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*Sent via electronic mail*

March 11, 2016

Gary Collard  
gcollord@arb.ca.gov  
California Air Resources Board  
1001 I Street  
Sacramento, CA 95184

Re: **Northern California Power Agency Comments on *Draft RPS Enforcement Regulation***

Dear Mr. Collard:

The Northern California Power Agency<sup>1</sup> (NCPA) appreciates the opportunity to provide this informal feedback to the California Air Resources Board (CARB) Staff on the draft language for the *Proposed Renewable Portfolio Standard Program Enforcement Regulation* (Draft Regulation) issued on January 27, 2016.

As noted in Staff's Presentation during the February 4 Workshop, the construct of the State's renewables portfolio standard program creates a unique situation wherein CARB is charged with determining if a penalty is warranted upon receipt of a referral of noncompliance from the California Energy Commission (CEC). CARB's outreach to the CEC and stakeholders in developing a regulation that addresses this bifurcated penalty construct under Public Utilities (PU) Code Sections 399.30(o) and (p) is crucial to creating a workable regulation that accurately reflects CARB's role and provides the necessary clarity and direction to both the agency and the affected publicly owned utilities (POUs). NCPA is pleased that CARB is engaged in such a collaborative process and appreciates Staff's recognition that additional time is necessary to work through the unique circumstances presented. Discussions during the February 4 workshop and subsequent feedback from Staff have been extremely helpful, and NCPA looks forward to continuing to work with CARB Staff and affected stakeholders on developing the regulation and necessary guidance on the RPS penalty process. NCPA offers the following comments in furtherance of those efforts.

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<sup>1</sup> 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 Member is the Plumas-Sierra Rural Electric Cooperative. NCPA owns, operates, and maintains a fleet of power plants that is among the cleanest in the nation, providing reliable and affordable electricity to more than 600,000 Californians.

### **The Regulation Must Recognize CARB's Exclusive Authority to Determine Whether a Penalty is Warranted.**

PU Code section 399.30(p) gives CARB exclusive authority to determine, what, if any penalties are warranted in the event that the CEC issues a notice of violation and referral to CARB. CARB's enforcement authority comes from Health and Safety (H&S) Code section 38580, and in exercising this authority CARB sets the final amount of a penalty based on all relevant circumstances. This requires CARB to give consideration to, among other things, the eight factors specified in H&S Code section 42403. Under PU Code section 399.30(p)(1), CARB must also ensure that the penalties imposed are comparable to those adopted by the California Public Utilities Commission (CPUC) for retail sellers. This distinct role the legislature has reserved to CARB is separate and apart from the CEC's role to determine compliance with the RPS mandates. As such it would be unlawful for the proceeding determining penalties to rely solely on the record created by the CEC relevant to noncompliance. In order to properly carry out its responsibility, CARB staff must be able to review, and the affected POU must be able to present, evidence relevant to the circumstances of the noncompliance, including matters that may not be part of the CEC's record. The regulation must include provisions allowing entities to present evidence relevant to the imposition of penalties.

The record in the CARB proceeding may include new evidence not submitted to the CEC or an explanation of evidence that was included in the CEC's record. CARB's mandate to consider all relevant factors before determining what, if any, penalty is appropriate requires the agency to review information from a different perspective than the CEC's determination of compliance. As such, even evidence that may have been part of the CEC's record and used to support a finding of noncompliance with the RPS mandate would not necessarily be assessed in the same manner when making a determination of whether penalties are warranted. As such, CARB must be able to review those factors de novo to make an independent determination, and the Draft Regulation must be revised to allow the presentation of such evidence.

NCPA appreciates Staff's acknowledgment of the distinction between the CEC's record relevant to compliance and the need to develop a record before CARB regarding all relevant circumstances that would impact a potential penalty assessment. The proposed revisions set forth in the Joint POU Proposed Revisions<sup>2</sup> ensure that this distinction is properly reflected in the regulation, and should be included in the final regulation.

### **CARB Should Not Defer to Recommendations On Penalties.**

During an enforcement proceeding before the CEC, the POU is focused on addressing the specific allegations of noncompliance with the RPS mandate. The focal point of the record developed in that proceeding is whether or not the POU complied with the provisions of the CEC RPS

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<sup>2</sup> The "Joint POU Proposed Revisions" attached to these comments reflect a common proposal from a broad range of California's publicly owned utilities, and is the same document attached to the comments submitted by the California Municipal Utilities Association and several other POU parties.

Enforcement Regulation.<sup>3</sup> CEC findings supporting a notice of violation are relevant to that agency's determination of compliance; however, they are not specific to a full review of factors relevant to setting an appropriate penalty. While the CEC compliance determination may also entail reviewing factors that are relevant to penalties, findings regarding the impact that information has as a mitigating factor relevant to establishing an appropriate penalty may not be complete. For example, when responding to a complaint for potential noncompliance, the affected POU will be focused on addressing just that issue. While the CEC's RPS Enforcement Regulations allow the POU to submit information regarding mitigating factors, POUs are more likely to concentrate their efforts on demonstrating compliance, rather than assuming noncompliance and creating a separate record on penalties. As such, it would be impossible to know the extent to which the CEC's findings would be different had they been presented with additional information. Further, such a finding would not be part of any judicial review should the POU file a petition for writ of mandate. CARB is not precluded from reviewing a penalty recommendation from the CEC that may be part of the record referred from that agency, but such a recommendation should not be given deference, and should not limit or preclude the ability of CARB to review and assess additional information provided by the affected POU as part of the CARB proceeding. The proposed language included in the POU Proposed Revisions addresses this concern and should be included in the final regulation.

### **The Regulation Should Incorporate CARB's Enforcement Penalty Policy.**

Staff has opined that CARB's unique role in the RPS penalty process requires a separate regulation setting forth the agency's authority and mandates, but that the agency's existing enforcement penalties policies and procedures will also apply. CARB has an enforcement policy that was last updated in September 2011<sup>4</sup> that explains the agency's existing procedures for determining violations and penalties. This policy should be incorporated into the Draft Regulation. Since factors considered for penalties are not the same as for compliance, incorporation of the Enforcement Policy would explain the bifurcated role between the two state agencies, providing needed clarity.

As noted in the Enforcement Policy, "ARB's enforcement process can be summarized in five steps: (1) finding violations through inspections, investigations or complaints, (2) determining the penalty, (3) notifying the responsible party, (4) providing the responsible party an opportunity to explain and ask questions and (5) resolving the violation informally if possible."<sup>5</sup> As currently proposed, the Draft Regulation does not recognize the role the existing policy should have in this process. In

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<sup>3</sup> Enforcement Procedures for the Renewables Portfolio Standard for Local Publicly Owned Electric Utilities (CEC RPS Enforcement Regulation); <http://www.energy.ca.gov/2013publications/CEC-300-2013-002/CEC-300-2013-002-CME.pdf>. Amendments to these regulations have been approved by the CEC and are currently pending review at the Office of Administrative Law; the amended regulations, which should have an effective date of no later than July 1, 2016, can be found at [http://docketpublic.energy.ca.gov/PublicDocuments/14-RPS-01/TN210547\\_20160226T160116\\_Final\\_Regulation\\_Text.pdf](http://docketpublic.energy.ca.gov/PublicDocuments/14-RPS-01/TN210547_20160226T160116_Final_Regulation_Text.pdf).

<sup>4</sup> Enforcement Penalties: Background And Policy (Enforcement Policy), September 30, 2011; <http://www.arb.ca.gov/enf/sb1402/policy.pdf>

<sup>5</sup> Enforcement Policy, p. 7.

essence, CARB's role in the RPS enforcement process begins after there has been a determination of noncompliance. As such, the CEC would be responsible for Step #1. The remaining steps in the enforcement process, however, would still need to be applied to the penalty determination. It is important that the regulation articulate CARB's intent to utilize the existing practices in conjunction with the further explanation set forth in the regulation, and that the provisions of the regulation not be viewed as a "stand alone" document. NCPA understands that Staff is amendable to proposed changes to the regulation that incorporate the relevant provisions of CARB's Enforcement Policy, including the multi-step process that allows for settlement discussions and an opportunity to introduce mitigating factors, and appreciates consideration of those changes. In order to make clear that the RPS regulation is intended to work with the existing process, proposed changes to the Draft Regulation that reflects this clarification are set forth in the Joint POU Proposed Revisions, and should be incorporated into the final regulation.

### **Application of CARB's Existing Authority and Comparability of Penalties Should be Addressed in Guidance.**

NCPA urges CARB to work with stakeholders and issue guidance on a number of procedural and interpretative matters prior to finalizing the RPS Regulation. In order to ensure that there is a common understanding and application of the interrelated rules applicable to CARB's enforcement and penalty authority regarding the RPS program, CARB should develop guidance to inform stakeholders. CARB is charged with determining whether a penalty is warranted for noncompliance; the amount of such penalty is guided by CARB's existing statutory authority and the requirement that "any penalties imposed shall be comparable to those adopted by the [CPUC] for noncompliance by retail sellers." In order to determine what an appropriate or applicable penalty would be, affected entities must have some guidance from CARB regarding their application of an emissions-based penalty to a violation that does not necessarily reflect additional GHG emissions. For example, the CPUC's penalty structure applies solely to renewable energy credits (RECs). However, CARB's authority relevant to emissions reductions must be reconciled with a potential violation that where the "shortage" in RECs surrendered is associated with a reporting error or the surrender of a PCC 2 versus PCC 1 REC, for example.

Guidance should also address issues of comparability and the relevance to the CPUC's penalty cap in making that determination. Staff's Draft RPS Regulation clearly notes that "for purposes of this Article, the term comparable shall not mean identical." It is important that consideration of the totality of the circumstances takes into consideration the proportional size, revenues, service territory, rates or any other common features of both the affected local publicly owned electric utility and retail sellers. Proposed revisions to the regulatory language on this issue is set forth in the POU Proposed Revisions, and should also be reflected in the agency's overarching guidance to stakeholders prior to adopting a final regulation.

Guidance regarding the manner in which any potential penalties would be calculated should also be developed. For example, under a per-day application of penalties, in instances where a

determination of a violation may be more than 36 months after the reporting deadline, strict application of per-day penalties could be significant and excessive. Similarly, as noted above, every incident of noncompliance will not reflect an actual emission. How each instance would be addressed is unknown. NCPA understands that CARB wants to avoid providing a “schedule” of penalties, but believes that establishing guidelines around the agency’s application of its existing penalty authority and the further direction provided in PU Code section 399.30(p)(1) is necessary to ensure that both the agency and stakeholders have a common understanding of the manner in which CARB will form the basis for a penalty that will be used as the basis for the subsequent settlement discussions.

Discussion and clarification regarding how these issues will be addressed and interpreted is essential to ensure that there is commonality in the manner in which CARB handles these penalty proceedings. Without parameters around these interpretive matters, there is the potential for inconsistent application of these factors in penalty proceedings.

### **Conclusion**

NCPA’s member utilities place a high priority on procuring electricity from eligible renewable resources for their retail sellers and are committed to meeting their compliance obligations under the State’s mandate. However, in the unforeseen event that circumstances preclude a POU from meeting its compliance obligation, it is imperative that determining what, if any, penalties are warranted for such noncompliance be carried out in a manner that is consistent with the legislative mandates and CARB’s authority, and that the applicable regulation provide clear and concise direction to the affected POU of the process CARB will follow. NCPA appreciates Staff’s understanding of the importance of these issues and willingness to continue to work with stakeholders on crafting a workable regulation that provides the necessary clarity and direction to both the agency and the affected POUs. If you have any questions regarding these comments, please do not hesitate to contact the undersigned or Scott Tomashefsky at 916-781-4291 or [scott.tomashefsky@ncpa.com](mailto:scott.tomashefsky@ncpa.com).

Respectfully submitted,



C. Susie Berlin, Esq.

**LAW OFFICES OF SUSIE BERLIN**

Attorneys for the:  
**Northern California Power Agency**

Attachment: **Joint POU Proposed Revisions**

cc: David Mehl  
Shannon Dilley

# JOINT POU PROPOSED REVISIONS

## Proposed Renewable Portfolio Standard Program Enforcement Regulation

Adopt new sections 60095, 60096, 60097, and 60098 Article 7, Subchapter 1.25, Chapter 1, Division 3, Title 17, California Code of Regulations to read as follows:

[Note: All of the text below is new language to be added to the California Code of Regulations]

### **Article 7. Imposition of Penalties for Violations of the Renewables Portfolio Standard by Local Publicly Owned Electric Utilities.**

#### **§ 60095. Purpose.**

The purpose of this regulation is to implement Section 399.30(p) of the Public Utilities Code.

NOTE: Authority cited: Sections 39600 and 39601, Health and Safety Code. Reference: Sections 38580, 42402, 42402.1, 42402.2, 42402.3, 42402.4, and 42403, Health and Safety Code; and Section 399.30, Public Utilities Code.

#### **§ 60096. Referral of Notice of Violation by the California Energy Commission.**

A referral of a notice of violation by the California Energy Commission pursuant to California Code of Regulations, title 20, section 1240, subdivision (h) shall be directed to the attention of the Executive Officer of the California Air Resources Board (Agency), who may impose penalties pursuant to the authority delegated by and consistent with this Article.

NOTE: Authority cited: Sections 39600 and 39601, Health and Safety Code. Reference: Sections 38580, 42402, 42402.1, 42402.2, 42402.3, 42402.4, and 42403, Health and Safety Code; and Section 399.30, Public Utilities Code.

#### **§ 60097. Enforcement Process.**

(a) Upon receipt of the entire record of proceedings required to be delivered pursuant to California Code of Regulations, title 20, section 1240, subdivision (h), the Executive Officer, or his/her designee, shall promptly provide written notice to the affected local publicly owned electric utility of such referral and the commencement of the Agency's enforcement process under this Article.

(b) The Executive Officer, or his/her designee, shall provide the affected local publicly owned electric utility with an opportunity to submit information relevant to

## JOINT POU PROPOSED REVISIONS

any penalty determinations for emission reduction measures under Health and Safety Code Section 38580, including, but not limited to, information relevant to any of the factors set forth in Health and Safety Code Sections 42403(b), 43024(b), or otherwise relevant to the Agency's implementation of Public Utilities Code Section 399.30(p).

- (c) The Executive Officer, or his/her designee, shall utilize the Agency's existing processes consistent with the Enforcement Penalty Policy, including engaging in settlement discussions and informal resolution of any enforcement remedy or penalty determination.
- (d) The Executive Officer, or his/her designee shall provide written notice to the affected local publicly owned electric utility before referring any enforcement action for an assessment and recovery in a civil action pursuant to Health & Safety Code Section 42403(a).

NOTE: Authority cited: Sections 39600 and 39601, Health and Safety Code. Reference: Sections 38580, 42402, 42402.1, 42402.2, 42402.3, 42402.4, 42403, and 43024, Health and Safety Code; and Section 399.30, Public Utilities Code.

### **§ 60098. Determination of Penalty.**

- (a) In determining whether a civil penalty should be imposed or if a civil penalty is to be imposed, the amount of such civil penalty, the Executive Officer or his/her designee shall make an independent determination, based upon all relevant circumstances and evidence, including, but not limited to, any evidence submitted by the affected local publicly owned electric utility under subsection 60097(b) of this Article.
- (b) For purposes of this Article, in assessing whether any civil penalty imposed is "comparable" to the penalties adopted by the California Public Utilities Commission for noncompliance by retail sellers, the term "comparable" shall not mean identical, and may take into consideration the proportional size, revenues, service territory, rates or any other common features of both the affected local publicly owned electric utility and retail sellers.

NOTE: Authority cited: Sections 38580, 39600, 39601, 42402, 42402.1, 42402.2, 42402.3, 42402.4, and 42403, Health and Safety Code. Reference: Sections 38580, 42402, 42402.1, 42402.2, 42402.3, 42402.4, 42403, and 43024, Health and Safety Code; and Section 399.30, Public Utilities Code.