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Electronically Submitted

August 11, 2011

Clerk of the Board
California Air Resources Board
1001 I Street
Sacramento, CA 95812

Re: Comments of the **Northern California Power Agency** on the *15-Day Revisions for the Proposed Regulation to Implement the California Cap-and-Trade Program*

Dear Sir:

The Northern California Power Agency[1] (NCPA) provides these comments on the *Modified Text* of the *Proposed California Cap on Greenhouse Gas emissions and Market-Based Compliance Mechanisms Regulation, Including Compliance Offset Protocols* (Modified Text), released by the California Air Resources Board (CARB) on July 25, 2011.[2]

Since the adoption of Assembly Bill (AB) 32, NCPA and its member agencies have been committed to achieving the goals and objectives of California's greenhouse gas (GHG) emissions reduction measures, and have been active participants before the CARB regarding many of the programs considered and adopted pursuant to the Scoping Plan.

NCPA offers these comments in the interest of furthering the development of the Cap-and-Trade Program (Program) in a manner that will allow the State to meet its emissions reduction goals while ensuring that electrical distribution utilities are able to continue to provide safe, reliable, and reasonably priced electricity to California residents and businesses.

NCPA understands that the scope of revisions set forth in the Modified Text pursuant to

1 NCPA is a not-for-profit Joint Powers Agency, whose 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, and the Truckee Donner Public Utility District, and whose Associate Members are the Plumas-Sierra Rural Electric Cooperative and the Placer County Water Agency.

2 On July 27, 2011, CARB issued a revised Appendix A to the Modified Text, and extended the comment deadline to August 11, 2011.

the direction provided by the Board during the December 16, 2010 meeting was not easily achieved. NCPA appreciates that many of those changes address concerns raised by NCPA and other stakeholders in initial comments on the October 2010 Proposed Regulation Order, *California Cap on Greenhouse Gas Emissions and Market-Based Compliance Mechanisms* (Proposed Regulation). As more fully set forth below, while NCPA supports a number of the revisions set forth in the Modified Text, and supports their inclusion as furthering established policies regarding the State's emissions reduction programs, there are other provisions with which NCPA has concerns. These provisions propose significant and substantive changes to not only the scope of the Program, but entities' compliance obligations there under, and should be addressed by CARB and stakeholders in a substantive manner that includes more than a single round of comments. NCPA has also been an active participant in the Joint Utilities – a diverse group of publicly owned and investor owned California and multi-jurisdictional electric utilities – and fully supports the comments submitted by the Joint Utilities on August 10, 2011, regarding the Proposed Regulation and Modified Text.[3]

NCPA offers the following comments on the Modified Text.

1. TREATMENT OF ELECTRICAL COOPERATIVES

Electrical Cooperatives as Electrical Distribution Utilities (§ 95802(a)(82) and § 95892(b))

The Modified Text correctly revises the definition of electrical distribution utilities in § 95802(a)(82) to include electrical cooperatives. CARB has determined that in order to receive allowances as part of the electricity sector allocation, entities must provide electricity to serve end-use customer load and receive payment for that load from end-use customers. California's electrical cooperatives meet that definition and are able to incorporate the emissions price signal. (Appendix A, p. 16)[4] In this respect, the utilities are the conduit by which the value of the

3 By separate letter, the Joint Utilities, comprised of California Municipal Utilities Association, Modesto Irrigation District, Los Angeles Department of Water and Power, Liberty Energy, NCPA, Pacific Gas & Electric Company, PacifiCorp, Sacramento Municipal Utility District, San Diego Gas and Electric Company, Southern California Edison Company, Southern California Public Power Authority, and the Turlock Irrigation District, urge CARB to review this provision and to make the proposed revisions addressed therein.

4 Appendix A of the *Notice of Public Availability of Modified Text and Availability of Additional Documents* (July 25 Notice).

allowances are delivered to the State's retail electric customers, as the utilities are best situated to deliver emissions reducing program benefits to their customers. Such benefits come in many forms, such as increased energy efficiency and expanded renewable energy portfolios. Electrical cooperatives are defined in Public Utilities Code section 2776 as "any private corporation or association organized for the purposes of transmitting or distributing electricity exclusively to its stockholders or members at cost." As such, they constitute a "hybrid" between a publicly owned utility (POU) and investor owned utility (IOU), in that they are owned by their members, but operate as a non-profit service for end use members, governed by their locally-elected boards of directors and must adhere to federal Rural Utility Service guidelines.

Accordingly, electrical cooperatives are properly included within the definition of "electric distribution utilities," (§ 95802(82)) and are properly treated similarly to the POUs for allowance allocation and disposition purposes (§ 95892(b)(2).

This clarification to the Regulation does not change the scope of the Program, nor does it have an impact on the proposed allocation of allowances to the electricity sector, as data from the electrical cooperatives has been included in the total number of electric sector allowances, and the electrical cooperatives located in California are included in Table 9-3.[5]

2. TREATMENT OF JOINT POWERS AGENCIES

§ 95802(a)(138) and § 95892(b) Joint Powers Agency and Allocated Allowances

The Modified Text in § 95892(b) properly allows POUs and electrical cooperatives to direct the allocation of their allowances to the compliance account of a Joint Powers Agency (JPA) of which they are members. This clarification is consistent with the policy position already approved by the Board regarding the treatment of allowances by POUs without expanding the scope of the allocation proposal or otherwise impacting the intent of allocation of allowances to electrical distribution utilities. JPAs, organized and operated under the laws of the state of California (California Government Code § 6500, et seq.), are POUs. JPAs may also be entities with compliance obligations under the Program, as are many of their individual members. The

5 The Regulation should be further modified to add "electrical cooperatives" to the definition key at the bottom of Table 9-3, or to change the POU designation to "publicly owned utilities and electrical cooperatives."

Modified Text allows for allowances designated to electrical distribution utilities whose generation resources are owned as part of a JPA arrangement in which the electrical distribution utility is a member to direct those allowances to either their own compliance account as previously approved in § 95892(b)(2) of the Proposed Regulation, or into a compliance account held by the JPA, as set forth in § 95892(b) of the Modified Text. Such a revision is consistent with the intent of § 95892(b)(2) as set forth in the Initial Statement of Reasons (ISOR), and does not in any way impact that ability of an electrical distribution utility to pass along the price signal for carbon to its customers. This section also properly treats electrical cooperatives in the same manner as POUs for purposes of allowance allocation and compliance account designations.

3. USE OF REPLACEMENT ELECTRICITY

§ 95802(a)(237) Replacement Electricity

The proposed definition of "replacement electricity" set forth in § 95802(a)(237) is overly broad, and its application in § 95852(b)(3) creates tension between two important programs designed to address the goals of AB 32; the California Renewable Portfolio Standard (RPS) and the Cap-and-Trade Program. NPCA urges CARB staff to thoroughly review the consequences and ramifications of the definition for replacement electricity set forth in § 95802(a)(237), as used in § 95852(b)(3).

The proposed definition of replacement electricity reflects a fundamental misunderstanding of the function of firming and shaping and must be modified to reflect the zero net replacement energy result of the firming and shaping function.[6] As proposed, this definition unduly constrains the resources available to compliance entities for firming and shaping their renewable energy contracts for delivery into California. Such practices are not only commonplace with regard to renewable contracts, but contemplated by the legislature and

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6 It is important to point out that the essence of "firm and shaped" agreements utilized by utilities is that the utility receives the project's wind energy output on a MWh for MWh basis. However, because the wind energy output is intermittent, but by contract is delivered on a scheduled basis, it means that some of the time the project's output is less than the scheduled delivery and that some of the time the project's output is greater than the schedule delivery. In turn, this means that the difference between output and delivery is either absorbed by, or made up by, incrementing and decrementing load following units. Load following units are most likely to be hydro or thermal. Under the balancing terms of these agreements, the increments and decrements to load following units sum to zero, and there is zero net replacement electricity.

regulators for purposes of the RPS. However, the proposed restriction would require that "[t]he physical location of the variable renewable energy facility busbar and the first point of receipt on the NERC E-tag for the replacement electricity must be located in the same Balancing Authority Area." NCPA supports the deletion of this entire sentence, as do the Joint Utilities, as inclusion of this limited definition negates the efficacy of RPS-eligible contracts, increases Cap-and-Trade Program compliance costs, and is contrary to the RPS goals of the state, all without meeting any of the AB 32 policy objectives. This attempt to disassociate the RPS-eligible generation resource from the electricity delivered into California creates an additional compliance obligation for covered entities that are first deliverers of electricity, and could further result in confusion regarding the treatment of unbundled renewable energy credits associated with that generation.

Many NCPA members have made considerable investments in contracts and ownership interests in renewable energy resources that meet all of the State's requirements for RPS compliance. These arrangements are usually more costly than traditional gas-fired generation, but were entered into for purposes of meeting RPS mandates and the utility's own carbon emission reductions goals. These contracts, however, are characteristically with generation facilities that are located within a Balancing Authority (BA) other than a BA where the utility is located; this results in the need for agreements for "firming and shaping" of the renewable resource to facilitate hourly scheduling requirements when scheduling from one BA to another. These firming and shaping agreements do not impact or change the output from the renewable resources, nor does the resource used for replacement electricity. Over time, the amount of energy scheduled into California from these agreements is trued up on a megawatt hour (MWh) for MWh basis, and the location of the energy used (and not replaced as the term would imply) outside of the BA where the renewable resource is located does not change the underlying generation from the renewable resource facility.

The part of this definition that would require the first point of receipt on the NERC E-tag for replacement electricity be located in the same BA as the renewable resource, is a needless complication that serves no purpose in either ensuring GHG reductions, nor furthering RPS goals, and indicates a misplaced reliance on the information contained in the NERC E-tag for purposes of tracking and monitoring renewable electricity transactions. Staff has stated that an intra-balancing authority requirement is necessary in order to facilitate tracking and verification of these agreements. However, these arrangements are already tracked through CARB's Mandatory Reporting Regulation (MRR). Accordingly, to address this error, CARB should strike the last sentence of the proposed definition requiring the "the physical location of the variable renewable energy facility busbar and the first point of receipt on the NERC E-tag for the replacement electricity to be located in the same Balancing Authority Area," and utilize the existing provisions of the MRR reporting and verification process to confirm these deliveries.

To be clear, neither the mere existence of a NERC E-tag, nor the fact that the underlying generation resources are both located in the same BA, have any bearing on the actual contracts or ownership agreements associated with these transactions. Nor do the NERC E-tags lend themselves to accurately tracking renewable energy credits and GHG emissions.

Rather, the E-tags are designed to track total electrons and therefore do not accurately reflect the contract between the utilities, the renewable generation source, and the source of the replacement electricity. Similarly, a first deliverer who buys power on an electronic exchange such as the Intercontinental Exchange (ICE), at the California Oregon Border, , is entering into a purchase of unspecified power from a third party. This third party may have multiple generation resources or none at all and is simply purchasing the energy from someone else. When a first deliverer is contracting for this power they are not contracting for electricity from a specific generation source with a specified emissions output, yet a NERC E-tag must be created to facilitate the BA's management of its net interchange. This NERC E-tag may ultimately be sourced to a coal-fired electric generation facility in Montana, a hydroelectric generation facility in British Columbia, or any number of other resources. Hence, it is highly likely that the actual NERC E-tags generated for the transaction does not accurately represent the source of the generation included in the contract entered into between the first deliverer and the third party. Placing a restriction on replacement electricity such that it must come from the same BA as the variable renewable energy facility implies that the source generation on a NERC E-tag represents a contract between the first deliverer and this source generation where no such contract exists. This restriction would likely result in market inefficiencies, increasing the cost of electricity and potentially the level of GHG emissions on a WECC-wide basis.

Because the E-tags do not necessarily reflect that actual contractual arrangements entailed in the firmed and shaped agreements, the "sources" of electricity included therein would not be accurate, which impacts the emissions factor used to calculate the compliance obligation; an incorrect E-tag can result in considerable added costs.

The following example involves an actual RPS contract and exemplifies the magnitude of the impact that the definition of replacement electricity in the Modified Text would impose on one contracting party:

- Big Horn 1 Renewable Generation (Big Horn 1) facility is likely to produce 586,920 MWh of electricity per year (200 MW * 8760 hours * .335 capacity factor). If all of this energy is reflected on the NERC E-tag as coal generation (without regard to the actual contractual and ownership arrangements in place), it would be assigned an emission factor of 0.962, which exceeds the 0.428 emissions factor associated with unspecified power.

- Applying the definition in the Modified Text, the contract owners, as the first deliverer of the electricity, would be responsible for the carbon compliance obligation associated with the difference, ((.962 - .428 * 586,920) = 313,415 metric tons of CO_2.

- Assuming a very modest $15 per ton[7] for the purchase of allowances, the result would be an **additional $4,701,229 per year** in compliance costs.

- Therefore, because the E-tag did not accurately reflect the parties' contractual arrangement, the assigned emissions factor for coal was improperly applied to the transaction, resulting in considerable costs.

- These additional costs have no relationship to the actual emissions associated with the arrangement. Rather, these costs are based solely on the misplaced notion that the NERC E-tag will accurately track the emissions of this power, without regard to the actual ownership arrangement in place.

- What is important to note about this example, is the fact that the Big Horn 1 facility continues to produce its entire output of 586,920 MWh of RPS-eligible electricity during the year under the terms of the contract with the electric utility. This example assumes that the production from the Big Horn 1 only occurs at times different from those times specified in the "firmed and shaped" contract between Big Horn 1 and the electric utility; therefore as part of the true-up of the firming and shaping contract, there is ZERO net "replacement energy".

7 The most recent indicative bids of carbon prices is around $15 pr ton. However, NCPA notes that these prices are likely to increase once the Program is implemented, and even the price of allowances purchased from the Reserve Account can exceed $40 per instrument. (Source: Evolution Markets, Inc.)

Furthermore, in addition to imposing a compliance obligation on covered entities that are the first deliverers of these kinds of RPS-eligible resources, the allowance allocation proposal put forth by Staff – and supported by a broad range of stakeholders, including electrical distribution utilities – assumes that the electrical distribution utilities will meet their RPS compliance obligations. The proposed definition of "replacement electricity" gives rise to a compliance obligation for renewable energy resources, creating tension between two State policies. As noted in Appendix A of the July 25 Notice, the methodology for calculating the number of allowances to be allocated to the electrical distribution utilities assumed that all utilities would comply with the 33% RPS mandate. Accordingly, a constraint was included in that calculation that begins with 20% RPS compliance in 2012 and increases linearly to 33% in 2020. To effect this constraint, Staff actually adjusted each utility's resource plans to incrementally invest in a sufficient amount of renewables to meet the RPS obligations and lay off or divest an equivalent amount of natural gas and coal resources to keep supply and load equal. (See Appendix A, p. 4) This methodology is consistent with CARB's stated commitment to increase renewable generation of electricity for purposes of reducing the State's GHG emissions. The 2008 Scoping Plan anticipates that the State will see a reduction of 21.3MMT of emissions from implementation of a 33% statewide RPS.[8]

Consistent with these stated objectives, the Proposed Regulation should be drafted in a manner that recognizes the fact that if the underlying contractual agreements that utilize replacement electricity (without an intra-balancing authority restriction) are deemed RPS eligible, they should not have a competing compliance obligation under the Cap-and-Trade Program. Maintaining the strict requirement that the renewable and firmed resources remain within the same balancing authority provides no real benefits to the state, and indeed, pits two state policies against each other. Accordingly, NPCA recommends the following revision to § 95802(a)(237):

> § 95902(a)
> (237) "Replacement Electricity" means electricity delivered to a first point of delivery in California to replace electricity from ~~variable~~ renewable resources in order to meet hourly load requirements. The electricity generated by the ~~variable~~ renewable energy facility and purchased by the first deliverer is not required to meet direct delivery requirements. ~~The~~

8 CARB's *Climate Change Scoping Plan*, December 2009, p. 46.

~~physical location of the variable renewable energy facility busbar and the first point of receipt on the NERC E-tag for the replacement electricity must be located in the same Balancing Authority Area~~.

4. PROHIBITIONS ON RESOURCE SHUFFLING

§ 95802(a)(245) Resource Shuffling and § 95852(b)(1)

The Modified Text includes a new provision regarding resource shuffling that must be subject to further review and stakeholder discussion in order for both CARB and stakeholders to fully understand how this provision impacts utility operations. NCPA is very concerned with the scope of this definition and the inclusion of such a complex and far reaching concept in the context of 15-Day Revisions to the Proposed Regulation. As more fully discussed below, this definition has the ability to adversely impact electric utilities in several respects. The definition of resource shuffling is problematic as drafted, because it could be interpreted to prohibit standard and existing electric transactions that maximize the efficient use of the State's limited electric transmission system and interferes with economic dispatch of electric generation resources. The proposed definition goes far beyond Staff's stated intent of minimizing leakage and ensuring the integrity of the Cap-and-Trade Program. (July 25 Notice, p. 10) Like the Joint Utilities, NCPA believes that the proposed definition for resource shuffling (as well as the related provisions of § 95852(b)(1)) must be publicly vetted in order to ensure that Staff fully understands the implications of such a drastic revision to the Proposed Regulation and the significant ramifications it creates for electrical distribution utilities.

NCPA agrees that any "plan, scheme, or artifice to receive credit based on emissions reductions that have not occurred" should be prohibited. However, the proposed definition would penalize those that participate in legitimate transactions, and indeed, would impact not only existing utility and electricity market operations, but long standing contractual commitments as well. While the proposed definition acknowledges generation resources that have historically served California load, it provides no guidance on interpreting historical sales, nor does it acknowledge that certain contractual transactions that may not meet this exclusion are merely the result of existing agreements or efficient economic dispatch of generation resources. Clearly, this cannot be Staff's intent. Accordingly, NCPA urges Staff to delay any formal action regarding the concept of resource shuffling until after such time as Staff has had an opportunity to hold a public workshop on this important issue.

5. NATURAL GAS SUPPLIERS AND DELIVERIES TO COVERED ENTITIES

§§ 95811(c) – Suppliers of Natural Gas as Covered Entities; § 95893 Natural Gas – reserved for allocation for natural gas suppliers, and § 95852. Emission Categories Used to Calculate Compliance Obligations

The Proposed Regulation does not address all aspects of the Program that pertain to the treatment of natural gas suppliers, and this omission could be detrimental to some covered entities, resulting in a double obligation. In § 95811(c), suppliers of natural gas are included as covered entities, and elsewhere in the Proposed Regulation, the various obligations of these entities are discussed. Most notably, the Modified Text in § 95852 regarding *Emission Categories Used to Calculate Compliance Obligations*, adds provisions for calculating emissions that are not included in the compliance obligation.

Beginning in 2015, the scope of the Cap-and-Trade Program will also include first deliverers of natural gas. Since the first compliance period focuses on the electric and industrial sectors, there is still some time to work through the details associated with the 2015 compliance obligation for natural gas suppliers. The Modified Text includes new provisions that clarify how the compliance obligation will be determined for suppliers of natural gas. Newly added sections 95852(c)(1) through (c)(4) provide that suppliers of natural gas will not have a compliance obligation for the delivery of natural gas to covered entities (Notice of Modified Text, p. 11), "thus leaving the remaining balance of CO_2e emissions . . . as the compliance obligation for the supplier of natural gas." Section 95982(c)(2) provides that "ARB shall calculate the metric tons CO2e of GHG emissions for natural gas delivered to covered entities."

NCPA recommends that the regulation also include an allocation of allowances to covered entities in an amount equal to the amount of CO_2e of GHG emissions for natural gas delivered to covered entities to offset the emissions associated with the compliance obligation that will be borne by the covered entities for the delivered natural gas. This adjustment does not create any additional allowances, as the compliance obligation associated with the supply of natural gas will have increased by an equal amount to the covered entity's free allocation; yet as more fully explained here, this adjustment would eliminate the potential for double charging the covered entity for the carbon cost.

In order to avoid a potential windfall for natural gas suppliers and a double compliance obligation for entities such as electric generation facilities, NCPA recommends that the provisions of § 95852(c), regarding the calculation of the compliance obligations for natural gas suppliers, be modified to allow for the allocation of allowances to [electric sector] covered entities to address the fact that the current market structure does not enable natural gas suppliers to distinguish between sales to covered and non-covered entities for purposes of pricing their product in the market.

The need for this modification arises out of the existing practices of those that engage in forward hedging of either gas or power. For example, the City of Santa Clara has current contracts for natural gas through 2014, but is exploring fixed-price natural gas supply contracts for the 2013 to 2018 timeframe. The concerns raised by the current provisions in the Proposed Regulation occur due to the fact that a first deliverer of natural gas that sells the product to an entity with a compliance obligation, such as an electric generator, incurs no carbon-related compliance costs since the cost will be borne by the electric generator. Since natural gas currently trades on electronic exchanges, such as ICE, purchasers and sellers do not know who they are contracting with. A seller of natural gas has to assume that they will be subject to the compliance obligation, need to procure allowances associated with their deliveries, and will therefore embed this cost in the offered gas price. Therefore, a generator who purchases the natural gas will then pay the offered price with this embedded carbon cost component and again have to retire allowances associated with the emissions from its generation. Accordingly, the purchase of natural gas products for electric generators costs the same as it does for entities without a compliance obligation under the Program. This results in higher costs for those entities with a compliance obligation, which has the unintended consequence that electricity generators – such as NCPA and its member utilities that own their own generation – will pay twice for the carbon associated with its natural gas needs; first in the purchase of the gas with the embedded carbon cost, and then again in the cost of allowances that will need to be purchased to cover the emissions obligation associated with the natural gas that burned at the power plant.

The Cap-and-Trade Program may cause changes in the market in response to the nascent regulatory scheme. One such change may involve the development of two separate natural gas commodities being offered for trade with distinct pricing mechanisms that address the cost of the carbon compliance obligation: one product that is sold only to covered entities with a compliance obligation under the Program, and a separate product for non-covered entities. However, until and if such a transition occurs in the market, the regulations need to reflect current market conditions, and assure covered entities that they will not pay twice for the carbon in their fuel.

If this situation is not addressed now, those entities that purchase their natural gas contracts in the forward market will be adversely impacted. Including the change within the Regulation at this time will allow utilities to continue their ongoing risk management practices and hedge portions of their natural gas needs in forward contracts. The proposed revisions to the Regulation that address this issue will allow the natural gas contract markets to continue without change, trading in just one natural gas futures commodity, but also assuring that covered entities such as electrical generation facilities are not required to pay for the cost of carbon and GHG emissions reductions twice.

Section 95982(c)(2) notes that "ARB shall calculate the metric tons CO2e of GHG emission for natural gas delivered to covered entities." In order to address the issues raised herein, NCPA recommends that the regulation also include an allocation of allowances to covered entities in an amount equal to the amount of CO_2e natural gas delivered to covered entities to offset the emissions associated with the compliance obligation that will be borne by the covered entities for the delivered natural gas. This adjustment does not create any additional allowances, as the compliance obligation associated with the supply of natural gas will have increased by an equal amount to the covered entity's free allocation. Yet, this adjustment would eliminate the potential for double charging the covered entity for the carbon cost. The table set forth below illustrates the double obligation. To correct this, NCPA recommends that the following revisions be made to section § 95852(c):

> **§ 95852**
> (c) Suppliers of Natural Gas. A supplier of natural gas covered under sections 95811(c) and 95812(d) has a compliance obligation for every metric ton CO2e of GHG emissions that would result from full combustion or oxidation of all fuel delivered to end users in California contained in an emissions data report that has received a positive or qualified positive emissions data verification statement or assigned emissions, ~~less the fuel~~

~~that is delivered to covered entities~~, as follows:.

(1) Suppliers of natural gas shall report the total metric tons CO2e of GHG emissions delivered to all end users in California pursuant to section 95122 of MRR;

(2) ARB shall calculate the metric tons CO2e of GHG emissions for natural gas delivered to covered entities, <u>and shall allocate to the covered entities an equivalent number of allowances to offset these emissions</u>. The emissions with a compliance obligation will be the CO2e emissions that received a positive or qualified positive emissions data verification statement or the assigned emissions from natural gas delivered to the covered entity by the supplier of natural gas

(3) ARB shall provide the supplier of natural gas a listing of all customers and aggregate natural gas volumes and emissions calculated from the supplier's natural gas delivered to covered entities; and

(4) The Executive Officer shall provide to the supplier of natural gas, within 30 days of the verification deadline pursuant to section 95103(f) of MRR, the metric tons CO2e of GHG emissions for which the supplier of natural gas will be required to hold a compliance obligation.

6. IMPACTS OF CORPORATE ASSOCIATIONS

§ 95833 Disclosure of Direct and Indirect Corporate Associations and § 95914 Auction Participation and Limitations

NCPA supports the inclusion of provisions within the Proposed Regulation that ensure registered entities are not able to collude and adversely impact the allowance market and auction operations. Provisions regarding the disclosure of corporate associations and the imposition of auction purchase limits should are necessary tools to meeting this objective. These restrictions, however, must be implemented in a manner that does not impede the regular business operations of entities such as JPAs that may have a compliance obligation under the Program, yet be comprised of member utilities that also have their own compliance obligations.

7. DELAYED ENFORCEMENT OF COMPLIANCE OBLIGATION

§ 95840 Compliance Periods

NCPA supports the proposed revision to § 95840(a) that reflects CARB's reasoned decision to timely launch the Cap-and-Trade Program, but delay enforcement of the compliance obligation until 2013.

8. REQUIREMENT TO COMPLY WITH THE MRR

§ 95850(b) General Requirements

The provisions of § 95850 set forth the general requirements for covered entities under the Program, and begins in subsection (a) with a statement that each covered entity is subject to the MRR. While this may be true, covered entities will have different compliance obligations under the MRR, and it is important that their respective compliance obligations not be generalized. Accordingly, NCPA recommends that all references to compliance with the MRR be drafted to provide "compliance with applicable MRR provisions."

9. EMISSIONS USED FOR CALCULATION OF COMPLIANCE OBLIGATION

§ 95852 Emissions Categories used to Calculate Compliance Obligations

In § 95852(b) of the regulation, the Modified Text seeks to clarify the basis for the calculation of the compliance obligation of first deliverers of electricity. As discussed herein, the application of several of these provisions is impacted by the underlying definitions set forth in § 95802(a), and NCPA urges CARB to address those issues before proceeding further.

§ 95852(b): In this section, the Regulation should reference not only subsection (b)(1), but subsections (b)(2) through (7) as well, as each of these subsections qualifies the calculation of the compliance obligation by referencing emissions that are not actually included. Accordingly, § 95852(b) should be revised as follows:

> **§ 95852**
> (b) First Deliverers of Electricity. A first deliverer of electricity covered under sections 95811(b) and 95812(c)(2) has a compliance obligation for every metric ton of CO2e of emissions, subject to section<u>s</u> 95852(b)(1) <u>to (b)(7) inclusive</u>, from a source in California . . . .

§ **95852(b)(1)**: As set forth in Section 4 of these comments, NCPA has concerns regarding the ambiguity and confusion associated with the definition of resource shuffling, and joins with the recommendation of the Joint Utilities asking that CARB strike this definition unless and until a definition can be crafted that narrowly defines the malfeasance only, and does not adversely impact electricity operations statewide. For purposes of this § 95852(b)(1), intentionally under reporting or misreporting emissions in an attempt to obtain credit for emissions reductions that have not occurred should be prohibited. However, the consequences of violating this prohibition should encompass the same penalty processes as the rest of the Program. NCPA suggests that § 95852(b)(1) be revised as follows:

> **§ 95852**
> (b)(1): Resource shuffling is prohibited~~,~~ and is a violation of this article~~ and is a form of fraud. ARB will not accept a claim that emissions attributed to electricity delivered to the California grid are at or below the default emissions factor for unspecified electricity specified pursuant to MRR section 95111 if that delivery involves resource shuffling. The following attestations must be submitted to ARB annually in writing, by certified mail only:~~
>
> > ~~(A) "I certify under penalty of perjury of the laws of the State of California that [facility or company name] has not engaged in the activity of resource shuffling to reduce compliance obligation for emissions, based on emission reductions that have not occurred."~~
> >
> > ~~(B) "I understand I am participating in the Cap-and-Trade Program under title 17, California Code of Regulations, article 5, and by doing so, I am now subject to all regulatory requirements and enforcement mechanisms of this program and subject myself to the jurisdiction of California as the exclusive venue to resolve."~~

§ **95852(b)(3)**: NCPA, in addition to several other entities, including the Joint Utilities, has proposed that the definition of replacement electricity in § 95802(a) be revised to strike the last sentence constraining the location of the resources and the reference to variable resources. Replacement electricity, as that definition is proposed to be revised, is an important tool associated with renewable generation arrangements. This tool, however, should not necessarily be restricted to "variable" resources. The provisions of this section should also be revised to acknowledge the broader range of ownership arrangements utilized in these kinds of transactions (as the Legislature did in Senate Bill X1 2). Section § 95852(b)(3) should be revised as follows:

> **§ 95852**
> (b)(3) Replacement electricity that substitutes for electricity from a ~~variable~~ renewable resource qualifies for the ARB facility specific emission factor specified pursuant to MRR section 95111 of the ~~variable~~ renewable resource under the following conditions:

(A) First deliverers of replacement electricity have a contract, or ownership relationship, with the supplier of the replacement electricity, in addition to a contract or ownership rights to electricity generated by ~~with~~ the variable renewable resource; and

. . . .

§ 95852(b)(7): CARB's July 25 Notice suggests that this subsection (b)(7) is needed to clarify the appropriate calculation for out-of-state resources. Since the calculation is already addressed in the MRR, NCPA suggests that CARB strike the detailed descriptions and reference rather to MRR § 95111(b)(5). Accordingly, § 95852(b)(7) should be revised as follows:

§ 95852

(b)(7) The compliance obligation for ~~(CO2e covered) is calculation based on the~~ emissions from electricity deliveries from jurisdictions that are not approved for linkage pursuant to subarticle 12 is calculated in accordance with MRR section 95111(b)(5).

~~(A) Emissions which result from specified electricity deliveries (CO_2e specified) will be assigned the facility emission factor, determined by ARB, for electricity deliveries meeting the requirements of section 95852(b)(2) through (5);~~

~~1. Specified deliveries meeting the requirements of section 95852(b)(2);~~
~~2. The adjustment for replacement electricity associated with the variable renewable electricity pursuant to section 95852(b)(3);~~
~~3. The specified electricity meeting direct delivery requirements pursuant to section 95852(b)(4); and~~
~~4. The specified electricity generated from the use of biomethane which meets the requirements pursuant to section 95852.2.~~

~~(B) All deliveries of electricity not meeting the requirements of section 95852(b)(2) through (5) will have emissions calculated using the default emission factor for unspecified electricity pursuant to section 95111 of MRR (CO2e unspecified).~~

~~(C)Emissions resulting from qualified exports (CO2e qualified exports) will be subtracted from the compliance obligation pursuant to section 95852(b)(6).~~

~~Compliance Obligation in~~ $\cancel{CO_2e_{covered} = CO_2e_{specified} + CO_2e_{unspecified} - CO_2e_{qualified\ export}}$

10. PROPERLY EXCLUDED EMISSIONS

§ 95852.2(a)(9) Excluded Emissions - Geothermal

NCPA supports § 95852.2(a)(9) that specifically excludes emissions "from geothermal generating units and geothermal facilities, including geothermal geyser steam or fluids;" from a compliance obligation under the Program. The geothermal energy industry is a leading provider of reliable renewable energy in California, and reported data from California's geothermal facilities has clearly demonstrated that any GHG emissions associated with the generation of this electricity is de minimus. This explicit revision to the Proposed Regulation furthers both the State's emissions reduction objectives, as well as the mandate to increase the RPS.

NCPA urges CARB to work with local air quality districts as those agencies undertake CEQA reviews of proposed geothermal projects to ensure that the local air districts apply the same metrics for evaluating a project's impact as CARB does when measuring that impact for compliance with the Cap-and-Trade Regulation. All of the State's environmental objectives are best served by a uniform and comprehensive approach to the treatment of GHG emissions from geothermal facilities.

§ 95852.2(a)(9) Excluded Emissions – SF_6

Since CARB has already adopted a regulation that addresses emissions of Sulfur Hexafloride (SF6) from Gas Insulated Switchgear (GIS),[9] it is appropriate that it not be included within the scope of emissions used to calculate a compliance obligation. NCPA fully supports the revision in § 95852.2 (b)(16) of the Modified Text that clarifies that SF_6 is excluded from emissions used to calculate the compliance obligation for the Program.

11. CALCULATION OF COMPLIANCE OBLIGATIONS

§ 95853 Calculation of Covered Entity's Triennial Compliance Obligation

In § 95853(a), the Modified Text includes language that addresses the circumstances under which an entity would incur a compliance obligation, and references all emissions contained in a verified report. However, since not all emissions that are reported and verified are

9 This section adds Subarticle 3.1, Regulation for Reducing Sulfur Hexafluoride Emissions from Gas Insulated Switchgear sections 95350 to 95359, title 17, California Code of Regulations.

actually used for purposes of computing an entity's compliance obligation, NCPA recommends that this section be revised to reference only the applicable emissions calculation set forth in § 95852.

> **§ 95853**
> (a) A covered entity that exceeds the threshold in section 95812 in any of the three data years preceding the start of a compliance period is a covered entity for the entire compliance period. The covered entity's triennial compliance obligation in this situation is calculated as the total of the ~~verified~~ emissions ~~that received a positive of qualified positive emissions data verification statement, or were assigned emissions pursuant to section 95131 of MRR~~ calculated in accordance with section 95852 for all data years of the compliance period.

§ 95855 Calculation of Covered Entity's Annual Compliance Obligation

Section 95855, which deals with the calculation of the annual compliance obligation should be revised to include a reference to the provisions of § 95856(d)(3) that was added to clarify the fact that there is no annual obligation in the last year of any compliance period. This section should also be revised to include a reference to the covered emissions calculation set forth in § 95852, for the same reasons set forth above. Revised § 95855 should read:

> **§ 95855**
> (a) An entity has an annual compliance obligation for any year when the entity is a covered entity except for the conditions specified in sections 95853(d) and 95856(d)(3); and
>
> (b) The annual compliance obligation for a covered entity equals 30 percent of emissions ~~reported~~ from the previous data year ~~that received a positive or qualified positive emissions data verification statement, or were assigned emissions pursuant to section 95131 of MRR~~ calculated in accordance with section 95852

12. CUMULATIVE CALCULATION OF OFFSET USAGE LIMIT

§ 95854 Quantitative Usage Limit on Designated Compliance Instruments–Including Offset Credits.

The Joint Utilities have proposed a calculation for determining the use of offset limits that would allow the calculation in § 95854 to be cumulative, based on both the total number of offsets submitted by the entity since the start of the Program and the total compliance obligation of the entity since the start of the Program. This revised calculation would allow entities to utilize offsets based on their total compliance obligation over the life of the Program, rather than looking at the compliance obligation for a single compliance period. The Joint Utilities have proposed a revised calculation and corresponding language for this section in their August 10, 2011 comments, which NCPA supports.

13. REVISIONS REGARDING TIMELY SURRENDER

§ 95856 Timely Surrender of Compliance Instruments

In the Modified Text, Staff has proposed several changes to the provisions regarding the timely surrender of compliance instruments set forth in § 95856. Specifically, in § 95856(d)(1) and (2), the deadline for the surrender of compliance instruments for all entities has been changed to November 1. In § 95856(d)(3), the Modified Text clarifies that there is no obligation to meet the annual compliance obligation during the last year of a compliance period. And, in § 95853(f)(3), Staff has clarified that the total surrender obligation is less the allowances already surrendered. NCPA appreciates the revisions to these provisions, and supports their inclusion in the final Regulation.

14. PROVISIONS REGARDING UNTIMELY SURRENDER

§ 95857 Untimely Surrender of Compliance Instruments

Timing of Untimely Surrender Obligation: In § 95857(b)(4), the Modified Text addresses the deadline for surrendering an entity's untimely surrender obligation. As originally proposed in the discussion draft, this section allowed three days between the first auction or reserve auction following the surrender date and the deadline for surrendering the untimely obligation. During the July 15 Workshop, several stakeholders noted that three days seemed impractical from an operations standpoint, and asked for additional time to complete the transaction. The Modified Text allows for five days to surrender the instruments. NCPA submits that five days is still an insufficient amount of time for entities to complete the necessary administrative functions that will accompany the purchase and surrender of allowances, and that § 95857(b)(4) allow two weeks (or 10 business days) to complete the transaction.

Incomplete Surrender of Untimely Surrender Obligation: In § 95857(c), the Modified Text adds new language regarding recalculation of the obligation for failure to submit the full amount. NCPA proposes revisions consistent with the Joint Utilities that clarifies the fact that this recalculation is a new obligation, and not in addition to the entity's original obligation.

§ 95857.

(c) If an entity with an untimely surrender obligation fails to satisfy the obligation pursuant to section 95857(b)(4), then:

(1) ARB will determine the number of violations pursuant to section 96014;

(2) If a portion of the untimely surrender obligation is not surrendered as required, the entity will have a new untimely surrender obligation (replacing the previous surrender obligation calculated under section 95857(b)(2)) equal to the amount of the previous untimely surrender obligation which was not satisfied by the deadline stated in section 95857(b)(4) upon which the number of violations will be calculated pursuant to section 96014. The new untimely surrender obligation is due immediately; and . . .

Allocation of Allowances from Untimely Surrender Obligation: NCPA supports the change to section § 95857 (d)(1)(A) that allows three quarters of the allowances surrendered as part of an untimely surrender obligation to be placed back into the Auction Holding Account, rather than being placed in to the Reserve Account. As originally drafted, all covered entities would be faced with a potential allowance shortage due to untimely surrender of others, an untenable situation that would have adversely impacted market liquidity and the ability of covered entities to meet their compliance obligation. Returning the allowances to the auction where they can then be made available to all auction participants ensures that all entities do not face a shortfall of available allowances, nor be forced to purchase allowances from the Auction Reserve.

15. VOLUNTARY RENEWABLE ELECTRICITY PROVISIONS

(§ 95802(a)(279), (280), and (281) Variable Renewable Electricity, § 95841.1 Voluntary Renewable Electricity, § 95870(c) Disposition of Allowances for VRE)

The Modified Text provides, for the first time, definitions and explanations regarding that aspect of the Cap-and-Trade Program that will allow entities to voluntarily retire GHG compliance instruments associated to the production of renewable electricity not used to meet the requirements of any other state programs. (§ 95802(a)(279), (280), and (281) Variable Renewable Electricity) NCPA strongly encourages CARB to include provisions within this section for annual review of the set-aside amounts. It is a laudable goal for entities to seek out renewable electricity contracts in excess of the statewide mandate, and seek to purchase and retire GHG allowances associated with that renewable electricity. However, those worthy objectives do not come without a cost, one that is likely to be felt by all California electricity customers. That is because as the statewide mandate for renewable electricity increases, so does the demand for such renewable resources. Those that are financially able to acquire the renewable resources will drive up the price, at the expense of the utilities that are constrained by legislation to acquire the resources in a cost-effective manner. Furthermore, even when the number of allowances that are set-aside for retirement of voluntary renewable electricity is small, the action results in fewer allowances being available to entities that need them to meet a mandatory compliance obligation. When considered collectively, the number of allowances that can be set-aside or removed from the market for voluntary retirement has a cumulative impact on all compliance entities.

Therefore, NCPA urges Staff to revise these provisions to reduce the total number of allowances that are set aside for the VRE program, and to mandate an annual review of the set-aside to determine the impact the program is having – if any – on the availability and cost of allowances for compliance entities. The following changes should be made to §§ 95870 and 95841.1:

§ 95870 Disposition of Allowances for Electric Sector

§ 95870
(c) Recognition of Voluntary Renewable Electricity Emissions Reductions. On December 15, 2012, the Executive Officer shall transfer allowances to the Voluntary Renewable Electricity Reserve Account, as follows:

~~(1)~~ ~~0.5~~ 0.25 percent of the allowances from budget years 2013-~~2014; and~~

~~(2) 0.25 percent of the allowances from budget years 2015-~~2020.

§ 95841.1 Voluntary Renewable Electricity

New § 95841.1
<u>(f) Beginning on January 1, 2014, and annually thereafter, the Executive</u>

> Officer Staff shall conduct a review of the this section 95841.1 to determine its impact on the availability and cost of allowances in the auctions during the preceding year, and if it is determined that the provisions of this section have adversely impacted the ability of compliance entities to meet their compliance obligations under the Program, the Executive Officer shall recommend to the Board corrective actions necessary to address the adverse impacts.

16. ALLOWANCES FOR ELECTRIC SECTOR

§ 95870 Disposition of Allowances for Electric Sector

The Modified Text provides that the "*[a]llowances available for allocation to electrical distribution utilities shall be 97.7 million multiplied by the cap adjustment factor in Table 9.2 for each budget year 2013-2020*." Section 95870(d). NCPA supports this modification that takes into account 90% of the 9.67 MMT that is attributable to electricity from cogeneration facilities purchased by electricity distribution utilities. (Appendix A, p.1) Including this amount in the allowances attributable to the electrical distribution utilities is appropriate, as independently verified by CARB staff using publicly available data.

NCPA recommends that this section include a specific reference to Table 9-3. It is in this table that the actual percentage of allowances to be allocated to the electrical distribution utilities for 2013-2020 is set forth, yet Table 9-3 is not actually referenced in the body of the Proposed Regulation.

17. GENERAL PROVISIONS FOR DIRECT ALLOWANCES TO ELECTRICAL DISTRIBUTION UTILITIES

§ 95890 General Provisions for Direct Allowances

Section 95890(b) would require electrical distribution utilities to comply with the MRR and have positive verification in the previous year in order to get free allowances each year. As discussed in Appendix A, an electrical distribution utility should be eligible to receive the allocation of allowances if they are listed in Table 9-3; accordingly, NCPA believes that § 95890(b) is unnecessary. For one thing, Appendix A of the Notice sets forth the requirements for electrical distribution utilities to qualify for allocation of allowances under the Program, and the qualification is not based on the amount of emissions reported under the MRR. Secondly, the MRR contains a wide range of reporting requirements; there is no single MRR rule that would apply to all electrical distribution utilities, and some electrical distribution utilities will be subject to different provisions of the MRR. Therefore, mandating compliance with the MRR is vague and could be ambiguous. Likewise, there are a number of reasons why an entity that is required to obtain verification does not have a positive verification in time to qualify for the subsequent year's allowance allocation. Further, if the goal here is to incentivize compliance with the MRR, the MRR and Cap-and-Trade regulation are each replete with remedies available to CARB should they feel that the electrical distribution utilities are not meeting their reporting obligations, in addition to the requirement to surrender allowances for underreported emissions. Accordingly, NCPA agrees with the recommendation of the Joint Utilities that § 95980(b) be stricken entirely.

> ~~§ 95890(b) "An electrical distribution utility shall be eligible for direct allocation of California GHG allowances if it has complied with the requirements of the MRR and has obtained a positive or qualified positive emissions data verification statement on its sales number for the prior year pursuant to the MRR."~~

If CARB determines that it is necessary to continue to reference the provisions of the MRR in conjunction with eligibility to receive an allowance allocation, NCPA recommends that the provisions of § 95980(b) be revised to provide a reference to the "applicable" MRR provisions.

> § 95890(b) "An electrical distribution utility shall be eligible for direct allocation of California GHG allowances if it has complied with the <u>applicable</u> requirements of the MRR and has obtained a positive or qualified positive emissions data verification statement on its sales number for the prior year pursuant to the MRR."

18. <u>ALLOCATION TO ELECTRICAL DISTRIBUTION UTILITIES and TABLE 9-3</u>

§ 95892 Allocation to Electrical Distribution Utilities

As noted above, NCPA supports the clarification in the Modified Text that includes electrical cooperatives within the definition of electrical distribution utilities. The proposed changes in § 95892(b)(2) accurately note that electric cooperatives as eligible entities and properly treated in a like manner with POUs for purposes of allowance allocation and distribution.

As addressed in section 1 of these comments, NCPA also supports the changes in the Modified Text that acknowledges the POU/JPA ownership arrangements and allows POUs and electrical cooperative to designate that their allocated allowances be placed into the compliance account of a JPA of which the POU or electrical cooperative is a member.

§ 95892(d) and (e): As used in these sections, CARB should clarify its intent with regard to the use of the terms "auction value," "allowance value," and "monetary value." These terms are used interchangeably in some context, yet they have distinct meanings. This clarification is necessary because these sections place specific requirements on electrical distribution utilities, and the scope of the requirements must be clearly understood.

§ 95892(f): The Proposed Regulation clearly expresses CARB's intent that the total value of the allowances allocated to electrical distribution utilities should be used for the benefit of customers and to further the objectives of AB32. This requirement is further refined by the oversight of the California Public Utilities Commission IOUs or the local governing boards of POUs and electrical cooperatives (§ 95892(a), (d), and (e)).

Accordingly, § 95892(f), which places further restrictions on the use of the funds for California Independent System Operator (CAISO) transactions, should be stricken, as it fails to recognize the manner in which energy transactions through the CAISO BA work. For entities such as NCPA that have all of their transactions go through the CAISO BA, including self scheduled energy that is delivered directly to load, this prohibition would place an unreasonable constraint on utility operations. Due to the CAISO's rules for scheduling and bidding, tracking the various permutations of such transactions would be virtually impossible. The prohibition on using allowances to meet surrender obligations for sales into the CAISO appears to be intended to address the sale of excess energy. However, as drafted, it creates untenable restriction on utility operations and should be deleted.

Pursuant to the provisions of § 95852(e), electrical distribution utilities will be providing detailed reports regarding the use of the allowance value. Those reports must reflect the beneficial use of the value, which will allow CARB to verify compliance with the provisions of the Regulation. The restriction in § 95852(f) does nothing to further the goals of the § 95852(a) and should be stricken from the Proposed Regulation.

> § 95852
> ~~(f) Prohibited Use of Allocated Allowance Value. Use of the value of any allowance allocated to an electrical distribution utility, other than for the benefit of retail ratepayers consistent with the goals of AB32 is prohibited, including use of such allowances to meet compliance obligations for electricity sold into the California Independent System Operator markets.~~

19. TABLE 9-3

Table 9-3 Percentage of Electric Sector Allocation Allocated to Each Utility

On July 27, CARB issued a Revised Appendix A. The tables and summaries in the Revised Appendix that correspond to Table 9-3 have been updated from what was provided on July 25. Before parties can comment on the specific numbers set forth in Table 9-3 (as opposed to the underlying methodology addressed in Appendix A), CARB must provide stakeholders with clarification regarding the finality of the tables. The underlying spreadsheets that support the final figures should also be provided. Stakeholders should be able to submit comments and input to CARB on this matter once such clarification is provided.

20. APPENDIX A STAFF PROPOSAL FOR ALLOCATING ALLOWANCES TO THE ELECTRIC SECTOR

Free Allocation to Electrical Distribution Utilities is Appropriate

NCPA supports allocation of allowances to electrical distribution utilities and the proposed allocation methodology set forth in Appendix A that utilized the publicly available information and dataset provided by the State's electrical distribution utilities. Electrical distribution utilities are best situated to deliver the benefits of allowance value directly to the State's retail customers and meet the stated objective of free allocation; that is "*to ensure that electricity ratepayers do not experience sudden increases in their electricity bills associated with the cap-and-trade regulation.*" (ISOR, p. II-28)

NCPA has long supported an allowance allocation methodology that recognizes electric utility investments in zero- and low-GHG emitting resources, including wind, solar, and hydro-electric, as well as investments in state-of-the art natural gas-fired electric generation facilities that emit far fewer harmful GHG emissions than their predecessor facilities. The preferred methodology that incorporates ratepayer costs, projected cumulative energy efficiency, and early action investments in qualifying renewable resources is appropriate.

NCPA supports Staff's consideration of these essential factors in determining the number of allowances to allocate to each electrical distribution utility. Further, it is appropriate for an allocation method that includes these three factors to provide lower-emitting utilities with more free allowances at the start of the Program, as this demonstrates that it is possible for an allocation method to both cover utility's Cap-and-Trade related costs, as well as acknowledge the early investments in low-GHG emitting resources. NCPA also supports Staff's recommendation to adjust the total number of allowances available to the sector to 97.7 MMT.

However, NCPA seeks clarification from CARB regarding the tables included in the Revised Appendix A, and the correlation to Table 9-3 in the Regulation in order to ensure that all of the figures expressed in the document correctly represent the appropriate number of allowances to be allocated to each of the electrical distribution utilities.

21. <u>REPLENISHING RESERVE ACCOUNT</u>

§ 95913 Sales from Reserve

NCPA fully supports the Reserve Account established in § 95831(b)(4). This account is going to be an important tool for compliance entities to help manage costs in the event that unforeseen market conditions result in higher than expected allowances prices. However, in order for the Reserve Account to continue to provide a backstop for compliance entities in the event that the allowances price is uneconomic, the Reserve Account must have a sufficient number of allowances in it throughout the term of the Program. As the Board recognized in Resolution 10-42, there must be a process by which to monitor and track the activity in the Reserve Account and provide reports to the Board regarding the depletion of the account. NCPA supports CARB's ongoing examination of this important issue, and the inclusion of a trigger mechanism within the Regulation that would automatically provide for replenishment of the Reserve Account. Such a mechanism will provide not only compliance entities, but the market in general, with assurances regarding the ongoing efficacy of the Reserve Account to facilitate the management of compliance costs.

22. CONSEQUENCES FOR VIOLATION OF § 95921

§ 95921(f)(1) Restrictions on Registered Entities; Reduced Holding Limits

The Proposed Regulation includes very vigorous penalty and enforcement provisions (see §§ 96013 and 96014). In addition, § 95921(f) provides an extensive list of options available to the Executive Officer in the event that a registered entity violates any of the provisions of § 95921. NCPA recommends that the list of options be revised to strike the ability of the Executive Officer to reduce the number of instruments a compliance entity can retain in its holding account below the amount allowed pursuant to § 95920. Such a restriction would impact the ability of covered entities to manage their compliance costs, and potentially meet their compliance obligations. NCPA believes that the remedies available to the Executive Officer in the remaining portions of § 95921(f) and throughout the Proposed Regulation are adequate without this additional restriction. Accordingly, § 95921(f)(1) should be deleted.

§ 95921
(f) Restrictions on Registered Entities. If an entity registered pursuant to section 95830 violates any provision specified in this article the Executive Officer may:

~~(1) Reduce the number of compliance instruments a covered entity or opt-in covered entity may have in its holding account below the amount allowed by the holding limit pursuant to section 95920;~~

23. PENALTIES AND VIOLATIONS

§ 96013 Penalties

NCPA supports Staff's inclusion of the mandate to consider "all relevant circumstances, including the criteria in Health and Safety Code section 42403(b)" when making a determination regarding any penalty amount. The factors set forth in H&S § 42403(b) address a wide range of circumstances that compliance entities may face, and it is wholly appropriate for factors such as these to be carefully reviewed and weighed in order to determine what, if any, penalty amount is appropriate for a given violation. This is especially true with regard to a regulation where the compliance obligations are many and varied, and where the regulation already includes a separate provision to address the most severe noncompliance – failure to surrender compliance instruments. NCPA also supports CARB's further development and refinement of its Penalty Policy, and specific consideration of how that Policy would apply to the non-traditional CARB regulatory programs, such as the Cap-and-Trade Program.

§ 96014 Violations

NCPA is concerned that the calculation of a separate violation for each single compliance instrument is excessive, especially given the other provisions in the regulation that address noncompliance, including the requirement to surrender four times the amount of an unmet compliance obligation. Accordingly, NCPA joins with the Joint Utilities in urging CARB to address violations of the compliance obligation in a realistic manner and consider each 1,000 instruments (or portion thereof) a single violation. Additionally, NCPA urges the revisions to § 96014(b) addressed in the Notice to be reincorporated into the revised regulation; that is the modification that provides that violations accrue every 45 days, rather than on a daily basis for compliance instruments that remain unsurrendered. (Notice, p. 41, Section FFFF) NCPA appreciates Staff's continued efforts to work with Stakeholders on this crucial issue, as directed in the Resolution 10-42.

> § 96014
> (a) If a~~n~~ ~~covered~~ entity fails to surrender a sufficient number of compliance instruments to meet its compliance obligation as specified in sections 95856 or 95857, and the procedures in 95857(c) have been exhausted, there is a separate violation of this article for each *1,000* required compliance instrument*s,* *or portion thereof,* that ha*ve*~~s~~ not been surrendered, or otherwise obtained by the Executive Officer under 95857(c).
>
> § 96014
> (b) ~~There is a separate violation for each day or portion thereof after the compliance date that each required compliance instrument has not been surrendered~~. There is a separate violation for each 45-day period or portion thereof after *date determined pursuant to section 95857(b)(4)* ~~*the end of the Untimely Surrender Period*~~ that each *1,000* required compliance instrument*s,* *or portion thereof,* ha*ve*~~s~~ not been surrendered.

24. CONCLUSION

NCPA appreciates the opportunity to provide these comments on the *Modified Text* of the *Proposed Regulation to Implement a California Cap-and-Trade Program*. 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,
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