the Regulatory Guidance Document.

Allocation to Natural Gas Suppliers

The Discussion Draft rightly proposes that allowances be allocated to natural gas suppliers for the protection of natural gas ratepayers. Natural gas customers will face rate increases associated with Cap-and-Trade program compliance costs, and as such, are the appropriate recipients of allowance revenues that are allocated to the natural gas suppliers. The proposed revisions properly recognize that the natural gas utility can place restrictions on the use of the allowance value, as long as the value is used exclusively for the benefit of retail ratepayers of each natural gas supplier, consistent with the goals of AB 32. However, the Discussion Draft errs in prohibiting the return of the allowance value in a volumetric manner. Each natural gas supplier's governing body should be able to define the manner in which the allowance value is returned to its ratepayers, consistent with the goals of AB 32. If there are instances where the maximum benefit is achieved by returning the value on a volumetric basis, then the customer is best served by receiving the value in such a manner. There are a number of considerations that will be incorporated into the final distribution of allowance value to the end-use customer, and those considerations should be specifically tailored to serve the best interests of the customers of each individual natural gas utility. NCPA urges CARB to propose amendments to the Cap-and-Trade Regulation that would allow natural gas utilities to return the value in any manner they deem appropriate as long as the value "is used exclusively for the benefit of retail ratepayers of each natural gas supplier, consistent with the goals of AB 32," including returning the revenue to the ratepayers in a volumetric manner.

Registration with CARB for Employees

Section 95830(c)(1) of the Regulation sets forth a list of information that a compliance entity must provide to register with CARB for an account in the tracking system. Proposed changes to section 95830(c)(1) in the Discussion Draft would require compliance entities to

provide additional information related to their employees, even those that will not be directly participating in transactions or decision-making regarding the Cap-and-Trade program. Specifically, entities would be required to provide the following information:

> 95830(c)(1)(I) Names and contact information for all persons employed by the entity that will either have access to any information regarding compliance instruments, transactions, or holdings; or be involved in decisions regarding transactions or holding of compliance instruments; or both.

The scope of the requested information is overly broad. There must be some parameters around an individual's "access to any information regarding compliance instruments, transactions, or holdings," otherwise this could ostensibly include all employees of a covered entity. In the most general terms, even members of the public have "information regarding compliance instruments," so it is possible that this requirement could apply to all employees of a compliance entity. While NCPA understands CARB's desire to track the conduct of entities and prevent potential manipulation or malfeasance in the market, the reporting required under subsection (I) is overly broad. CARB's desire to obtain more disclosure regarding the individuals that are involved in the decision making process must be balanced and weighed against what could be an additional and potentially burdensome reporting requirement.

Further, there must be some demonstration that the individuals at issue are directly involved in the decision making process, even beyond the PARs, AARs, and directors and officers that are already required to be disclosed under the Regulation. The reporting should be limited to only include employees that will have access to information regarding trading transactions or similar conduct. The scope of the access and the type of information the employee has access to must be defined in such a way as to address the agency's concerns without being overly broad.

Disclosure of Cap-and-Trade Contractors

Proposed changes to section 95830(c)(1)(J) and section 95923 would require covered entities to disclose the identities of "cap-and-trade contractors" working with the covered entity and the nature of the work. Section 95923(a) of the Discussion Draft defines the criteria for determining Cap-and-Trade contractors as:

> 95923(a)(1) "A "Cap-and-Trade Contractor" is a contractor employed by an entity registered in the cap-and-trade program to work on cap-and-trade compliance if the contractor:

(A) Verifies the entity's emissions as part of ARB's Mandatory Reporting Regulation;
(B) Advises or consults with the entity regarding compliance with the Cap-and-Trade Program, and receives information from another registered Cap-and-Trade participant."

NCPA is concerned with the potential breadth of this definition. First of all, there are many individuals that "advise and consult" with more than one participant in the Cap-and-Trade program, but which have not access to nor information regarding trading or allowance instrument acquisition matters. Advising a registered entity regarding MRR or Cap-and-Trade program compliance can cover a range of issues and matters, from advising on reporting deadlines to potential use of allowance values. Requiring reporting to CARB about all such individuals is not warranted unless those individuals have access to confidential or restricted information.

Furthermore, the term "contractor employed by an entity" is in itself vague and ambiguous. The breadth of arrangements between entities that CARB could intend to include within the definition is overly broad. As explained during the July 18 Workshop, CARB believes that this disclosure is necessary because employees of "contracting firms" are setting up individual accounts in CITSS, which the agency believes could be problematic. To address this concern, CARB should rely on restrictions that target the individuals registering for CITSS accounts. Those individuals should be required to disclose whether they are associated in any way with a compliance entity, and as noted above, the level of the involvement should be such that the individual has direct control or access to decision making processes that impact allowance acquisition. The restrictions and burden should be placed on individuals registering for CITSS, especially as voluntarily associated entities; with that information, on a case-by-case basis, CARB would be notified of relevant information, and can make a determination regarding which individuals should not be permitted to participate in CITSS.[3] The Cap-and-Trade Regulation should not be amended to require entities to report the information proposed in section 95923 of the Discussion Draft.

Compliance Timeline

During the July 18 Workshop, Staff introduced a proposed revision to the compliance timeline that would move the deadline for completion of emissions verifications to August 15.

[3] This disclosure could be addressed in a similar manner as the proposed revisions regarding Voluntarily Associated Entities set forth in section 95814 of the Discussion Draft.

NCPA opposes the proposed change. Shortening the amount of time allotted for emissions verification would not have a beneficial result, as many covered entities have already experienced delays in the verification process. The proposal remains problematic even if the amount of time allotted for verification is unchanged and the covered entity reporting deadline is shortened by two weeks. NCPA is opposed to any change in the reporting deadlines that allow covered entities less time to gather and report the mandated information. The final reporting obligation represents a significant undertaking for covered entities, and one that requires considerable coordination and data collection. Restricting the amount of time available to complete this task would unduly burden covered entities such as NCPA and its members. The MRR and Cap-and-Trade Regulations should not be amended to shorten the reporting or verification deadlines.

Cost Containment

NCPA appreciates the proposal set forth in the Discussion Draft to address the availability of allowances in the highest level of the Allowance Price Containment Reserve Account (APCR). In response to the direction set forth in Board Resolution 12-51, the Discussion Draft proposes that an additional source of allowances be made available to replenish the APCR by allowing borrowing from future years. The proposal would allow borrowing of up to 10% of future allowances, starting with the latest vintage, beginning in 2015. These allowances would be available once per year at the last APCR Sale immediately prior to the November 1 compliance deadline. This proposal, while not providing for an unlimited supply of allowances, does provide notice to the markets and compliance entities regarding the availability of allowances at the highest price tier in the future.

However, as drafted, the current proposal does not specifically address more moderately priced responses to potential price volatility that may not necessarily result in exhausting the APCR. NCPA continues to urge CARB to consider the Joint Utility Group proposal presented during the June 25 Cap-and-Trade Workshop, and incorporate options that increase the availability of allowances, and implement certain triggers that ensure covered entities will have access to allowances, even in advance of a depletion of the third tier of the APCR.

Allocation of Allowances to Electrical Distribution Utilities

The Discussion Draft proposes revising section 95870 to allocate allowances to electrical distribution utilities on October 14, rather than November 1, for allocations from 2014-2020 annual allowance budgets. Given the timing change and the potential effective date of any amendments adopted by the Board, the October 14 distribution may not be effective until the allocation for the 2015 annual allowance budget. NCPA further seeks clarification whether there would be any corresponding changes to the September 1 deadline for POUs to inform CARB of the designation of their freely allocated allowances per Section 95892(b)(3).

Order of Compliance Instrument Retirement

The Discussion Draft proposes revisions to the Regulation that would specify the order in which compliance instruments are removed from an entity's compliance account for retirement. As clarified subsequent to the July 18 Workshop, the proposed order for compliance instrument retirement is: (1) offset credits, earlier vintages first, (2) APCR allowances, (3) allowances – earlier vintages first, and (4) true-up allowances up to the true-up amount. During the July 18 Workshop, a number of stakeholders noted that as a default, the order proposed by CARB was not objectionable. However, stakeholders also expressed a desire to have the ability to designate which allowances they would like withdrawn by CARB for retirement. Understanding that capability could be designed in CITSS, but not without some effort, staff asked that stakeholders indicate their likelihood of utilizing such a feature, and how it would be implemented. NCPA believes that such a feature should be implemented. It would be used by covered entities that need to distinguish between their allowances by vintage and would facilitate tracking of allowances generally. The self-designation could be required by a certain date in advance of when the Executive Officer would withdraw the allowances under section 95856, and in the event that the covered entity failed to make such a designation, the provisions set forth in section 95856(h) of the Discussion Draft would be controlling. The PAR or AAR would have the authority to make the designation.

Additionally, while the proposal in section 95856(h) makes no distinction between freely allocated and purchased allowances, in the event that entities are not allowed to designate their preferred allowance retirement order as discussed above, NCPA urges CARB to make such a

distinction. Being able to distinguish between purchased and freely allocated allowances is necessary to address the restrictions on the use of allowances and allowance value set forth in section 95892(d)(5) of the Regulation. If the vintage alone is used to determine allowances withdrawn from the compliance account, an electrical distribution utility that has placed its freely allocated allowances directly into its compliance account could be in a situation where allowances are retired for an unauthorized use. Therefore, the classification of allowances should be further defined to distinguish between freely allocated allowances and purchased allowances, and the withdrawal for retirement should take this designation into account before withdrawing allowances by vintage generally.

Resource Shuffling

NCPA appreciates the additional clarity that the Discussion Draft proposes to add to the Regulation regarding the definition of resource shuffling, and the proposal the strike the attestation requirement. Resource shuffling, undertaken to avoid a compliance obligation under the Cap-and-Trade program is properly prohibited in the Regulation. With that said, it is imperative that the Cap-and-Trade Regulation be drafted in such a way as not to constrain or impede legitimate electricity transaction merely because the generation resources used in those transactions may not have the same GHG emissions.

The conditions listed in section 95852(b)(2)(A) of the Discussion Draft include the most common kinds of transactions involving electricity imports with substitutions between sources with different emissions levels. However, that list is not exhaustive, and myriad transactions could result in the appearance of resource shuffling, but in fact, involve no plan, scheme, or artifice on the part of the first deliverer to reduce its emissions compliance obligation. Accordingly, section 95802(a)(252) of the Regulation should be amended to clearly reflect this.

> "Resource Shuffling" means any plan, scheme, or artifice ~~to receive credit based on emissions reductions that have not occurred, involving the delivery of electricity to the California grid~~ undertaken by a First Deliverer of Electricity to substitute electricity deliveries from sources with relatively lower emissions for electricity deliveries from sources with relatively higher emissions resources to reduce its emissions compliance obligation. *Not all substitutions of electricity between sources with different emission levels are resource shuffling, and* ~~R~~resource shuffling does not include substitution of electricity deliveries from sources with relatively lower emissions for electricity deliveries from sources with relatively higher emissions resources when the substitution occurs pursuant to the conditions listed in section 95852(b)(2)(A).

Resource shuffling must be a transaction that involves a plan, scheme, or artifice on the part of the compliance entity. It is proper for CARB to recognize that such schemes may also involve third parties to help enable or facilitate the malfeasance. However, the prohibition in section 95852(b)(2)(B)(1) of the Discussion Draft may inadvertently capture legitimate, yet undefined, transactions. Accordingly, this section should be revised to clarify that the substitution must be done for the *sole purpose of reducing* a first deliverer's compliance obligation.

> 95852(b)(2)(B)(1): Substituting relatively lower emission electricity to replace electricity generated at a high emission power plant procured by a First Deliverer under a long-term contract or ownership arrangement, when the power plant does not meet California's EPS, and the substitution is made *for the sole purpose of reducing* ~~*to reduce*~~ a First Deliverer's compliance obligation.

CONCLUSION

NCPA appreciates the opportunity to provide these comments to CARB on the Discussion Draft and looks forward to working with staff on final proposed amendments to the current Cap-and-Trade Program Regulation that will facilitate the continued success of the program without impeding the ability of covered entities like NCPA and its members to comply with the Regulation.

If you have any questions regarding these comments, please do not hesitate to contact the undersigned or Scott Tomashefsky at 916-781-4291 or scott.tomashefsky@ncpa.com.

Sincerely,

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