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Jeannie Blakeslee
California Air Resources Board
1001 I Street
Sacramento, CA

Re: **Northern California Power Agency Comments on February 18, 2009 Draft
Proposed AB 32 Administrative Fee**

Dear Jeannie:

In accordance with the direction provided during the February 25 "Proposed AB 32 Administrative Fee Regulation" workshop, the Northern California Power Agency¹ (NCPA) hereby submits these comments on the *Proposed Regulation Order, Fees for Sources of Greenhouse Gas Emissions* (Draft Regulation) for an AB 32 Administrative Fee, issued February 18, 2009.

NCPA is pleased to be able to submit these comments and appreciates the challenges faced by CARB staff in designing and developing the Draft Regulation. NCPA has been working closely with CARB staff to ensure that the practical application of the fee results in a fair application of the costs to the affected entities. It is imperative that the Administrative Fee not result in significant additional costs for a limited portion of the state's economy, and that compliance with the Draft Regulation not be unduly burdensome – both in terms of financial impacts and administrative costs. In these comments, NCPA focuses on the applicability of the fee to various fuel types, and not the process emissions for refineries or cement manufacturers. Furthermore, these comments discuss the actual Draft Regulation, and do not address potential legal issues associated with the application of the proposed Administrative Fee.

COMMENTS

During the February 25 Workshop, CARB staff reiterated its intent to implement a fee program that is economy-wide and impacts the most upstream sources of emissions. The Draft

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 whose Associate Members are the Plumas-Sierra Rural Electric Cooperative and the Placer County Water Agency.

Regulation seeks to impose the Administrative Fee on fuels at or near the source of entry into the State's economy, with the belief that the current structure does not single-out any one sector of the economy. It is also the intent of CARB to ensure that the Administrative Fee is consistent with existing programs, allows the Agency to use existing data, and is not costly to administer. To that end, CARB has issued the Draft Regulation with the understanding that the current proposal would cover approximately 75% of the state's greenhouse gas (GHG) emissions and that affected entities will be able to pass the costs along to the end users of the referenced fuels and refineries and cement manufacturers.

General Comments

While the Draft Regulation lays out specific provisions regarding the imposition and applicability of the fee, there are several areas that remain problematic, and that CARB should clarify and address before issuing the Proposed Regulation for comment and approval.

First and foremost, if adopted, the Draft Regulation would put into place a fee that has the potential to result in a significant financial burden - not only on those responsible for payment of the fee, but for all Californians as the cost of the fee passed through to end users. Of particular concern to NCPA is that fact that there are no limits on the annual revenue requirements that will be used to calculate affected entities' fee obligation. The Draft Regulation contains no safeguards regarding the total annual budget to be covered by the fee, creating the potential for an unlimited funding source for the State at the expense of the affected entities, or their end use consumers if the fee is passed through. This lack of a cap creates significant uncertainty for affected entities that are charged with budgeting for the upcoming fee. Further, the Draft Regulation does not address controls regarding the possibility of the administrative fee funding other government services that are already included in the regular budgets of agencies providing implementation support to CARB. The process for determining the annual revenue requirement must be open, and include an opportunity for stakeholder input and comments. This needs to begin with an open and public review of the annual California Environmental Protection Agency (EPA) "EPA Summary Budget," where stakeholder comment can be used to shape revisions and amendments to the initial proposed budget. CARB noted that the State Legislature always has the "last say"; however, the other agencies involved in the process - including all those that are going to submit for additional personnel and contracts- should be required to do so in a public process prior to the submission of the revenue request to the legislature.

The Fee should be designed to ensure that it covers the broadest section of the State's economy. As drafted, it currently provides a disproportionate impact on some sectors or industries. There should be provisions in the fee that ensure CARB will continue to review other sources of emissions within the state and ways that they can be included within in the fee base.

Additionally, NCPA notes that the Draft Regulation is based on the assumption of pass-through of the fee that is neither explicit in the Draft Regulation, nor implicit in the operations of affected entities. If the fees cannot be passed through for a variety of reasons, the Draft Regulation may produce a disproportionate distribution of the fee amongst the various sectors of the State's economy.

Section 95200 – Purpose

As drafted, the Draft Regulation assesses fees on sources that supply GHG emitting fuels, and not on the fuels themselves. Health and Safety (H&S) Code Section 38597 provides that CARB may adopt “a schedule of fees to be paid by the sources of greenhouse gas emissions regulated pursuant to this division.” Since it is the intent of CARB that the fee be passed along to end users, the “Purpose” section of the Draft Regulation must state how this is accomplished in order to ensure that the fee itself complies with H&S § 38597.

While H&S § 38597 broadly authorizes the adoption of a fee, the revenues of which “are available upon appropriation, by the Legislature, for purposes of carrying out this division,” CARB should ensure that its articulated purpose for the proposed fee is clearly stated in § 95200 of the Draft Regulation. Namely, the regulation itself should specifically include the following:

- ❖ A reference that the fee will be used by CARB and other state agencies to support implementation and execution solely related to the Scoping Plan and to repay loans.
- ❖ A reference to the fact that the fee *will not* be used to support ongoing programs such as energy efficiency and renewable energy already in existence.
- ❖ A reference to the ongoing evolution of the mechanisms for cost collection and review of inclusion of additional affected entities.
- ❖ A reference to the fact that the fee will be reviewed upon the implementation of a cap-and-trade program.

This section of the regulation should also include the reference currently found in § 95206(d) that “the fees collected from the entities are to be expended by the state board only for the purposes of recovering costs of implementing the provisions of AB 32 and repaying the Debt.”

Because AB 32 and H&S § 38597 provide no ceiling on the amount of money that can be appropriated “for purposes of carrying out the California Global Warming Solutions Act of 2006,” and because the financial evaluation contained in the Scoping Plan deals primarily in “end result” numbers, the potential for affected entities to be saddled with the burden to provide the State with an annual “blank check” is great. It is imperative that CARB narrowly define the purpose of the fee to ensure that there are containment measures with regard to the total annual obligation.

Section 95201 – Applicability

Section 95201(a) of the Draft Regulation notes that the fee is applicable “to the following sources of statewide GHG emissions.” NCPA recommends that this language be revised to reflect the fact that the fee applies to the underlying fuel source, and the ultimate use of those fuels that produces the GHG emissions. The regulation should be revised to provide that that the article applies to the “*following fuels, the combustion of which results in greenhouse gas emissions, and process emissions.*”

Section 95201(a)(1) applies the fee to “public utility gas corporations.” NCPA has had the opportunity to discuss the Draft Regulation with CARB staff, and appreciates the proposed revisions to this section proposed by staff. Namely, it is NCPA’s understanding that in order to provide the greatest level of clarity and accuracy, the Draft Regulation will be revised to reflect that as it applies to natural gas moved by public utility gas corporations, calculation of the fee will be determined at the distribution level. The public utility gas corporation will remain the entity responsible for payment of the fee (and ostensibly will pass that fee along to all of its end-users – both retail and wholesale), and will further be responsible for reporting the specified quantities of natural gas delivered to the distribution points.

NCPA also supports revision of the Draft Regulation to combine the provisions of § 95201 with those in § 95205 – Fees Imposed. Combining these two sections, and including the various clarifications discussed above with regard to the point at which the fee is reported, will make the regulation less burdensome and easier to read.

Section 95202 – Definitions

While the Draft Regulation contains an extensive list of definitions, § 95202 should also include definitions for “fiscal year” and “interstate pipeline” for the context in which these terms are used in the draft Proposed Regulation.

Fiscal Year: as drafted, the fee is designed to collect moneys from the affected parties using a calculation that is based on two separate time periods. Since the revenue requirement is based on amounts budgeted for a “fiscal year” and the fee calculation is based on reported data from affected entities for the calendar year, the regulation should define the applicable fiscal year.

Interstate pipeline: § 95201(a)(2) notes that the article applies to entities “purchasing or consuming natural gas in California that has been transported directly by an *interstate pipeline*. . .” The regulation should include a definition of the pipelines at issue. This clarification will also be helpful in further defining the proposed change regarding the point at which natural gas will be “charged” the fee for purposes of fuel transported by a public utility gas corporation.

Section 95203 – Calculation of Fees

NCPA notes that the issues surrounding determining the Total Revenue Requirement CARB noted that the Draft Regulation was largely based on the Nonvehicular Source Fee Program (NVSF) that was developed as a result of 1999 legislation (Assembly Bill 1103), which extended indefinitely CARB’s authority to collect permit fees from large nonvehicular sources of air pollution. While there are aspects of the NVSF (this fee is “intended to help defray the ARB’s cost of implementing the nonvehicular provisions of the [California Clean Air Act]”²), there is an important difference in that the NVSF is based on a *capped amount*, not subject to annual adjustments. This distinction is crucial; under the Draft Regulation, the total amount of the revenue requirement is unlimited. Affected entities total fee obligation has the potential to fluctuate widely from year to year; it is surely a foregone conclusion that this total amount will only increase. This becomes especially problematic when entities are trying to budget for their

² 2002-2005 CCAA Nonvehicular Source Fee Program Overview, October 17, 2008.

annual fee obligation, or determine the manner in which to pass the costs along to end users (this is also discussed below in the context of § 95206, Payment and Collection).

The description of Required Revenue in § 95203(a)(1) must provide greater clarity with regard to the total revenue requirement for any given year. As more fully set forth above, the purpose of the fee must be narrowly tailored to ensure that CARB's objectives are met without allowing the possibility for excess fund collection. As stated, "*funds necessary to recover the costs of implementation of AB 32 program expenditures each Fiscal Year,*" allows a great deal of discretion regarding the total amount of the revenue requirement.

Section § 95203(a)(1), which provides in part that the fee is "*based on the number of personnel positions and contracts approved in the California budget for that fiscal year,*" should be more narrowly tailored. Again, as noted above, the total amount for "contracts approved" for any fiscal year can be quite large, and is likely to increase annually as implementation of AB 32 continues. This portion of the Draft Regulation needs to include additional safeguard to ensure that the RR is not an uncapped amount. Once the fee is approved, there will be a permanent, guaranteed funding source for state positions; the potential for cash-strapped agencies to "contract" for AB 32 work and hire additional personnel under the heading of AB 32 will be great. The regulation should be crafted as to narrow the scope of the revenue requirement as much as possible.

Section 95203(a)(2) provides for "payback" of past costs during the first three years of the fee. This section should be more fully defined; the exact numbers are known, and should be included within this description. The description should also clarify that the payback will be accomplished through three equal payments over the next three years.

Section 95203(a)(3) provides that the revenue requirement can include amounts incurred by CARB in defense of the article in court. NCPA is concerned that the inclusion of this provision could have a chilling effect on those that lawfully choose to challenge the application of the fee.

The description of the Total Revenue Requirement (TRR) in § 95203(a)(4) must be further clarified. Currently, the provisions notes that "the Debt payment (if any) and any carryover (*as defined in section 95203(a)(4)*) in addition" to the revenue requirement shall be the TRR. (emphasis added) However, as set forth, it is not clear what "Debt payment" and "carryover" refer to. This provision should be revised to provide the necessary clarification.

Section § 95203(a)(5) provides direction with regard to potential "shortfalls" or "excess" in revenue collections. It is conceivable that excess revenues may be collected to the extent that contracts of employee positions are funded and not filled for any given year. It is further conceivable that shortfalls in collection may occur if obligated entities do not remit their total fee obligation. As worded, it also appears that CARB is contemplating potential shortfalls in revenues that may be based on the expenditures during the budgeted fiscal year in excess of the previously approved TRR. In the latter instance, there should be *no excess*. NCPA is concerned that this language allows for even less certainty with regard to the total fee obligation, and is

therefore, very problematic. Ostensibly, any shortfall would not even have to be approved as part of a subsequent budget, but would automatically be added to the total revenue requirement approved for the subsequent year. That is clearly untenable. It is also problematic to require future entities to foot the bill for past undercollections based on nonpayment, and creates an even more tenuous link to the underlying premise of the fee that 75% of the State's economy is paying the fee. The Draft Regulation should be revised to strike any and all references to the inclusion of shortfalls in future TRR.

Section 95204 – Reporting Requirements

Section 95204(g) must include the due date for submitting the requested information. Section 95204(g) provides that “unless information submitted is subject to the mandatory reporting regulations, Title 17, California Code of Regulations section 95100 *et seq.*”, the information is to be submitted to CARB. The reporting regulations contained in 17 CCR 95100 include mandatory deadlines, but any of the additional information required under the fee regulation must also be subject to date certain deadlines.

The Reporting Requirements should also be revised to clarify the point along the transmission system of natural gas at which CARB seeks usage data.

Section 95206 – Payment and Collection

As proposed, the Draft Regulation seeks annual payment of the fee obligation from affected entities within 60 days of being noticed of the amount due. The amount due, revised annually and based on an unspecified and uncapped amount, has the potential to vary greatly from year to year, making estimating the total annual obligation problematic. Unlike the NVSF upon which the Draft Regulation is based, the AB 32 Administrative Fee is not subject to a statutorily established cap, nor an open review and approval process. Depending on the amount of the fee due, 60 days is likely not sufficient time for entities to come up with the amounts due, especially for the first year.

Furthermore, as noted by CARB staff, since the premise that the fee covers 75% of the State's economy is based on the notion that the fee will be passed-through to end users and customers, affected entities must be given adequate time to bill and collect the amounts due from their customers and end users. Passing through the costs will require that entities include an “adder” additional line-item on their invoices for the initial transactions; since the fee covers a 12 month period, it would take at least 12 months for entities to recover the amounts that they owe the state. Requiring these amounts to be paid within two months of receiving a fee notice is unreasonable. Accordingly, affected entities must be given sufficient notice of their annual compliance obligation to develop a revenue stream to pay those costs, a task not easily accomplished in all instances since those being called upon to pay the current fee will not be the same customers upon which the relevant data reported to CARB was based.

Furthermore, even in future years, it will not be possible for entities to plan ahead for subsequent fee determinations, as there are no checks or limitations on what the state's revenue requirement is going to be. Since the revenue requirement is used in the calculation, it would be impossible for an entity to even estimate the total obligation and begin “passing through” a

further expenditure to its customers. It is imperative that entities be given adequate time between the notification of the total annual assessment and the due date.

The Draft Regulation should be revised to allow for the collection of the fee in monthly or quarterly payments. This would allow the affected entities to reconcile their current budget and pass-through collection with payments to the state.

Section 95206(a) provides that there will be written notice of the “amount due for the current calendar year,” and § 95206(b) provides that entities will be notified that they must remit specified amount “for the then-current fiscal year.” The Draft Regulation must be revised to reconcile these two different time periods.

The amount of the late fee referenced in § 95206(c) must be more clearly defined. The Draft Regulation should provide some clarity with regard to what the Board’s “additional expenses incurred by the entity’s untimely payment” may be.

Section 95206(d) addresses the use of the fees collected, and should properly be in the purpose section of the document. The Draft Regulation should also be revised to clarify the referenced to the “state board,” as that is not a defined term in the Draft Regulation.

CONCLUSION

NCPA appreciates the opportunity to offer these comments and suggestions to CARB, and to assist in the formulation of a fair and equitable Administrative Fee. NCPA also looks forward to further collaboration with CARB and interested stakeholders in the further development of the proposed AB 32 Administrative Fee.

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,

MCCARTHY & BERLIN, LLP



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