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Submitted Via Electronic Mail

April 15, 2011

Mr. Paul Jacobs, Chief
Mobile Source Enforcement Division
California Air Resources Board
1001 I Street
Sacramento, CA 95812

Re: Comments of the Northern California Power Agency on California Air Resources Board *Proposed Enforcement Policy Paper*

Dear Mr. Jacobs:

The Northern California Power Agency¹ (NCPA) appreciates the opportunity to submit these comments to the California Air Resources Board (CARB) on the *Proposed Enforcement Penalties: Background and Policy* (Policy Paper), released for public comment on February 25, 2011.

I. INTRODUCTION

CARB undertook development of the Policy Paper in compliance with Senate Bill (SB) 1402 (2010), which requires the agency to draft an “Enforcement Penalty Policy.” The Policy Paper provides a “penalty policy for civil or administrative penalties” and addresses the ways in which CARB takes into “consideration all relevant circumstances, including but not limited to” the specific factors set forth in Health & Safety Code (HSC) § 43024.² The Paper notes that the agency has a long standing practice of considering all relevant circumstances in assessing penalties, and that the Policy, in addition to fulfilling the requirements of AB 1402, formalizes the

¹ NCPA member are 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, and the Truckee Donner Public Utility District, and Associate Members are the Plumas-Sierra Rural Electric Cooperative and Placer County Water Agency.

² Unless otherwise noted, all code references shall be to the California Health and Safety Code.

agency's "longtime penalty-setting practice of taking into consideration 'all relevant circumstances,' including the eight SB 1402 factors." NCPA fully supports consideration of all the SB 1402 factors, and is pleased that the review factors have been codified by the legislature.

While SB 1402 requires CARB to publish a penalty policy applicable to specified vehicular air pollution violations, CARB has gone a step further, noting that "because the principles governing the [C]ARB's penalty calculations are common across [C]ARB's programs [sic], the policy is designed to apply to all of the programs that [C]ARB enforces." NCPA appreciates Staff's work on assessing its current enforcement practices, and compiling in one comprehensive document the way in which the agency intends to treat all enforcement actions, not just those that are specifically targeted by HSC § 43024. However, NCPA is concerned that the Policy Paper does not provide sufficient guidance or direction with regard to regulations and programs for which CARB has enforcement authority, and which have their genesis in Assembly Bill (AB) 32 and the Scoping Plan. Because the Policy Paper is intended to cover the full range of enforcement activities that the agency may engage in, the full range of enforcement actions and options should be included within the policy. This must also include a policy statement on the interaction between the traditional penalty provisions set forth in the HSC and enforcement and penalty provisions contemplated in the various AB 32 programs, including the cap-and-trade regulation.

II. COMMENTS

A. The Policy Must be Revised to Address AB 32 Programs

The Policy is intended to be CARB's comprehensive statement on the treatment of all enforcement actions, yet it does not address any of the circumstances unique to AB 32-type programs that NCPA and others have raised in the context of the various AB 32 program rulemakings. This includes such issues as multiple or duplicative penalty provisions, determination of the actual violation "event," and the applicability of daily penalty provisions to annual or multi-year compliance obligations.

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 relevant laws and regulations. NCPA believes that CARB should consider financial penalties as a last resort and should link their imposition to malfeasance or gross negligence, and that this position should be clearly articulated in the Policy.

1. The Policy Should Clarify that Daily Penalties are Not Appropriate or Lawful for All Programs and Regulations.

The Policy must address the appropriate circumstances under which daily penalties can be assessed for AB 32-related programs. NCPA notes that the imposition of daily penalties is not mandated by AB 32. In this respect NCPA is concerned with the application of daily penalties in the context of annual and multi-year compliance obligations. 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. The potential to impose onerous penalties exists in the Regulation, as drafted, and should be addressed therein. 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 or program at issue is based on a maximum annual compliance obligation. CARB is not constrained by the provisions of § 38580(3) or the interpretation that § 38580(3) *requires* a daily penalty metric. Rather, the HSC gives the agency the authority to assess such penalties only if appropriate, and requires CARB to make a program-by-program determination of such appropriateness. Accordingly, the Policy must address this review and the factors and circumstances that will be used to make this determination.

2. The Policy Should Provide Clear Guidance on the Calculation of a Violation

The Policy should also provide guidance on the calculation of each separate violation and/or transaction. This issue is of crucial importance because it is a factor in determining the appropriate penalties and the calculation of monetary penalties. Such a calculation should also take into account the practical implications and limitations associated with the violation at issue. For example, a failure to timely submit a required report may appropriately be assessed a daily penalty, while failure to meet an obligation that requires a specific cure that only occurs once each quarter should be treated differently.

3. The Policy Should Clarify that Duplicative Penalties Will Not be Assessed

Penalty determinations must also take into account the extent to which the underlying regulation addresses noncompliance, and this should be fully addressed in the Policy. For example, the cap-and-trade regulation adopted by the Board on December 16, 2010 includes specific provisions and penalties for non-compliance with the regulation [cite]. The Policy should acknowledge and address these instances, in order to ensure that entities are not subject to double-jeopardy. In this respect, it is important that the calculation and determination of the penalty be crafted to deter non-compliance by removing any economic benefits of non-compliance, but not to be so onerous as to preclude the ability of a compliance entity to pay the fee and continue meeting future compliance obligations – including the purchase of additional allowances, especially if there is no malfeasance or negligence on the part of the compliance entity.

B. The Policy Should Provide Greater Specificity on Key Issues

It is imperative that the Policy on enforcement be comprehensive and transparent, and that penalties be fairly assessed and administered. The Health and Safety code provides Staff significant discretion in applying penalties that are commensurate with the violation, similar to the provisions of § 43024; the code calls for review of factors such as the extent of harm, 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 affected

entities with certainty regarding the criteria under which they may be assessed a penalty. The mandates of § 43024 requiring CARB to draft a specific enforcement policy that clearly discusses these various factors provides a unique opportunity to set forth in one place the application of the guidelines, developed as part of a public process.

For example, not all of the violations for which CARB may impose a penalty directly impact air quality. Some of the regulations impose penalties for failure to meet emissions standards, as well as for failing to timely report. The Policy should clearly set forth the review process for the different kinds of violations based on the gravitas of the situation and the underlying violation.

1. Assessing the Maximum Penalty as the Presumptive Starting Point is Inconsistent with § 43024

The Policy notes that assessment of penalties begins with an assumption of the highest possible penalty assessment, and works down from that number, regardless of the type of violation at issue. The Policy states that it is CARB's position that the statutory maximum is the proper presumptive starting point when determining the amount of a penalty to apply, with mitigating factors taken into consideration after that. The Policy Paper further notes that this approach is consistent with case law interpreting penalty statutes and that to maintain the deterrent effect that legislature intended at the time the statutes were adopted, "current penalties are appropriately set towards the maximum ranges the statutes provide." Further, the Policy treats all violations in the same manner, without distinguishing between actions that result in the release of pollutants versus clerical and recordkeeping obligations. This approach is inconsistent with the direction set forth in § 43024.

In the Policy Paper, CARB sets forth a summary of its current enforcement practices, including justification for the level of penalties that it assesses. Throughout the Paper, CARB states that the purpose of penalties is to encourage compliance, as well as deter future violations and provide a level playing field for all businesses. However, the stated approach does not justify a blanket presumption of the maximum penalty for all violations. Furthermore, nothing in the guiding principles behind the agency's determination of penalties – deterrence, fairness, and swift

correction of environmental problems – is served by beginning the penalty assessment with a presumption of the maximum amount. The Policy should be revised to address this.

CARB focuses on protecting “air quality” when determining whether to impose fines (p. 17) and that case law has consistently looked at “air quality violations,” in determining the appropriate amount (p. 18). It is important to note, however, that not all of the applicable regulations affect air quality in the same way, and indeed, some regulations include corrective and punitive remedies within their own language. Accordingly, it is incumbent upon CARB to apply all of the § 43024 factors *before* making any assumptions regarding the appropriate level of the penalty. The discussion set forth on page 21 of the Policy Paper details all of the different factors that must be assessed, and nothing in that discussion, nor in AB 1402, provides a basis for a presumption that all the factors are present, nor that “penalty calculations must start at the maximum but can be mitigated, if possible, down from there” (p. 21) Accordingly, the Policy should be revised to strike the presumptive starting point of the maximum penalty.

2. Assumption of the Maximum Penalty is Not Consistent with AB 32 Programs

The Policy is replete with references to the agency’s obligation to protect air quality. A number of references in the Policy to air quality are used to support the presumption of the maximum penalty amount, and the need to impose penalties to punish violations. NCPA notes that this presumption is one that does not adequately address the AB 32 programs. For example, the proposed cap-and-trade regulation includes penalty provisions within the regulation that address, correct, and penalize covered entities for failure to timely submit the necessary number of allowances. The imposition of additional penalties, beginning with an assumption that the maximum amount should be imposed is not consistent with the guiding principles of (1) deterrence, (2) fairness, and (3) swift correction of environmental problems.

C. The Enforcement Process Should be Incorporated into the Enforcement Policy

In section III, the Policy Paper reviews CARB’s current enforcement process. CARB’s current process with regard to notification of violations and an opportunity to discuss the violation with CARB staff should be retained and specifically set forth in the Enforcement Penalty Policy

(Part 2 of the Policy Paper). It is imperative that affected entities and those charged with a violation have an opportunity to work with CARB staff in resolving the issue. It is also important that this practice be formally incorporated into the actual Policy, as part of the established practice for resolution of violations or alleged violations.

D. CARB Should Provide Opportunity for Further Public Review

NCPA appreciates the fact that Staff recognized the importance of this issue and extended the original deadline for the submission of comments by two weeks. Staff has stated that following the submission of comments, the agency will take all comments into consideration and issue its final policy statement, which will become effective immediately. At this time, Staff has stated that it does not intend to hold further meetings or workshops on this issue, nor will there be another opportunity for affected entities to comment on the Policy before it is “finalized.” NCPA urges Staff to provide for a more formal approval process, and at least one more round of comments and meetings on the next draft of the Enforcement Policy. As both Staff and Stakeholders have stated, enforcement of environmental regulations is important and intended to induce compliance. Because it is so important, it is essential that affected entities have a clear and unambiguous understanding of not only the underlying regulations, but how they will be implemented by CARB staff in an enforcement proceeding. Because the first draft of the Policy was completely devoid of any acknowledgment of the unique circumstances surrounding the enforcement of AB 32 and Scoping Plan programs, it is important for stakeholders to have an opportunity to review and reply to CARB’s revised policy statement that addresses this initial shortcoming.

III. CONCLUSION

NCPA appreciates the opportunity to provide these comments on the Enforcement Policy Paper, and looks forward to continuing to work with Staff in developing an enforcement policy that adequately covers all of the myriad programs for which CARB has enforcement authority, including programs implemented pursuant to AB 32. NCPA is hopeful that the further development of a comprehensive enforcement policy – one which will be far reaching and impact

a wide range of stakeholders – is subject to further stakeholder review and public process. 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