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Submitted Electronically

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Gary Collord
Energy Section – Stationary Source Section
California Air Resources Board
1001 I Street
Sacramento, CA 95812

Re: Comments of the **Northern California Power Agency** on the *Proposed Regulation for a California Renewable Electricity Standard, June 2010*

Dear Mr. Collord:

The Northern California Power Agency[1] (NCPA) is pleased to submit these comments to the California Air Resources Board (CARB) on the June 2010 *Proposed Regulation for a California Renewable Electricity Standard*. These comments address the proposed regulatory language (Proposed Regulation) for the Renewable Electricity Standard (RES) contained in Appendix A of the Staff Report: Initial Statement of Reasons (ISOR).

NCPA appreciates Staff's commitment to developing a RES that will meet the mandate set forth in the Governor's September 15, 2009 Executive Order (EO) S-21-09, and the challenges that developing such a regulation create. NCPA provides these comments to CARB in the context of the Proposed Regulation, and with the understanding that the legislature is concurrently working with stakeholders on crafting a renewable procurement standard that can meet the State's objectives of reducing GHG emissions associated with the generation of electricity. Despite the similarities between many aspects of the two proposed programs, nothing in these comments should be viewed as a position by NCPA on the current version of Senate Bill 722. These comments are offered solely for the purposes of advising CARB on the Proposed Regulation issued for comment on June 2, 2010.

NCPA is pleased to see that the Proposed Regulation acknowledges many of the complexities inherent in meeting the challenges that an RES presents. It is important to reconcile the purpose of the Proposed Regulation – to reduce greenhouse gas (GHG) emissions associated

[1] NCPA 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, the Truckee Donner Public Utility District, and the Turlock Irrigation District, and Associate Members Plumas-Sierra Rural Electric Cooperative and Placer County Water Agency.

with the generation of electricity[2] – with the obligation of many of the Regulated Parties to provide safe and reliable electricity to California consumers. These interests must be balanced throughout the RES program. Implementation of a successful RES program will take more than the passage of a sound regulation. It will require the development of new renewable generation resources, extensive new infrastructure to transport the electricity from those resources to California's customers, revamping of the current siting and permitting processes to allow development to occur at a pace that will meet the 33% mandate, and careful balancing to ensure that this is all accomplished while maintaining the provision of reliable electricity to all of California's customers –a major challenge when intermittent renewable resources are figured into this equation.

The Proposed Regulation partially acknowledges this balancing in the recognition that compliance with the RES should be met with both in-state and out-of-state renewable resources, by allowing the unlimited use of renewable energy credits (RECs), and by not imposing artificial deliverability requirements. However, the Proposed Regulation does not go far enough in recognition of these challenges, and must go further to address compliance flexibility in the face of barriers that are not controlled by Regulated Parties. Specifically, the Proposed Regulation should be revised to reflect the following changes:

- The definition of a REC should not impact a Regulated Parties' property rights in a REC, nor ignore the environmental attributes of the underlying resource.
- The definition of *RES Qualifying POU Resources* should be limited only to those resources that do not otherwise meet the requirements of an eligible resource as determined by the California Energy Commission (CEC) as of the effective date of the Regulation.
- The Compliance Deadline should be July 1 of the year following the Compliance Interval, to (i) be consistent with the existing reporting obligations and (ii) allow parties sufficient time to gather the data, acquire the RECs needed, and submit the required reports.
- Compliance Intervals should be every three years from 2020 and beyond.
- Achievement Plans should not be subject to further review or sufficiency demonstration since they entail only a snapshot in time at the beginning of the program.
- Duplicative Annual Reports should be eliminated in years when Compliance Interval Reports are required.
- Compliance Interval Reports should be submitted every three years.
- Absent willful misconduct or gross negligence, daily penalties should not apply for reporting violations.

[2] Proposed Regulation § 97000.

- Flexible compliance provisions must be included to address and excuse non-compliance due to market barriers or outside factors beyond the control of a Regulated Party.
- In the assessment of any penalties, generation of electricity from a Regulated Party's existing large hydroelectric resources should be a mitigating factor, since such facilities clearly meet the purposes of the RES.
- The partial exemption for small Regulated Parties is warranted and reasonable.
- DWR and WAPA are properly not subject to an RES Compliance Obligation.

DEFINITION OF A REC SHOULD ACKNOWLEDGE BOTH THE PROPERTY RIGHTS ALREADY INHERENT IN THE INSTRUMENT AND THE ENVIRONMENTAL ATTRIBUTES OF THE RENEWABLE RESOURCE

RECs are Property Rights

NCPA remains concerned that the Proposed Regulation unduly and unlawfully restricts the Regulated Parties' property interests in RECs, as that term is defined in the the Western Renewable Energy Generation Information System (WREGIS) protocols, and as commonly used throughout the renewable electricity industry. As drafted, the Proposed Regulation would unlawfully strip a REC of its underlying property right (§ 97002(16) - renewable energy credit or REC). A REC is defined in the Proposed Regulation as "one [megawatt hour] MWh of electricity generated by an eligible renewable energy resource." This MWh of electricity has a value and is a property right to the holder. In the ISOR, Staff discusses the definition and creation of a REC (ISOR, pp. VI-13), clearly demonstrating the vested interest an owner has in the underlying instrument. Throughout the regulation the term REC is used to refer to the "compliance instrument;" due to contradictions inherent in the common lexicon associated with this term and the definition in the Proposed Regulation, the Proposed Regulation should be revised to clarify that it is the compliance instrument surrendered under this Regulation that has no property value once surrendered, and not the REC itself.

NCPA understands that CARB is concerned with the potential for third parties to assert claims against the agency in the event that the Regulation changes the use of a compliance instrument in the future. For this purpose, CARB added language to the definition of a REC to further protect the Agency's ability to address this concern: "ARB reserves the right to alter or amend the attributes or use of a REC *as it is used for demonstrating compliance with this Article*." (emphasis added) However, the answer to such a concern is to limit the definition of a REC as used in the Proposed Regulation to the compliance instrument contemplated therein, and not to unlawfully restrict a Regulated Party's interest in a valuable commodity. CARB's concern is that the agency not be faced with a "takings"[3] claim in the event that CARB changes the

[3] A "taking" can occur when the Federal or a State government takes an action that restricts of limits a property right

construct of the RES program. The definition can, and should, be revised to address the agency's concern, while allowing entities to maintain their "property right" in the underlying instrument used for compliance purposes. The property right limitation must be narrowly tailored to address the compliance instrument produced under the creation of this Regulation, and not limit the legitimate property interest parties have in an existing instrument that represents "one MWh of renewable electricity."

Accordingly, NCPA recommends that the Proposed Regulation be revised, as set forth below, to limit the restrictions on a REC as used for compliance with the RES Regulation, and not otherwise impede the valuable property right that an entity has in the renewable energy instrument that it purchases and registers with WREGIS.

RECs Have Renewable and Environmental Attributes

As noted in the ISOR, electricity generated from an RPS-eligible facility has renewable and environmental attributes.[4] Accordingly, the definition of a REC should not strip that renewable electricity of the underlying *environmental* attributes, especially when a Regulated Party is likely paying a premium for the entire "bundle" of attributes associated with the underlying generation. In order to ensure that the definition of a REC does not have a deleterious impact on the overall GHG market, NCPA recommends that the definition of a REC not be drafted as to address the other attributes associated with the underlying electricity.

Proposed Revisions to § 97002(16)

(16) **"Renewable Energy Credit or REC"** means one MWh of electricity generated by an eligible renewable energy resource. A REC does not include an emission reduction credit issued pursuant to Health and Safety Code section 40709. ~~A REC also does not include any allowance issued pursuant to a cap-and-trade or similar program.~~ As used for purposes of this Article, ~~A~~ a REC is intended to serve only as a compliance instrument, and a compliance instrument surrendered under this Article does not constitute property or a property right~~.~~, provided further that nothing in this section otherwise alters or impairs an entities' property rights associated with a REC. ARB reserves the right to alter or amend the attributes or use of a REC as it is used for demonstrating compliance with this Article.

of a citizen, whereby the property owner may be entitled to compensation from the State. See also U.S. Constitution, amend. V and XIV.

[4] "An example of an environmental attribute is the reduction in GHG emissions that occur when renewable power displaces fossil fuel generation." ISOR, p. VI-1

COMPLIANCE INTERVALS and RES PERCENTAGES

Compliance Interval Should be Every Three Years After 2020

NCPA supports the implementation of a three-year compliance interval after 2020. The need for multi-year compliance intervals is interlinked with the intermittent nature of the very resources at issue. Not only do renewable resources provide energy at variable times and seasons, but they also involve a fairly nascent REC market (at least on the scale of which will be necessary to support a statewide mandate of 33% renewable electricity generation). Despite the added flexibility that multi-year compliance intervals provide at the beginning of the program, there is no demonstration that such flexibility is not needed in the later years. The ISOR notes that "there should be more build out of additional renewable facilities" after 2020 (ISOR, VIII-13), yet that build out will coincide with a higher RES requirement across the state (as the total target increases to 33% in 2020), and ideally, will also be necessary to address future economic growth (and increased retail sales) across the state. In oral comments, Staff has noted that the expected maturity of the REC market will also help flatten out the need for multi-year intervals and the variability inherent with renewable resources, such as low and high hydro years. However, there are still considerable uncertainties associated with developing such an extensive REC market, and the availability of renewable resources post-2020 is simply unknown. These uncertainties can be minimized by the implementation of multi-year Compliance Intervals. Accordingly, NCPA supports a multi-year compliance schedule for years beyond 2020.[5] Multi-year compliance intervals allow the state to ramp up its renewable generation procurement and REC market, without placing undue hardship on electricity consumers, or second guessing when the REC market will mature or the rate at which renewable projects will be developed.

Proposed Revisions to § 97004(a)

Compliance Intervals	REC Percentage
2012 through 2014	20
2015 through 2017	24
2018 through 2019	28
2020 through 2022 and every three years thereafter ~~and annually thereafter~~	33

[5] Consistent with a three-year compliance interval, the Compliance Interval Reports should only be required every three years. The continued Annual Reporting requirement in years when a Compliance Interval Report is no required ensures that both the Regulated Party and the regulator have sufficient information to continue to track the compliance trajectory and calculate the compliance obligation.

Compliance Deadline Should be July 1

NCPA appreciates Staff's recognition of the fact that a certain amount of time is needed between the end of a Compliance Interval and the date in which compliance instruments can be surrendered. The Proposed Regulation establishes March 31 as the Compliance Deadline for purposes of surrendering the required number of RECs at the conclusion of each Compliance Interval; NCPA believes the Compliance Deadline should be July 1. As noted by several stakeholders, including NCPA, 90 days is still an insufficient amount of time to make all of the necessary calculations and acquire the requisite number of RECs for surrender. For example, WREGIS allows up to 90-days for reporting of renewable generation data, which would make the March 31 compliance period almost impossible to attain with any amount of accuracy.

Furthermore, a July 1 date is consistent with existing reporting transactions. For example, NCPA is working closely with CEC staff to formalize a June 15 date to submit various renewable energy reports, making the July 1 deadline more consistent with existing deadlines and practices, which would reduce the administrative burden associated with the Proposed Regulation. Six months from the end of the Compliance Interval until the deadline for surrendering the necessary compliance instruments gives Regulated Parties a sufficient amount of time to calculate the surrender obligation, acquire the necessary RECs, and surrender the compliance instruments. This is also consistent with the deadlines for Reporting already mandated under the Proposed Regulation, which requires the submission of all Annual Reports – which detail the calculations for determining the surrender obligations – by July 1. NCPA recommends that the Proposed Regulation be revised to reflect a July 1 Compliance Deadline.

Proposed Revisions to § 97002(a)(4)[6]

> (4) "**Compliance Deadline**" means July 1 ~~March 31~~ of the year following the end of each compliance interval.

ENFORCEMENT AND PENALTY PROVISIONS MUST BE REVISED TO ADDRESS ANNUAL COMPLIANCE PARADIGM AND FLEXIBLE COMPLIANCE CONSIDERATIONS

Flexible Compliance Provisions Must Acknowledge Factors Beyond the Control of the Regulated Party

Regardless of the feasibility or economic analyses conduced, it is virtually undisputed that a 33% RES is an aggressive goal for the State. While aggressive does not mean unachievable, it does mean that there are real constraints and impediments beyond the control of Regulated Parties

[6] Changes would also need to be made to § 97004(b), where the reference to March 31 should be replaced with "Compliance Deadline."

that must be accounted for when Regulated Parties are called upon to demonstrate compliance. Factors to be considered that are beyond the control of the Regulated Parties include permitting, siting, and construction of renewable generation resources; transmission development; scheduling of the intermittent energy supply; and system reliability challenges. The Proposed Regulation does not make any accommodations for noncompliance due to systemic or other factors not within the power of a Regulated Party to direct. Other factors that can impede timely compliance also include such things as the failure of a REC market to operate as anticipated, or lack of sufficient renewable resources necessary to meet the statewide mandate, as well as the inability to procure necessary permits when such permits were diligently sought and reasonably expected, or operational failures totally unforeseen and outside the control of the Regulated Party.[7] Regardless of the zealousness with which renewable resources are pursued, instances such as these are not unforeseeable. It is also important for Regulated Parties to ensure operational control of resources, and that procurement of specific resources does not adversely impact the provision of reliable electricity.[8] These issues are not trivial and are among many factors that impact attainment of the RES program objectives. As acknowledged in CARB's own Scoping Plan, "reaching a target of 33 percent will require that California quickly address challenges such as program complexity, lack of transparency, permitting difficulties, and transmission, distribution and, for intermittent renewable, integration issues."[9]

The various aspects of the program that will be addressed in the § 97011 review process will be critical to providing the agency and lawmakers with insight to assess changes that may be needed to the program in the future. Major delays in the construction of renewable resources or transmission facilities should be monitored by the State (through the various agencies charged with permitting and siting), and not only in the context of the regular intervals contemplated under the Regulation Review process contained in the RES. These systemic problems in the Program should warrant direct action by CARB and provide immediate relief to Regulated Parties in the context of complying with the Regulation.

Ongoing monitoring and scheduled reviews, however, do not address the present impediments (or penalties) that Regulated Parties will be faced with in the event that program flaws are encountered, and are insufficient to address real-time concerns impacting compliance entities before any changes can be effected pursuant to the Regulation Review process. Accordingly, provisions that address excuses for non-performance in the face of factors that are outside the sole control of the Regulated Party must be drafted into the enforcement and obligation sections of the regulation. The Proposed Regulation must address these types of

[7] As a practical matter, it is important to note that a multi-year Compliance Interval will level out compliance constraints such as these, likely facilitating regular compliance at the end of the multi-year period.

[8] See Health & Safety Code § 38501(h), which provides that it is the intent of the legislature that the GHG reduction measures be design "in a manner that minimizes costs … and maintains electric reliability."

[9] California Air Resources Board, *Climate Change Proposed Scoping Plan*, October 2008, C-127.

situations within the Compliance Obligation section of the Regulation itself. NCPA supports the inclusion of flexible compliance mechanisms *drafted into the regulation*, and not merely the after-the-fact reviews of the feasibility of achieving compliance that will come from the Regulation Review called for in § 97011.

Accordingly, in addition to the review processes proposed in § 97011, a new subsection should be added to § 97009 to specifically acknowledge Staff's consideration of these circumstances in any compliance review process, and a finding of the existence of such conditions should stand as an excuse for nonperformance in that no penalties should be assessed against the Regulated Parties under these circumstances.

Proposed Language for New § 97009(c)

(c) Upon application from a Regulated Party, the Executive Officer shall review requests to modify the application of the RES to the Regulated Party, and shall consider the following factors on a case by case basis:

(1) The failure to site transmission upgrades necessary to deliver planned renewable resources;

(2) Changes in market conditions that have increased compliance costs;

(3) the existence of considerable variation in load of the Regulated Party from year to year and whether compliance intervals should therefore be modified;

(4) the variability of energy supply from the resource portfolio of the Regulated Party from year to year and whether compliance interval should therefore be modified;

(5) the amount of zero or low carbon resources that are not eligible renewable energy resources and are already in the resource portfolio of the Regulated Party prior to the effective date of this regulation;

(6) the ability of the existing zero or low-carbon non-Eligible resources to provide ancillary services or ramping services to the applicable Balancing Authority in order to facilitate electrical integration of eligible renewable energy resources that have intermittent generating characteristics and thereby ensure reliable system operation; and

(7) the electrical requirements of the grid, including whether existing zero or low-carbon resources owned or controlled by the Regulated Party that are not eligible renewable energy resources provide locational or other reliability benefits to the applicable Balancing Authority.

If the Executive Officer finds these factors, the application of the RES shall be modified for that Regulated Party to take into account these enumerated factors as they apply to that Regulated Party.

RES Enforcement Provisions Must be Consistent with an Annual Compliance Obligation

The goal of a successful enforcement program is to ensure that regulated entities comply with the regulation – indeed, enforcement provisions should motivate compliance and punish malfeasance or negligence. In the absence of either of these, penalties assessed against regulated parties will only detract from achieving the underlying goals of any regulation. NCPA understands that CARB has the authority to promulgate penalties for noncompliance, but believes that penalties should be levied by the Agency with the sole intent of attaining the goals of the RES Regulation. The Agency should consider financial penalties as a last resort and should link their imposition to malfeasance or gross negligence. Regulated Parties who are unable to meet their compliance obligations are better served utilizing scarce resources procuring additional renewable electricity than paying penalties or dealing with burdensome administrative processes. NCPA is encouraged by Staff's commitment to utilizing the processes set forth in the Regulation in the interest of furthering compliance, and not in seeking punitive disposition. However, the potential to impose onerous penalties exists in the Regulation, as drafted, and should be addressed therein.

NCPA remains concerned with the application of daily penalties in the context of annual compliance obligations, and the lack of any review factors that call for a cure period. The application of a daily penalty for violation of an annual compliance obligation is counterintuitive to encouraging enforcement, and impractical. Such a metric is not consistent with an annual compliance obligation, notwithstanding CARB's discretionary authority to impose such a penalty. Health and Safety Code[10] section 38580(3) does provide that:

> the state board **may** develop a method to convert a violation of any rule, regulation, order, emission limitation, or other emissions reduction measure adopted by the state board pursuant to this division **into the number of days in violation, where appropriate**, for the purposes of the penalty provisions of. . . . (emphasis added).

It is clearly not "appropriate" to impose such a penalty scheme when the regulation at issue is based on a maximum annual compliance obligation. Furthermore, despite the fact that 33% renewable energy is included as a complementary measure in the Scoping Plan, the authority to implement the RES is found in the Governor's EO S-09-015 and not in AB32. Accordingly, CARB is not constrained by the provisions of § 38580(3) or the interpretation that this requires a daily penalty metric.

Regulated Parties Should have Access to Specific Guidelines Regarding Enforcement

The Health and Safety code provides Staff significant discretion in applying penalties that are commensurate with the violation, calling for a review of factors such as the extent of harm,

[10] Unless otherwise noted, all code sections references shall be to the Health & Safety Code (H&S).

nature and persistence of the violation, a utility's record of maintenance, duration of violations, and how far over the limit the utility is. However, these discretionary factors do not provide Regulated Parties with certainty regarding the criteria under which they may be assessed a penalty. The enforcement provisions should be based on clearly defined guidelines that are developed as part of a public process. The Proposed Regulation anticipates penalties for both reporting and compliance obligations; specific language stating what the penalties are and how they are determined must be included in the regulation or accompanying guidelines. Parties should be afforded a view of the due process and penalty structure they may face for failure to comply with the new regulations. Insight into the penalty structure will help send a clear signal to participants about what is expected and the development of such language should be addressed in a public forum.

In designing and implementing the enforcement provisions of the RES, it is imperative that the policy grounds for these provisions be kept in mind, and that the myriad factors that impact compliance – many of which are outside the control of the Regulated Party – be considered. When noncompliance is due solely to factors beyond the dominion of the Regulated Party due to barriers that simply cannot be overcome, penalties serve no purpose whatsoever. The flexible compliance mechanisms discussed herein should be incorporated into the provisions regarding enforcement in § 97009.

Generation from Large Hydroelectric Resources Should be Used to Mitigate Penalties

The purpose of the Proposed Regulation "is is to reduce greenhouse gas emissions associated with the generation of electricity." (§ 97000) Regardless of the size of the facility, hydroelectric generation is a zero-GHG resource. The Proposed Regulation recognizes the environmental benefits of large hydroelectric resources in § 97004(c), and the ISOR specifically notes that "although large hydroelectric generation does not meet the regulatory definition of an eligible renewable energy resource, it is nevertheless a renewable source of electricity with a beneficial air quality profile." (ISOR, p. VIII-14, emphasis added) Accordingly, the ISOR has already acknowledged the beneficial attributes of these resources.

The same rationale used to justify the provisions of § 97004(c) support special treatment of these resources in other situations. For example, in instances where a Regulated Party fails to achieve the REC percentage with RES qualifying resources, but meets the shortfall with hydroelectric resources that are part of the Regulated Party's portfolio at the time the RES was adopted, then special enforcement provisions should apply. It is simply counter-intuitive and contrary to the purpose of the regulation itself to force Regulated Parties to acquire either more costly or higher GHG emitting resources in order to comply with the RES. The RES Regulation should not result in an increase in GHG emissions due to a Regulated Party's need to shift its resource portfolio away from its current zero-emitting resources. Such a result would clearly

contradict the intent of not only AB 32, but EO S-21-09 which serves as the basis for the Proposed Regulation.

NCPA proposes that special enforcement provisions be drafted. Specifically, in instances where a Regulated Party can demonstrate that despite best and commercially reasonable efforts to comply with its Achievement Plan and Annual Reports, the Regulated Party failed to meet the annual REC target, yet was able to meet all or a portion of the shortfall with electricity generated from an existing[11] large hydroelectric resource, penalties should not be assessed for the shortfall met with those resources. The rationale has already been established in the ISOR to justify such a provision.

Proposed Revisions to § 97009

§ 97009. Enforcement

(a) *Penalties.* Penalties may be assessed for any violation of this Article pursuant to Health and Safety Code section 38580.

(b) *Violations.* ~~A violation of the requirements of this Article shall be deemed to result in an emission of an air contaminant.~~

(1) ~~Each day or portion thereof that a Regulated Party violates or remains in violation of a requirement of this Article is a separate violation.~~ Each day or portion thereof that any report required by this Article remains unsubmitted, is submitted late, or contains incomplete information, or information known to be inaccurate at the time it was submitted ~~information~~, provided however, that, an Achievement Plan submitted pursuant to § 97006(b) shall not be submitted for information purposes only, shall constitute a separate violation of this Article.

(2) Except as provided in subsection (c) below, if ~~If~~ a Regulated Party fails to retire a sufficient number of WREGIS certificates to meet its RES Obligation by the Compliance Deadline ~~date specified in section 97004~~, there is a separate violation of this Article for each required WREGIS certificate that has not been retired by the Compliance Deadline. ~~There is also a separate violation for each day or portion thereof after the Compliance Deadline that each required WREGIS certificate has not been retired.~~

(c) Excuses for failure to retire sufficient number of WREGIS certificates: non-performance. Except in the case of gross negligence or malfeasance, in no event shall a Regulated Party be subject to penalties for failure to retire a sufficient number of WREGIS certificates if either of the following are demonstrated:

[11] It is NCPA's intent that this special provision apply only to those resources that are already part of a Regulated Party's portfolio at the time of adoption of the RES and that this limitation acknowledge that not all entities, including publicly owned utilities, include their large hydroelectric resources as part of their "RPS portfolios."

(i) the shortfall in surrender of compliance instruments is equal to or less than the Regulated Party's use of electricity from large hydroelectric resources not considered RES Qualifying POU Resources, and which were a part of the Regulated Party's generation portfolio as it existed on the effective date of this Article, and to the extent that the shortfall was less than the total amount of electricity from such large hydroelectric resources, the total amount of the shortfall upon which CARB shall determine penalties shall be limited to the difference between the Compliance Obligation and the surrender amount plus resources from large hydroelectric resources.

TRADING AND BANKING OF RECS

WREGIS Certificates Should be Permitted for use in a Federal Renewable Energy Program and Other State GHG Programs

Section 97005(b)(3) limits the use of WREGIS certificates, noting that they cannot be used for dual compliance obligations. NCPA urges CARB to revise this section to allow the use of these same compliance instruments for any subsequent Federal renewable energy mandates. Doing so would allow a flexible transition of California's RES Program into a federal program, without imposing undue restrictions on California's Regulated Parties.

Furthermore, as noted above, the provision of RECs and renewable energy includes other environmental attributes. To the extent that those attributes are purchased by a Regulated Party as part of the same transaction that includes the REC, definitions contained in the RES Regulation should not restrict the lawful use of those instruments and all their environmental attributes. Accordingly, NCPA recommends that § 97005(b)(3) be more limited in scope regarding the use of WREGIS certificates to address only compliance with the RES, and not attempt to deal with other state non-renewable energy programs at this time.

Proposed Revisions to § 97005(b)(3)

(b) Use of WREGIS certificates
. . .
(2) WREGIS certificates retired to meet California's RPS program compliance or any subsequently adopted Federal renewable electricity program compliance may also be used to demonstrate compliance with this Article.
. . .
(3) Exclusive use

(i) Except as provided in section 97005(b)(2) above, a WREGIS certificate retired to demonstrate compliance with this Article may not also be used to meet the regulatory or voluntary requirements of any other federal, state, or local program renewable electricity program compliance ("secondary program").

(ii) In the event that a Regulated Party has retired or attempts to retire a WREGIS certificate to demonstrate compliance with this Article and also to meet a regulatory or voluntary requirement of a secondary program renewable electricity program, the WREGIS certificate will be deemed ineligible for any use under this Article at the time such certificate is dedicated to meet such requirement of a secondary program.

REC Trading Should Not be Limited to Three Years

There should be no limitations placed on the duration of time during which legitimately produced RECs can be traded for compliance with this Article. Section 97005(d) allows for the banking and trading of RECs with several restrictions, including a three-year limit on holding or trading RECs from the date they are issued. The ISOR presents no legitimate reasons for the imposition of such a restriction. Limitations on the use of a lawfully created REC should not be incorporated into the RES Regulation. NCPA believes that the three-year limitation on the trading of RECs is needlessly restrictive, and that Regulated Parties should be allowed to trade RECs until they are retired or surrendered for compliance purposes under this Article. Staff has stated that it believes that the maturity of the REC market will allow for a steady supply of RECs and the ability to readily trade the instruments. However, until such time as it has been demonstrated that the REC market is sufficient to meet the needs of a statewide 33% mandate, parties' access to the instruments should not be arbitrarily limited.

Furthermore, RECs that are issued prior to the effective date of the RES Regulation that have not been retired to meet an RPS obligation should not be subject to a trading limit.

In an attempt to further distinguish between a REC as a compliance instrument and the underlying property right in a renewable generation resource, NCPA proposes that the RES Regulation be revised to reflect that RECs associated with RES Qualifying POU Resources be surrendered for compliance purposes only by the original REC owner, but that the Regulation not otherwise address the fungibility of the REC associated with those resources.

Proposed Revisions to § 97005(d):

(d) *Banking and Trading of RECs.* For purposes of meeting a RES Obligation, RECs may be banked and traded subject to the following limitations:

(1) A REC may be retained or traded ~~for a period of up to three calendar years from the date WREGIS issued the certificate, including the certificate issuance year, or~~ until ~~a REC~~ it has been retired into a WREGIS retirement subaccount or surrendered for compliance purposes, whichever occurs first.

(2) ~~A REC must be moved to a WREGIS retirement subaccount within three calendar years from the date WREGIS issued the certificate, including the certificate issuance year, to be used towards a RES Obligation. A REC placed in a retirement subaccount that is not used to meet a compliance requirement~~

~~under section 97004, may be banked without limit to meet a future RES Obligation.~~

~~(3)~~ RECs generated or procured from a RES Qualifying POU Resource may be banked by the original REC owner and may only be surrendered for compliance under this Article by the original REC owner. ~~RECs generated or procured from a RES Qualifying POU Resource may not be sold or traded to any other entity~~.

(4) RECs generated or procured by a Regulated Party operating under the partial exemption in subsection 97003, are not eligible for sale, banking or trading.

REPORTING REQUIREMENTS SHOULD BE BASED ON THE NEED FOR INFORMATION AND RECONCILED WITH EXISTING OBLIGATIONS.

Data Sought by CARB Should be Reconciled with Data Already Reported to the CEC.

Pursuant to the ISOR, CARB's purpose in seeking information from Regulated Parties is two-fold: (1) to track the progress of Regulated Parties in meeting their RES obligation, and (2) to track the progress of the program and the REC market. While these are both important objectives, it is also important to note that Regulated Parties are already required to submit significant amounts of information regarding their renewable energy procurement plans and practices to other State agencies, and the duplication of efforts to submit additional reports containing the same information to CARB is not necessary. For example, publicly owned utilities are already required to report to the CEC regarding their RPS programs pursuant to the mandates of Public Utilities code § 387. Submitting the same data to CARB in a different format would be unwarranted and duplicative. Since CARB has noted that its interest in the informational reports sought under § 97006 of the Proposed Regulation is for review and tracking purposes, NCPA believes that the interests of the State are best served by coordinating the receipt of that information with existing mandates and reports already being submitted to the CEC and the California Public Utilities Commission. Before adoption of the final Regulation, NCPA urges CARB to closely review the information sought in § 97006, analyze the objective and justification for seeking this information, and ensure that this data is not already available from another State agency.

Achievement Plans are Unduly Burdensome

The Proposed Regulation requires the filing of an Achievement Plan by July 1, 2012 "for the overall 2020 RES target." The one-time plan is intended as a snapshot of the Regulated Party's plan and procurement strategy, but must also include information "sufficient to demonstrate how the Regulated Party plans to achieve and maintain the 33% RES requirement by

2020." While most utilities likely already have a 33% target with a plan as to how that target will be achieved, the *requirement* to submit such a plan to CARB and the need to make a "sufficient demonstration" to the agency by July 1, 2012 is problematic. This concern is especially compounded by the potential for daily penalties under § 97009 in the event that CARB deems the report incomplete or otherwise find the demonstration insufficient; without objective criteria for judging the sufficiency of Regulated Party's Achievement Plan, the potential for penalties is significant.

As justification for requiring this information, the ISOR notes that it is necessary "so that ARB may track Regulated Party plans and actions in meeting their RES obligations and anticipate the need for program modifications through the periodic review process." (ISOR, p. VIII-18) A snapshot of information received at the beginning of the program will not be particularly helpful in meeting this objective, and rather the information submitted in the Annual Progress Reports or Compliance Interval Reports submitted under §§ 97006(c) and (d) will not only be sufficient to meet this need, but more useful for obtaining the underlying data it appears CARB is seeking. Requiring this level of detail in the Achievement Plan, eight years in advance of the actual 33% requirement, is not only onerous, but unrealistic. NCPA urges CARB to recognize the tensions inherent in this structure and revise the Proposed Regulation to acknowledge receipt of the Achievement Plan as an *informational filing*, which can be used by both CARB and the Regulated Party in the context of ongoing communications, but which "sufficiency" is not subject to review or approval by the agency.

<u>Proposed Revisions to § 97006(b)</u>

(b) *Filing of Achievement Plans.* By July 1, 2012, each Regulated Party, except those exempted by section 97003 and DWR and WAPA, shall submit an achievement plan to ARB for the overall 2020 RES target containing the following information:

(1) Regulated Party Information
(A) Entity name, contact name, mailing address, phone number, and email address;
(B) Name of Responsible Official for entity; and
(C) Entity WREGIS account identification number.

(2) Achievement Plan Informational Data
(A) The applicable compliance subsection under section 97004;
(B) A plan and procurement strategy, including any known procurement or project development activities by contract and resource type~~,~~ ~~sufficient to demonstrate how the Regulated Party plans to achieve and maintain the 33 percent RES requirement by 2020~~.

Annual Progress Reports Should Not be Required in Compliance Years

Section 97006(c) requires Regulated Parties to submit an Annual Progress Report beginning in 2013, and each year thereafter. Given the amount of information provided in the Compliance Interval Reports submitted under § 97006(d), it is duplicative and unduly burdensome to require Regulated Parties to submit both Annual Progress Reports and Compliance Interval Reports in the same year. NCPA recommends that the requirement to submit the Annual Progress Report be suspended during the years when a Compliance Interval Report is required.

Proposed Revisions to § 97006(c)

(c) *Filing of Annual Progress Reports.* Beginning July 1, 2013, and July 1st of each year thereafter, except in years where the Regulated Party is required to file a Compliance Interval Report, each Regulated Party, except those exempted by section 97003 . . .

'Project Status' Portion of Compliance Interval Reports Should be an Informational Update Only

After each Compliance Interval,[12] a Regulated Party is required to submit a Compliance Interval Report. Subsection (3) of § 97006(d) requires the Regulated Party to submit a "Project Status Report," including "project development status report on any project development activities, including site control, permitting status, financing status, interconnection progress, and transmission access during the next compliance interval, consistent with the achievement plan." It is not clear why this level of detail is needed in a report to CARB. In the ISOR, Staff notes that "this information must be submitted to ARB so that ARB can verify compliance with the RES obligation for the applicable compliance interval and ensure that regulated parties that fall short of their RES obligation have a concrete schedule in place to come into compliance within the current reporting year." (ISOR, VIII-19) However, the information sought in subsection (3) does not specifically addresses the rationale articulated in the ISOR. Furthermore, Regulated Parties, such as local publicly owned electric utilities, will be required to make periodic and ongoing updates to their own regulatory bodies that will include this kind of information, making this additional requirement duplicative and burdensome. Accordingly, in order to address the tensions articulated above, as well as the Agency's purported desire to gather monitoring information, NCPA urges CARB to strike the requirement to include this level of detail in the Compliance Interval Report, and rather request that "project status information" be provided in the form of an "Informal Update" to be included in the Compliance Interval Report.

[12] As more fully addressed above, NCPA recommends that the Compliance Interval be every three years, beginning in 2020.

Proposed Revisions to § 97006(d)

(d) *Filing of Compliance Interval Reports.* By July 1, 2015, July 1, 2018, July 1, 2020, and on July 1st ~~annually~~ every three years thereafter, each Regulated Party. . .

(3) ~~Project Status Report~~ Informational Update: A project development status report on any project development activities, including site control, permitting status, financing status, interconnection progress, and transmission access during the next compliance interval, consistent with the achievement plan submitted under 97006(b) above.

DEFINITION OF RES QUALIFYING POU RESOURCES MUST BE CLARIFIED

Clarification of the Definition to not Include All RPS Eligible Resources

As drafted, § 97002(19), RES Qualifying POU Resources, would apply to all POU renewable resources, even those that meet the current RPS definition adopted by the CEC. The definition needs to be corrected to reflect both CARB's intent as set forth in the ISOR (see ISOR, VII-7-8) and Staff's stated intent that this specific exception be applied only to those resources that would not otherwise qualify as eligible resources under § 97002(8) (a) or (b).

Clarification of Eligible Entities to Not Exclude Entities that can Demonstrate Compliance with the Requirements

The intent of § 97002(19) is to allow POUs that lawfully use non-CEC certified resources (such as large hydro and RECs from out-of-state wind) to meet their current RPS obligation to continue to do so for the RES, until the current ownership interest in those resources expires. In the ISOR, Staff notes that this approach "recognizes prior utility investments in this wider set of renewable resources and maintains RPS program consistency under the transition to the RES program," (ISOR, p. VII-7) and "to be equitable, those resources invested in by the POUs for RPS compliance should also be allowed for RES obligations" (ISOR, p. VII-8).

Table VII-2 sets forth the "*Uncertified" Resources Claimed as Renewable Generation by POUs in 2008*. (ISOR, p. VII-8) While the table is not included in the Proposed Regulation, it is Staff's interpretation of POUs that have claimed uncertified resources for RPS, based on information that Staff has procured from POU filings with the CEC. NCPA notes that any Regulated Party that can demonstrate compliance with the specific provisions of § 97002(19) should be eligible to utilize this exemption, regardless of whether or not they are currently reflected on Table VII-2, as the table is a compilation of various reports submitted to the CEC, and not a showing of the ability to meet the requirements of this section.

Proposed Revisions to § 97002(19)

(19) **"RES Qualifying POU Resource"** means a renewable energy resource as defined in section 97002(a)(8)(C), which resource does not otherwise meet the definition of an eligible renewable energy resource as defined in section 97002(a)(8)(A) or (B) whose electrical generation was . . . "

PARTIAL EXEMPTION FOR SMALL ENTITIES IS JUSTIFIED AND REASONABLE

NCPA supports the provisions of § 97003 and the partial exemption from the RES for a Regulated Party formed prior to September 15, 2009 that had annual retail sales to end use customers of 200,000 MWh or less, averaged during calendar years 2007 through 2009. It is important to note that these entities are still bound by the provisions of the RPS, and as such, are striving towards achieving higher renewable electricity portfolios. However, as noted in the ISOR, the cost to these smaller entities "to procure renewable energy or RECs would create a disproportionate use of resources relative to the environmental benefits." (ISOR, VII-5)

The ongoing obligation to report sales and comply with the RES if and when the Regulated Party reaches the threshold will ensure that these regulated parties include renewable resources in their procurement plans, without imposing undue economic impacts on their customers. This limited and narrowly tailored exemption also allows these smaller entities the opportunity to gradually ramp-up, or increase their renewable portfolio without creating a loop-hole for the creation of new Regulated Parties below the threshold that could avoid compliance with the RES.

The ISOR includes a list of entities that staff believes would be eligible for the partial exemption based on the available data (ISOR, VII-6). NCPA notes that any Regulated Party that can demonstrate retail sales within the eligibility threshold, regardless of whether or not they are included on this list, would be eligible for the partial exemption upon such a showing.

RES REGULATION PROPERLY IMPOSES NO OBLIGATION ON DWR OR WAPA

The Proposed Regulation imposes certain reporting requirements on the Department of Water Resources (DWR) and the Western Area Power Administration (WAPA), which Staff will evaluate and incorporate into the triennial review process. (ISOR, VII-20) By its express provisions, the Proposed Regulation does not impose a compliance obligation on either DWR or WAPA (§ 97004(d)). Since neither of these agencies are primarily retail electricity providers, there are properly excluded from having a compliance obligation under the regulation. Such an obligation would only result in additional costs for retail customers of these agencies and added compliance costs for the State. NCPA supports Staff's conclusion that DWR and WAPA do not have a compliance obligation under the RES Proposed Regulation.

OTHER REVISIONS

§ 97002(10): Definition of "large hydroelectric generation"

In order to be consistent with Public Utilities Code § 399.11, the definition in § 97002(10) should be corrected to note that large hydroelectric generation is anything greater than 30 MW.

> (10) **"Large hydroelectric generation"** means a hydropower generating facility with ~~a 30 MW or larger~~ generating capacity of greater than 30 MW and which otherwise does not meet the definition of a small hydroelectric facility as described under Public Utilities Code section 399.12; and/or is not recognized as an eligible resource for the RPS program as set forth in Public Utilities Code section 399.11 et seq.

§ 97002(17): Definition of "Renewable Portfolio Standard or RPS"

Public Utilities Code § 399.11 applies to investor owned utilities, while publicly owned utilities are required to implement and enforcing a renewables portfolio standard pursuant to the provisions of Public Utilities Code § 387. The definition in § 97002(17) should be revised accordingly.

> (17) **"Renewables Portfolio Standard or RPS"** means the Renewables Portfolio Standard" as set forth in Public Utilities Code sections 399.11 et seq and 387.

CONCLUSION

NCPA appreciates the efforts of CARB to develop the RES, and welcomes the opportunity to continue working with CARB to craft a viable, sustainable, and economically feasible RES that fulfills the purposes of the Regulation.

Respectfully submitted,

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