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To: **California Air Resources Board**  
From: **Northern California Power Agency**  
Attn: **Climate Change Section**  
Date: **February 13, 2009**

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The Northern California Power Agency<sup>1</sup> (NCPA) appreciates the opportunity to offer these comments to the California Air Resources Board (CARB) on the *Concept Workshop on AB 32 Administrative Fee Regulation* (Proposed Fee), held on January 27, 2009. While CARB has acknowledged that the fee structure is still conceptual in nature, it has also stated that it would be helpful to have stakeholder input before issuing the formal proposed regulation. To that end, NCPA hopes to facilitate CARB's process by submitting these comments. NCPA notes, however, that given the tentative conceptual nature of the Proposed Fee, many of the comments contained herein are also questions or concerns that could be addressed with further clarification.<sup>2</sup>

## **THE PROPOSED FEE**

As proposed, NCPA understands that the fee would be charged to "upstream sources" in order to cover the broadest base, and would be charged based on existing data. (Presentation Slide 4) Those responsible for the charge would be the "most upstream" user or seller of gasoline, diesel, coal, and natural gas within the state, and in-state refineries and cement manufacturers responsible for process emissions. (Presentation Slide 5) Entities responsible for

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<sup>1</sup> 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.

<sup>2</sup> NCPA would also like to express its appreciation to members of the Climate Change section, especially Staff Lead on the Administrative Fee Jeannie Blakeslee, Bruce Tuter, and Manager Jon Costantino for their assistance in

the fee would be required to report annually the amount of fuel that is “used/sold” or processed in California, and pay the annual fee based on the date submitted. (Presentation Slide 7)

The fee will be based on the total revenue requirements for the State each fiscal year – beginning in 2009-2010. The total revenue requirement will take into account: (1) quantities of reported fuels and emissions, (2) emissions from specified fuels and processes based on CARB’s inventory (with 2004 used as the initial base year), and (3) fuel emissions factors. (Presentation Slide 10) After determining the annual revenue requirement, the annual fee will be determined based on revenue and sales/usage and process emissions data for the responsible entity for the previous year (as reported to CARB). Accordingly, the cost per unit CO<sub>2</sub>E will equal the *total revenue requirement in dollars*, divided by the *total CO<sub>2</sub>E from fuel burned and process emissions*. (Presentation Slide 11) The fee applicable to each affected entity for fuel usage will be calculated based on the annual “Fee Rate” and the affected entities’ reported quantities of fuel sold or used in California. (Presentation Slides 12-13)

CARB anticipates utilizing 2008 usage information collected in 2009 to determine the total fee obligation of the responsible party by January 2010. Entities will be informed of their financial obligation in January 2010, and will be required to remit payment to the state by March of that same year. (Presentation Slide 14)

## **NECESSARY ELEMENTS OF THE FEE REGULATION**

In order to formulate a practical and reasonable Administrative Fee, it is imperative that the structure and rules regarding both imposition and collection of the Proposed Fee be straightforward and unambiguous. Accordingly, NCPA notes that the rules and formulation of the fee must include and consider:

- safeguards and transparency regarding total expenditures each year
- clarity regarding the responsible entity
- clarity regarding applicable and associated reporting requirements
- impacts on non-state public agencies for AB 32 administration
- future review to consider inclusion of additional fuel sources and process emissions
- future review of the need to reduce or eliminate the fee in light of the implementation of a cap-and-trade program
- sufficient time to develop and design the fee

## **ESSENTIAL ELEMENTS OF THE PROPOSED FEE**

### **Cost Safeguards and Transparency**

The fee must be designed to include safeguards against excess charges, be based on costs that are approved and verified in a transparent public process, and provide responsible parties with sufficient notice to adjust their revenue requirements to cover the costs.

There must be some assurances regarding the total cap on the annual fee assessment. To do otherwise would be to write the state a blank check for administration of AB 32, which is clearly not in anybody's best interest. Each year, entities will be called upon to pay the fee, and despite the hope that the overall amount will be relatively stable from year to year, there are no assurances that the costs of administering AB 32 will not increase over time. Indeed, the opposite is true. Given the sheer number of programs that must be developed and/or implemented in the coming years, the total price tag for AB32 administration is sure to increase as the State begins initiating programs contemplated in the Scoping Plan, and as we draw closer to the proposed 2012 launch of a state-wide cap-and-trade program.

The fluctuating nature of the fee is very problematic, especially for public agencies that will be deemed the responsible entities. These agencies will be called upon to submit fees of an unknown amount just months after receiving an invoice from the State. In many instances, and especially in the first year, it will likely not be possible for these public agencies to simply write the state a check because they would not have been able to budget and allocate funds for the amount at issue. Coupled with this, as discussed more fully below, is the fact that many of the public agencies that will be responsible for the charge will also be burdened with their own AB 32 administrative costs associated with implementation of programs mandated by the Scoping Plan for which they are responsible.

The costs upon which the total revenue requirement is established must be determined in an open and transparent process. The Proposed Fee will be based on amounts determined annually by the State Legislature during the budget process. Simply put, the annual legislative budget process is not one that is easy to understand, cumbersome, and probably not the best forum to provide necessary review. AB 32 requires CARB to mandate emissions reduction measures that are cost-effective. While the legislation also allows the agency to seek recovery of fees associated with administration, there should likewise be some cost containment mechanisms

placed on the process.

In order to craft a fair fee, it is imperative that those responsible for paying the fee – and indeed those to which the fee will ultimately be passed along – have some means by which to verify the total expenditures that they are being called upon to fund. The Scoping Plan addresses utilization of a broad range of programs to effect the State’s emission reduction mandate. However, many of those programs are already in existence or are part of State programs that meet other important objectives that predate AB 32 (such as energy efficiency and renewable energy programs). To utilize the authorization in AB 32 to restructure agencies’ budget allocations away from their existing designation to AB 32 administration is unfair to the entities ultimately responsible for payment of the Proposed Fee. Affected entities need to know – as part of a discrete process – what costs are being included in the determination of the annual revenue needs.

Finally, affected parties must be given sufficient notice of their annual compliance obligation to develop a revenue stream to pay those costs. For example, natural gas utilities operating at the margin will have no additional funds to pay the Proposed Fee unless adjustments are made to their charges. Similarly, entities that use natural gas fired electric generation to supplement electricity received from hydroelectric resources already face challenges in low-hydro years when they are required to purchase greater quantities of natural gas. In instances involving both of these kinds of affected entities, it would be imprudent and irresponsible to simply raise prices to cover an unknown fee, especially in times like these when the state is facing severe economic hardship. Accordingly, it is imperative that entities be given adequate time between the notification of the total annual assessment and the due date. Furthermore, since the total amount due is going to be based on an annual assessment to cover costs incurred over a 12-month period, entities should be able to pay their annual assessment of the fee over a similar 12-month period, and not be required to come up with a single burdensome, lump sum payment.

### **Clarity Regarding the Responsible Entity**

Affected entities must know what their fee obligation is and when it occurs. CARB has noted that its proposed approach is to assess the Proposed Fee on upstream sources. This would allow the fee to be “broad-based” and “economy wide,” and should work to make the fee both predictable and simpler to administer than other approaches. However, that simplicity must not

come at the cost of clarity. NCPA appreciates the efforts of CARB staff to work with stakeholders to bring greater clarity regarding the “point of regulation” for assessing the fee. However, the issue has not yet been resolved.

For purposes of determining the user/seller of natural gas, CARB staff has clarified that there is no intention to charge the fee twice for any “therm” of natural gas used or sold in the State. Accordingly, if a “direct buyer”<sup>3</sup> purchases natural gas from a California utility, the purchaser would not be responsible for the fee. It is important that this distinction is clearly set forth in the proposed regulation in order to ensure that the entity that *is* responsible for the fee knows so.

The fee concept provides no guidance regarding instances when natural gas is purchased by a California user or seller from third parties. Staff has acknowledged that this issue needs to be further deliberated, and appreciates the efforts of Staff to work with stakeholders to design the fee in a way that maintains administrative simplicity. As NCPA recently discussed with Staff, it is important that the construct of the fee is clearly defined before the proposed regulation is introduced. The question for purposes of affecting such an outcome is whether or not the current reporting regulations include requirements for reporting fuel imports from such entities, and whether that can be used as an accurate basis for CARB to determine the applicable fee. Regardless of whether CARB chooses to assign the charge to the operator of the pipeline through which the fuel moves or the “first user,” the affected entity must know of the obligation.

Another issue that raises questions that still need to be addressed involves natural gas placed in storage. Depending on the final design of the fee, there is the potential for such fuel to be charged twice, which is clearly not CARB’s intention. The use of gas storage facilities in California is very common. Natural gas users often purchase specified quantities of natural gas that are then placed into storage. The entity then consumes or sells natural gas as necessary. There is currently no accounting mechanism that would address how to determine applicability of the Proposed Fee on natural gas consumed from storage. One suggestion by staff has been to assess the fee on the natural gas before it is placed in storage. However, this could be problematic in that fuel placed into storage may not be utilized by the same entity that originally purchased it. Storage can hold volumes of gas that have had the fee previously paid, and other

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<sup>3</sup> In the January 27 Presentation, “affected entities” to which the fee applies includes “natural gas utilities and/or

volumes which were purchased from an out of state entity and no fee was paid. If gas was sold from storage, the fee would have been paid for some or all of that gas. So charging a fee on gas sales from storage is problematic. Staff has also discussed the possibility of assessing the fee on natural gas that is transported in the State, with the understanding that the entity transporting the fuel will not necessarily be the first user or seller of the fuel, but would have the record information necessary to determine what quantities of fuel should be attributed to what entities within the State.

A crucial issue underlying many of the concerns regarding assignment of the Proposed Fee to natural gas is accounting: and whether there are accounting (and reporting) mechanisms in place that will allow for an administratively simple application of the Proposed Fee.

NCPA appreciates Staff's invitation to further discuss these issues and craft solutions that are clear and practicable, and looks forward to continued dialogue with Staff to do so.

### **Clarity Regarding Applicable and Associated Reporting Requirements**

Administration of the Proposed Fee depends in large part on the Reporting Regulations. In order to determine the amount of the fee applicable to an affected entity, CARB must be able to apply the Fee Rate to the quantities of fuel sold/used in California, and in order to do this, CARB must be able to utilize – in a timely fashion – the data reported to it. While the Reporting Regulations require the submission of 2008 data in 2009, it was widely anticipated that such data would be collected on a “trial run basis.” Instead, that information is now going to be utilized to assess a fee. NCPA believes that it could be problematic to now utilize this data for this purpose. It is also important to ensure that the Reporting Regulations are actually applicable to each of the entities that will be responsible for the fee. For example, since how to track the initial seller/user of natural gas in all instances has not been clearly defined, it is unknown whether that responsible entity is in fact an entity that is required to report under the State's current regulation.

Additionally, while CARB has expended considerable efforts in developing a *Reporting Tool* that will facilitate both the submission and utilization of the reported data, current Beta testing of the tool has not been entirely successful. Development of the Proposed Fee must take this into account, as well as the additional burden that this may place on what Staff hopes will be

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direct purchasers of natural gas.”

a straightforward administrative process.

### **Impacts on Non-State Public Agencies for AB 32 Administration**

The purpose of the Proposed Fee is to cover the costs of state agencies to administer and implement AB 32 programs. (Presentation Slide 3) The funds will be paid to CARB and other State agencies – such as the California Energy Commission (CEC) and California Public Utilities Commission (CPUC) – that will be responsible for administering or implementing various programs set forth in the Scoping Plan. State agencies, however, are not the only governmental entities that will be responsible for the administration and implementation of AB 32 and the Scoping Plan programs. Indeed, many public agencies, such as publicly owned utilities, will also be called upon to invest significant resources in the implementation of the Scoping Plan, including the administration and oversight of energy efficiency and renewable energy programs. For the State’s investor owned utilities, these functions are overseen by the CPUC, which will likely authorize reimbursement in the form of the Administrative Fee for their efforts. However, despite the fact that local public agencies will be called upon to incur costs in analogous administrative duties, under the Proposed Fee, those entities will not be compensated. At the same time, some of these same entities – those that are natural gas utilities or that utilize natural gas to generate electricity – will be required to pay the fee. CARB should consider crafting the Proposed Fee in such a way that does not create a double burden on these public entities.

### **Ongoing Review of Affected Entities**

The fee must be designed to allow for the future inclusion of additional responsible entities in order to ensure that the fee is in fact spread across the broadest portion of the State’s economy. CARB has noted that one of its objectives in designing the Proposed Fee is to make the charge broad-based and to try to cover as much of the economy as possible. In response to this statement, several stakeholders noted that there are a number of fuel sources (and other process emissions sources) that are not currently covered by the Proposed Fee. Staff explained that the initial affected entities were selected because they do cover the majority of the State’s economy, but also acknowledged that there are other sources that have not been included. It appears that the rationale for not including other fuel types at this time is primarily due to the

desire to (1) maintain a fee that is simple to administer and (2) implement a fee that is based on existing data.

While NCPA understands that both of these factors limit the scope of applicability for the fee, it is imperative that the fee be continually reviewed. Such review should seek ways to include a broader range of fuel sources within the scope of the fee in order to spread the cost across an even greater portion of the economy. The development and refinement of reporting tools should also bring about the ability to include additional affected entities within the base of the Proposed Fee. Accordingly, the fee should be subject to regularly scheduled periodic reviews in order to determine if certain elements need to be updated.

### **Elimination of the Administrative Fee with Cap-and-Trade**

NCPA urges CARB to treat the Proposed Fee as an interim funding measure. The Proposed Fee must be continually reviewed to ensure that there is no duplication in collection, and to determine if the fee should be adjusted, reduced, or eliminated in its entirety with the implementation of a cap-and-trade program. While Staff has indicated that the Proposed Fee is not intended to automatically terminate with the implementation of a cap-and-trade program, it is necessary to ensure that the need for the fee, as well as possible alternative funding sources, be reviewed in the context of a cap-and-trade program. It is anticipated that the cap-and-trade program will generate revenue for the State. Consideration should be given to utilizing some of those revenues to fund the implementation of AB 32, and eliminate the Administrative Fee.

### **Timing of the Process**

Despite the pressing need to implement the Proposed Fee and begin collecting funds, the fee should not be adopted or implemented until all of the details have been reviewed and any problems fully resolved. It is clear that a great deal of effort has been invested in designing a fee that addresses the State's need for reimbursement of costs associated with the administration of AB 32, as well as the desire to create a structure that is both easy to administer and that can be spread across the broadest part of the economy as possible. However, as noted herein, there are still several critical elements of the Proposed Fee that are missing or as yet unresolved. Even taking into account Staff's responsiveness to inquiries and their eagerness to resolve issues,

NCPA is concerned that the timeline established for the development of the actual regulation and approval by the Board is overly aggressive. As currently contemplated, the draft regulation would be released at the end of February, followed by at least one workshop, with release of the Staff Report and commencement of a 45-day comment period beginning of April. Following workshops on the proposed regulation, the document would be brought before the Board for approval on May 28, 2009, approximately four months from the date the concept was first introduced.

Even accounting for the State's need to begin collecting the fee as soon as possible, commencement of the 45-day comment period merely one month following release of the draft regulation is not likely to afford either stakeholders, nor CARB, the time to fully work through the outstanding issues. NCPA urges CARB to remain cognizant of the status of outstanding issues, and if warranted, delay the issuance of the 45-day language and final approval by the Board to ensure that the final product is one that does not end up costing the State even more administrative resources.

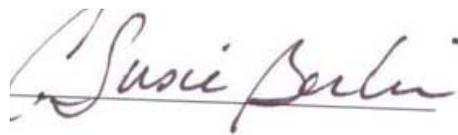
## **CONCLUSION**

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](mailto:scott.tomashefsky@ncpa.com).

Sincerely,

**MCCARTHY & BERLIN, LLP**

A handwritten signature in cursive script that reads "Susie Berlin". The signature is written in dark ink and is positioned above the printed name.

C. Susie Berlin

**Attorneys for the Northern California Power Agency**