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Gary Collord
Energy Section – Stationary Source Section
California Air Resources Board
1001 I Street
Sacramento, CA 95812
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Re: Comments of the **Northern California Power Agency** on the
Renewable Electricity Standard Preliminary Draft Regulation

Dear Mr. Collord:

The Northern California Power Agency¹ (NCPA) appreciates the opportunity to submit these comments to the California Air Resources Board (CARB) on the March 11, 2010 Renewable Electricity Standard Preliminary Draft Regulation (Preliminary Draft Regulation or PDR). These comments address the Preliminary Draft Regulation, as well as issues raised by CARB Staff and Stakeholders during the March 18, 2010 Workshop.

I. INTRODUCTION

The state of California has determined that increasing renewable electricity procurement is a key tool in reducing the amount of greenhouse gas (GHG) emissions associated with the generation of electricity. NCPA and its members have a long and demonstrated commitment to increasing their renewable electricity portfolios, while continuing to provide safe, reliable, and reasonably priced electricity to their customers. In the Scoping Plan, CARB anticipates that reductions of 21.3² million metric tons CO₂e can be achieved through the increase of renewable electricity from 20% in 2010 to 33% by 2020 across the state. As mandated by Assembly Bill (AB) 32, achieving the statewide standard of 33% renewable electricity – and development of the RES Regulations that will govern this objective – must be done “in a manner that minimizes costs

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.

² California Air Resources Board, *Climate Change Proposed Scoping Plan*, October 2008, page 46.

... and maintains electric reliability.” (Health and Safety Code § 38501(h).)

These comments on the PDR are offered in the context of developing the RES regulation in a manner that allows the state to reduce overall statewide GHG emissions, facilitate the development of renewable electricity resources, while also allowing regulated parties to procure resources at reasonable costs, and ensure the reliable provision of safe and reasonably priced electricity to consumers. These comments address the issues in the order they are raised in the Preliminary Draft Recommendation, and do not indicate any priority with regard to the matters set forth herein.³

II. COMMENTS ON THE PRELIMINARY DRAFT REGULATION

A. WAPA Sales to Regulated Parties Should Not Excluded

As drafted, § 97001(a) of the PDR purports to include state and federal agencies within the scope of regulated parties. NCPA understands that Staff has discussed – and continues to discuss – this issue with the Western Area Power Administration (WAPA), a federal agency that is included in the list of regulated parties set forth in § 97002(12). However, as purchasers of wholesale power from WAPA, NCPA and its members are concerned that any of the agency’s added costs for compliance with the RES Regulation would be passed on to the regulated parties that purchase power from WAPA. This would result in a double assessment on many of California’s electricity consumers, as regulated parties will bear the cost of their own RES programs, as well as the costs for RES compliance passed along from their power supplier. To the extent that WAPA does not provide retail electric sales, the agency should be excluded from the scope of the regulation.

B. The Exemption for Small Regulated Parties is Warranted

NCPA strongly supports the partial exemption for small regulated parties set forth in § 97001(b). NCPA believes that an exemption for smaller regulated parties that are in existence at the time the regulation is adopted is warranted and reasonable in order to avoid undue burdens on this limited number of entities.

1. The Partial Exemption is Warranted

The partial exemption defined in § 97001(b) for Small Regulated Parties should be retained at a level of no less than 200,000 MWh. The exemption is proposed for regulated parties that provide 200,000 MWh or less of electricity to retail end-use customers in a calendar year.

³ NCPA takes no specific position at this time on matters set forth in the Preliminary Draft Regulation that are not specifically addressed in these comments.

NCPA supports the partial exemption – of no less than 200,000 MWh – for smaller compliance entities to achieve the goals articulated by Staff, and notes that this threshold would apply to less than 1% of the State’s electricity load.⁴ Specifically, NCPA believes that this nominal exemption is warranted given the extent of the administrative burden of compliance and the cost impacts on the regulated entity and their customers, balanced with the ability to phase-in compliance for these parties. The requirements that all entities strive to meet an RES mandate, coupled with ongoing reporting requirements ensures that this partial exemption is not utilized as a tool to avoid compliance with the RES. In fact, each regulated party that is ultimately exempted must still comply with Renewable Portfolio Standard (RPS) mandates expressly required in existing State law.

2. The Partial Exemption Should be Limited to Existing Regulated Parties

While all of the cost considerations justify the inclusion of a threshold for smaller regulated parties already in business in California, the same rationale does not apply to new entrants into the electricity market. NCPA recommends that the partial exemption be limited to those regulated parties that are already in business as of the effective date of the regulation, in order to avoid an inadvertent loop-hole that could incentivize the creation of a regulated entity that only intends to provide retail service below the threshold amount.

C. The Definition of a REC Should be Clarified

A renewable energy credit (or REC) is defined in § 97002(13). Throughout the regulation, the term REC is used to refer to the “compliance instrument”; due to the common lexicon associated with this term and the definitions set forth in the PDR, this creates some confusion. In order to avoid any uncertainty, NCPA recommends revisions to the definitions for REC and WREGIS Certificate. Section 97002(13) should be revised to strike the reference to a renewable energy certificate (which is never defined in the document) and replace it with “WREGIS Certificate.” Section 97002(22) should be revised to add a reference to the WREGIS regulations that govern those certificates. Additionally, while the PDR contemplates the use of tradable-RECs, that term is not defined in the proposed regulation, and a new definition should be added to define “tradable-RECs.” All of these are key and relevant terms, and in order to avoid confusion regarding the treatment of these different instruments, any ambiguity regarding the use of these terms must be clearly addressed in the Regulation.

⁴ Staff had originally proposed a 500,000 MWh exemption in the October 2009, *Proposed Concept Outline for California Renewable Electricity Standard (RES Concept Outline)*; the reduction to 200,000 MWh does not appear to reflect a significant difference in the total amount of retail load that would be included in the partial exemption, and staff should consider a threshold of no less than 200,000 MWh.

Sections 97002(13) and (22) should be revised to read

§ 97002(13) “**Renewable Energy Credit or REC**” means a credit issued by WREGIS associated with one MWh of electricity generated by an eligible renewable energy resource or facility as evidenced by a ~~Renewable Energy~~ WREGIS Certificate. A REC does not include an emission reduction credit issued pursuant to Health and Safety Code section 40709 or any credits or payments associated with the reduction of solid waste and treatment benefits created by the utilization of biomass or biogas fuels. A REC also does not include any allowance issued pursuant to a cap and trade or similar program. A REC surrendered under this Article 6 does not constitute property or a property right.

§ 97002 (22) “**WREGIS Certificate**” means a certificate of proof issued through WREGIS that one MWh of electricity was generated by a RES eligible renewable energy resource, as defined in the WREGIS Operating Rules, dated June 4, 2007, or as may be subsequently amended.

D. Definition and Use of POU Eligible Resources

The PDR contemplates the “limited use” of resources that some publicly owned utilities (POUs) are currently using to meet their RPS obligation in an attempt to reconcile the State’s current dual regulatory structure for RPS. Accordingly, in § 97002(15), the PDR defines the *RES Qualifying POU Resources*, and includes a limit on a regulated party’s ability to use those resources for compliance purposes. This proposed limitation is designed to protect the investments of entities that were lawfully permitted to use different resources, while at the same time phasing out their use in order to bring all regulated parties under the same standard. NCPA believes that this provision is appropriate to address the existing paradigm under which the POUs adopted their respective RPS ordinances and met their obligations.

1. Timeframe for Applicability

As proposed, § 97002(15) sets a cut-off date for all such contracts of September 15, 2009. Remaining consistent with the rationale for employing this category of resource, NCPA believes that the cut-off date should be linked with the effective date of the regulation. Additionally, language in § 97002(15)(B)(2) that limits the applicability of the facility to the “initial term” of the contract should be stricken. There is no reasonable rationale for distinguishing between an initial and renewal period for a generation resource, as long as both occurred before the proposed cut-off date. There are myriad business, legal, and financial reasons for structuring contracts in certain ways, including long-term agreements or short-term agreements with multi-year renewal periods. None of these mechanisms change the fact that the initial investment was made prior to the proposed cut-off date, and accordingly should not adversely impact the ability of a regulated party to use the resources for meeting the RES obligation.

Section 97002(15) should be revised to read:

(15) **“RES Qualifying POU Resource”** means a renewable energy facility that is not certified by the CEC as eligible for the RPS program, but whose generation was approved by the POU’s Governing Board as counting towards its RPS targets, and:

(A) The POU owned the facility prior to ~~September 15, 2009~~ the effective date of this Article 6 or

(B) A contract for electricity from the facility was executed prior to ~~September 15, 2009~~ the effective date of this Article 6; and:

(1) The POU procured electricity and RECs, or RECs without electricity, from the facility prior to ~~September 15, 2009~~ the effective date of this Article 6; and

(2) The electricity was procured during the ~~initial~~ term of the contract or any subsequent renewals executed before the effective date of this Article 6 ~~and not during any extended or modified term.~~

2. Types and Kinds of Resources

During the March 18 Workshop, Staff specifically asked stakeholders to address whether there should be limits on the types or kinds of renewable resources that may be claimed. On this point, NCPA notes that the proposed eligible resources do not address large hydroelectric resources. Even without inclusion of these resources as “eligible resources,” the regulation must address the use of these and similar low- and zero-GHG emitting resources as part of the State’s overall objective to reduce GHG emissions and secure additional renewable electricity resources. The PDR states that “the purpose of this regulation is to reduce greenhouse gas emissions associated with the generation of electricity.” (PDR § 97000) To adopt a GHG reduction measure that results in an increase in GHG emissions due to a regulated party’s need to shift its resource portfolio would clearly not fall within the intent of AB 32, nor the Governor’s Executive Order S-21-09. In instances where regulated parties have a large amount of zero-to-low emitting GHG resources that are not eligible for the RES, those entities should not be forced to acquire either more costly or higher-GHG emitting resources in order to comply with the RES.⁵

3. Type of Ownership Interest

Staff also inquired whether there should be disparate treatment for resources depending on whether they are owned or contracted resources. NCPA believes that both types of resources should be treated the same. There is no reasonable explanation for distinguishing between the types of ownership interests in various resources. To do so would be to call into question

⁵ As more fully addressed in Section H below, potential penalties for non-compliance should also take into consideration the types of resources a regulated party utilizes in its energy portfolio.

decisions that were made in the past and based on factors that were relevant at that time; in either case, the end result is the same – a significant investment was made in a renewable electricity resource that reduces reliance on fossil based electricity generation resources.

E. Renewable Electricity Standard Obligation

1. The Regulation Should Clearly Set Forth the Compliance Obligation and Allow Sufficient Time to Determine the Obligation and Surrender RECs

In order to avoid confusion and ambiguity, the regulation should clearly set forth regulated parties' compliance obligation in § 97003. This section references measurement and reporting of REC retirements pursuant to the formulas set forth in § 97005(c), but does not specifically address this metric with regard to the compliance obligation defined in § 97003. Furthermore, in order to more accurately address the ability to determine the annual compliance obligation and obtain the requisite number of RECs to surrender, entities should have a set date upon which to surrender the RECs. Allowing for a date certain after the end of the compliance period allows regulated parties to compile their necessary load information and obtain the final amount of RECs needed for surrender. This date certain for surrender of the RECs will not impact the total number of RECs that regulated parties are required to acquire on an ongoing basis, which is reflected and monitored pursuant to the annual reporting obligation under § 97005(c).

Accordingly, NCPA proposes that the following changes be made to the first sentence of § 97003:

§ 97003 Unless exempted by section 97001(b), each regulated party shall retire an amount of RECs ~~equivalent to its REC obligation at the end~~ within six months of the end of each compliance interval, as specified in Table 1, equivalent to that percentage of the regulated party's retail electricity load. . .

2. Three Year Compliance Intervals Should be Required

Section 97003 should be revised to reflect three-year compliance intervals. There are many factors that impact an entities' ability to meet the RES obligation annually, including hydrological conditions, extreme weather fluctuations, long lead times on development and permitting of various renewable energy resources and transmission facilities, and the very nature of renewable electricity resources that make their availability variable. Application of a three-year compliance period allows for evening out of all these factors, which is necessary to ensure overall stability. Even after 2020, surrender obligations (in the amount of 33%) should be required every three years, with the annual reporting requirements maintained. NCPA does not oppose the proposed compliance period amounts set forth in the PDR, but rather proposes that the

dates be changed to reconcile ongoing three-year surrender obligations with the currently proposed REC percentages.

F. Renewable Electricity Standard Requirements

In §97004, the Regulation sets forth requirements for the RES surrender, which requires tracking by WREGIS. NCPA supports the use of WREGIS Certificates for tracking RES compliance and surrender. NCPA also supports the inclusion of specific language regarding banking and trading of RECs, which provides a valuable flexible compliance tool for regulated parties.

1. Unlimited Use of Tradable RECs Should be Allowed

The PDR anticipates the use of tradable-RECs and proposes two separate options for administering the use of these tradable-RECs. NCPA supports the “unlimited use of ‘unbundled’ RECs without electricity delivery requirements, bundled REC acquisitions to comply with RPS delivery requirements, and eligibility for RES Qualifying POU Resources,” as defined in Option 1. (PDR § 97004(a), discussion box)

During the March 18 Workshop, Staff sought input on several factors regarding the two options proposed in the PDR. In response to those inquiries, NCPA notes that a broader range of renewable resources available to regulated parties will ensure the highest quality and lowest cost options. Renewable resources should be available to California electricity providers, regardless of where they are located. Allowing the unlimited use of tradable-RECs provides not only a much needed cost-containment tool for regulated parties, but also provides the best options for procuring the most efficient and reliable renewable resources. Regulated parties are going to need the flexibility allowed by the use of tradable-RECs to meet the RES obligation. It is more important to focus on availability, efficacy, and viability of renewable energy options in the big picture, than to limit the options by irrelevant geographic or deliverability requirements.

2. Banking and Trading of RECs is Appropriate

Section 97004(d) allows regulated parties to bank RECs in their possession, but not used for the current compliance interval. As noted above, both electricity load and renewable electricity resource availability can vary greatly. The ability to retain additional RECs past one compliance period or trade with another entity that is long on RECs during any given compliance interval provides regulated parties with a key and essential cost containment mechanism. In response to Staff’s inquiries, NCPA supports the unlimited trading of RECs that have not been retired, and urges CARB to retain the current language that does not limit the “life” of a REC.

Further, at least at the beginning of the market, CARB should draft the regulation so that RECs are only tradable between regulated parties. This would address concerns regarding market

manipulation and shortages that result from commercial transactions from non-compliance entities. Once the RES program has matured, this issue may be revisited.

G. Monitoring, Verification, and Compliance

The PDR also requires the submission of annual “RES Progress Reports” and “RES Procurement Plans.” The POUs are required to submit these plans to the CEC and CARB (§ 97005(b)(2)). Reporting requirements mandated under the RES Regulation need to be reconciled with the myriad of current reporting obligations of regulated parties. Specifically, NCPA notes that most, if not all, of the information requested under § 97005(b)(2) is already provided to the CEC in other reports. Requests for information must be narrowly tailored to obtain exactly the data needed for a set purpose. It is imperative that the reporting obligations not impose duplicative or burdensome obligations on both the regulated parties and the administrative agencies that will be collecting and reviewing the documentation submitted.

H. Enforcement Provisions Must be Expanded and Clarified

As a practical matter, it is imperative that enforcement of the regulation be comprehensive and transparent, and that penalties be fairly assessed and administered. There is very little information in the PDR regarding the procedure for enforcement, and no information regarding the amount or kind of penalties that would apply. NCPA looks forward to more robust language regarding enforcement in the next draft of the regulation and provides the following comments in order to assist Staff in the development of this section.

1. Factors Mitigating Non-Performance

Despite the diligent pursuit of renewable resources, there may still be instances where a regulated party will not be able to meet the compliance obligation. This concern will increase as the demand for renewable resources increases in order to comply with the statewide standard, coupled with economic growth and other factors that increase electricity consumption (such as electrification of the other industries), even in the face of ever increasing conservation and energy efficiency measures.

The treatment of these instances must be addressed in the enforcement section of the regulation. NCPA recommends the inclusion of specific enforcement criteria that address – as is being addressed in Senate Bill 722 discussions – instances where noncompliance is due to circumstances beyond the control of the regulated party and preclude that party from securing the necessary RECs. This includes factors such as inadequate transmission capacity, unanticipated delays in permitting or construction of renewable resource facilities outside the control and due diligence of the regulated party, or insufficient supply of reliable electricity from eligible

renewable resources.

Noncompliance due to Cost Factors: The RES is but one of several complimentary measures the electric utilities and retail electric providers will be utilizing to reduce GHG emissions and move the entire state towards achieving the emissions reduction goals set forth in AB 32. However, such reductions cannot be mandated “at any cost.” Indeed, AB 32 specifically directs CARB to promulgate regulations and adopt measures that achieve technologically feasible **and cost-effective** reductions. Inclusion of a provision that addresses instances where it is simply not cost-effective for a regulated party to obtain a portion of its RES obligation provides a comprehensive framework within which California’s regulated parties can comply with the intent of the RES while continuing to provide reliable and reasonably priced electric service to electricity customers throughout the state.

Noncompliance due to External Factors: Instances that would excuse non-performance include the failure 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. Regardless of the zealotry with which renewable resources are pursued, instances such as these are not totally unlikely. It is also important for regulated parties to be able to maintain operational control and ensure that procurement of specific resources does not adversely impact the provision of reliable electricity.⁶ 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 renewables, integration issues.**”⁷

2. Penalty Metric

The Regulation establishes a kWh compliance obligation, but a penalty metric based on kWh is not necessarily commensurate with the violation. If the violation is for failure to surrender the requisite number of compliance instruments, then that should also be the measure upon which penalties are based.

3. Standards for Review:

Notwithstanding CARB’s discretionary authority to impose penalties, it is imperative that all enforcement provisions be crafted in a fashion that encourages performance over penalties for non-compliance. Enforcement of the regulation must be reconciled with the express provisions of Health and Safety Code § 38580(3), which requires that penalties be appropriate. In this case, daily penalty provisions are not appropriate and are inconsistent with state law.

⁶ See Health & Safety Code § 38501(h), which notes 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.**” (emphasis added)

⁷ California Air Resources Board, *Climate Change Proposed Scoping Plan*, October 2008, C-127, emphasis added.

Staff has extensive discretionary authority to apply penalties that are commensurate with the violation by reviewing factors such as the extent of harm, nature and persistence of the violation, a regulated party's record of compliance, and the extent to which the regulated party was deficient in the total amount of RECs surrendered. While these factors can, and should, be applied when reviewing the extent of a penalty to assess, such penalty should have its basis in the single violation at issue – the failure to remit the requisite number of RECs.

4. Monetary Penalties

In the event that monetary penalties are assessed, the penalty calculation metric should be included in the regulation or in publicly-developed guidelines. The calculation and determination of the penalty should be crafted to deter non-compliance by removing any economic benefits of non-compliance, and take into account the compliance entity's culpability in the shortfall, including intentional or negligent acts. Furthermore, CARB must remain cognizant of the broad range of generation resources that are available to electricity providers, and the extent to which the non-compliant regulated entity is affecting measures to reduce the carbon content of its electricity generation fuels. For example, if a non-compliant entity fails to procure 33% of its electricity generation from a California-certified renewable resource but maintains a portfolio that contains large hydroelectric or similar low- to no-GHG resources, this should be factored into any penalty calculation. Even if those resources do not qualify as RES eligible, they do comport with the stated purpose of the Regulation. Accordingly, the penalty provisions should be crafted to recognize instances where a regulated party's electricity portfolio still achieves the purpose of the Regulation.

5. Enforcement Guidelines

NCPA also encourages Staff to develop enforcement provisions that are based on clearly defined guidelines as part of a public process. It is simply insufficient to say that "penalties may be assessed pursuant to Health and Safety Code § 38580." (PDR, § 97008(a)) Specific language stating what the penalties are and how they are determined must be included in the regulation. 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. The development of such language should be addressed in a public forum.

6. Clear Appeal and Review Process for Enforcement Provisions

The enforcement process will cover a broad range of activities, ranging from reviewing the timeliness of mandatory submissions and calculating the total surrender obligation for regulated parties, to verifying RECs surrender and confirming trades. Accordingly, the Regulations must include information regarding the process that will be employed by Staff in the

event that a discrepancy is discovered, and how that discrepancy will be handled. Timelines for notice, review, verification, and if necessary, appeals should be clearly articulated in the regulation.

CONCLUSION

NCPA appreciates the opportunity to provide these comments on the Preliminary Draft Regulation and looks forward to working with Staff of future drafts of the RES regulation. If you have any questions regarding these comments, please do not hesitate to contact the undersigned or Scott Tomashefsky at 916-781-4291 or scott.tomashefsky@ncpa.com.

Sincerely,
MCCARTHY & BERLIN, LLP

A handwritten signature in blue ink that reads "C. Susie Berlin". The signature is written in a cursive, flowing style.

C. Susie Berlin
Attorneys for the Northern California Power Agency