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## M E M O R A N D U M

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**TO:** California Air Resources Board

**FROM:** Modesto Irrigation District  
Redding Electric Utility  
Turlock Irrigation District

**SUBJECT:** Proposed Enforcement Penalties: Background and Policy

**DATE:** April 15, 2011

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### The Utilities

Modesto Irrigation District (“MID”), Redding Electric Utility (“REU”), and Turlock Irrigation District (“TID”), collectively the “Utilities,” appreciate the opportunity to comment on the “Proposed Enforcement Penalties: Background and Policy” document (PROPOSED POLICY) developed by the California Air Resources Board (CARB).

MID, REU, and TID are local publicly owned electric utilities. MID and TID are irrigation districts located in the Central Valley, while REU is a municipal utility within the City of Redding. MID serves over 111,000 electric customers with a peak load of over 620 Megawatts (MW). REU serves 42,000 customers with a peak load of 247 MW. TID serves about 100,000 electric customers with a peak load of approximately 600 MW. The Utilities maintain similar resource mixes, including hydroelectric, eligible renewable resources and fossil fuel sources. MID anticipates it will meet about 18% of its retail sales with eligible renewable energy in 2010 and will begin to meet over 27% of its retail energy sales with renewable energy in 2011. REU has long-term contracts to provide 31% of its energy from eligible renewable resources. TID is currently meeting 27% of its retail load with eligible renewable energy. In addition to the foregoing state-defined eligible renewable resources, the Utilities have ownership and/or contractual interests in large hydroelectric resources that meet up to 21 percent of their retail load. The Utilities also share similar challenges in implementing CARB’s AB 32 programs including weather patterns, demographics and local economics. The Utilities have consistently supported the goals of AB 32 and participated in many of CARB’s proceedings in an effort to ensure that these goals are adopted in a manner where the regulations and implementing strategies promulgated under AB 32 consider the impacts on the electric ratepayers of California and include appropriate protections for consumers.

The Utilities appreciate CARB’s work to produce the Proposed Policy and believe it is a good first step towards implementing equitable, transparent enforcement. The Utilities support the concepts in Senate Bill 1402 (SB 1402) and appreciate the level of transparency that the Proposed Policy begins to achieve.

## **II. Legal Framework**

The Utilities continue to remain concerned that CARB includes AB 32 penalties under the same enforcement process as other Stationary Source penalties, which call for violations to be calculated on a per day basis. The Utilities do not agree that regulations with annual or periodic targets, such as the SF 6 reduction requirement and the cap-and-trade program, should be subject to daily violations.

## **III. ARB's Enforcement Process**

The Utilities believe the steps outlined achieve CARB's goal of creating a fair and equitable enforcement program.

The Utilities are extremely pleased to see the inclusion of "Section D. Opportunity to Discuss". The Utilities have advocated for a pre-penalty process in various AB 32 proceedings by which a regulated party can meet and confer with appropriate CARB staff prior to the issuance of any violation. A meet and confer process could be used to obtain filing extensions, to clarify where mandated filings may not meet CARB's data sufficiency expectations, or to otherwise ensure that CARB has appropriately understood and considered any barriers an entity has encountered towards achieving compliance. Thus, the entity would be able to make corrections before any penalties are imposed and avoid shifting funds away from emissions reduction activities. The Utilities are hopeful that the inclusion of this Section D will allow for such a meet and confer process. As well, an appeals process should be included to provide checks and balances in this process.

## **VIII. ARB Considers All Relevant Circumstances in Assessing Penalties Including Eight Statutory Factors.**

The Utilities support the General Penalty Principles, specifically the principle of fairness and agree with CARB that this is at the heart of an effective enforcement program. The Utilities agree that it is important to allow flexibility from one case to another. Such flexibility is provided under record request requirements in the California Public Records Act (Government Code section 6250 *et seq.*) Particularly as it relates to record requests and audits by CARB, entities that must comply with CARB's requirements are likely to accumulate significant amounts of records over these extended periods. The Utilities are suggesting that the Proposed Policy acknowledge the Public Records Act, whereby the Executive Officer would have the ability to extend the time for providing documents in appropriate circumstances. The language below has been suggested by the Utilities for inclusion in the Cap-and-Trade Regulation Order. The Utilities recommend that it be referenced within the Proposed Policy.

### *Unusual Circumstances -*

- (c) *In unusual circumstances, the time limit for providing records prescribed in this section may be extended by the Executive Officer, upon written request by the covered entity setting forth the reasons for the extension and the date on which the documents are expected to be dispatched. As used in this section, "unusual circumstances" means the following, but only to the extent reasonably necessary to the proper processing of the particular request:*
- (1) The need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request.*
  - (2) The need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records that are demanded in a single request or at a single time.*
  - (3) The need for consultation, which shall be conducted with all practicable speed, with another agency having substantial interest in the determination of the request or among two or more components of the agency having substantial subject matter interest therein.*
  - (4) The need to compile data, to write programming language or a computer program, or to construct a computer report to extract data.*

An item the Utilities have some concern over is CARB's procedure of setting the penalty at the maximum amount, and working down in consideration of various factors. On the contrary, CARB should state that penalties start at \$0, but *could* result in penalties up to the maximum, considering the eight factors noted in SB 1402.

### **I. SB 1402's Statutory Factors**

The Utilities acknowledge that compliance is a critical objective of any CARB enforcement policy. We strongly believe that compliance could be best achieved if specific circumstances are taken into account and that violations are looked at on a case-by-case basis. The eight statutory factors identified in SB 1402 acknowledge this idea.

Electric utilities are faced with a number of extenuating circumstances that can affect their ability to meet compliance obligations. Attention has to be paid to situations outside the control of electric utilities when complying with the various AB 32 regulations such as the availability of transmission, the availability of low emitting technologies that are feasibly implemented, the shifting of emissions from other sectors (such as through the electrification of vehicles), the responsibility of electric utilities to maintain grid reliability, the cost effectiveness of available compliance tools, and other mitigating circumstances such as unusual weather, hydro and economic conditions.

In addition to the eight items from SB 1402, the Utilities urge CARB to include a penalty factor that states that any enforcement penalty must be measurable, gradual, and relative to the gravity

and intent of the violation. For example, the delayed submittal of a filing should not be exposed to the same level of penalties as the failure to take action toward procuring necessary resources. Likewise the failure to achieve the established emissions target due to the unavailability of cost effective carbon allowances should not be exposed to the same level of penalties as a violation resulting from an entity's failure to seek to purchase the allowances in the first place. Ameliorating circumstances must be factored into the enforcement process.

### **Further General Observations**

Public Utilities, by nature, trend to the conservative side when it comes to outlay of public funds. As such, most Public Utilities are planning for resources and mitigating risk in a forward fashion in order to ensure that its core functions are met. It is not uncommon for a Public Utility to look 20-30 years forward. In that vein, having an undefined risk parameter like CARB's proposed enforcement policy drives up costs, as Utilities will, by nature, hedge against the worst possible scenario. The Utilities encourage CARB to develop clearly structured penalty methodologies that will help prepare Utilities and ensure that ratepayers are not faced with a potential exorbitant penalty. For example, a 1,000 Metric Ton shortfall for a 3 year compliance period in the Cap & Trade Regulation could result in 3 years worth of daily penalties. At the minimum daily penalty (\$1000), that equates to nearly \$10.1 million (1000 tons x \$1000 x 1095 days). At the maximum daily penalty, it equates to over \$1 trillion. Any large corporation would have a hard time covering that risk, much less a small public utility. To that end, The Utilities suggest the following in order to ensure clarity and certainty:

- 1) Any penalty should start at \$0, and go up according to the criteria laid out in SB 1402.
- 2) Harmonize the disconnect between daily penalties and annual or multi-annual targets.
- 3) Create a clear, transparent and balanced process to determine penalties. The range of potential penalties makes it nearly impossible to mitigate risk, and in the case of Public Utilities unduly burdens public resources.

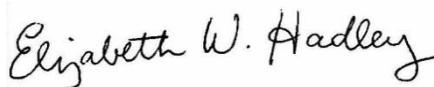
### **Conclusion**

The Utilities are supportive of the Proposed Policy and appreciate the opportunity to comment; we would welcome the chance to discuss these concepts further.

Respectfully submitted,



Joy Warren  
MODESTO IRRIGATION  
DISTRICT



Elizabeth Hadley  
REDDING ELECTRIC UTILITY



Dan Severson  
TURLOCK IRRIGATION  
DISTRICT