



May 31, 2016

Mr. Gary Collord  
Air Pollution Specialist  
California Air Resources Board  
1001 I Street  
Sacramento, CA 95814

**Re: Comments of the Joint POU's on the Revised Proposed Renewables Portfolio Standard Enforcement Regulations and the May 5, 2016 Workshop**

Dear Mr. Collord:

The California Municipal Utilities Association ("CMUA"), Northern California Power Agency ("NCPA"), Southern California Public Power Authority ("SCPPA"), Los Angeles Department of Water ("LADWP"), Sacramento Municipal Utility District, Imperial Irrigation District ("IID"), and M-S-R Public Power Agency ("M-S-R") (collectively "Joint POU's") respectfully submit these comments to the California Air Resources Board ("ARB") on the Revised Draft Renewables Portfolio Standard Enforcement Regulation ("Revised Draft") and the Public Workshop to Discuss Proposed Renewables Portfolio Standard Enforcement Regulation ("POU RPS Enforcement Regulation), held on May 5, 2016 ("May 5 Workshop").

The Joint POU's commend ARB staff for their hard work in developing the draft enforcement regulations and greatly appreciate ARB staff's willingness to consider and address the various concerns the Joint POU's raised throughout this process. In particular, the Revised Draft resolved the major issues the POU's raised in their respective comments and the Joint POU Proposed Revisions to the original draft of the regulations. The Revised Draft represents a substantial improvement over the original draft and the Joint POU's strongly support it. In this letter, the Joint POU's recommend a few additional revisions to the Revised Draft that will address some

remaining concerns, and further request that ARB take additional steps in the near future to provide guidance and clarity to the POU's on issues not addressed in the Revised Draft that are relevant to the ARB's enforcement process. The Joint POU's look forward to working with the ARB to finalize and support the adoption these regulations and develop of guidance regarding the enforcement program.

## 1. Joint POU's Recommended Revisions to the Revised Draft

The Joint POU's support the Revised Draft, but request that the ARB consider a few additional revisions that would address the Joint POU's remaining concerns. *First*, the Joint POU's recommend that the ARB revise Section 60097(b) to clarify that only the California Energy Commission's ("CEC") final determination of non-compliance is treated as fact that is not subject to further review, which is consistent with the ARB's presentation at the May 5 Workshop and prior discussions between the ARB and the Joint POU's. *Second*, in order to ensure that an affected POU has sufficient time to provide ARB all relevant information, the affected POU must be able to verify the information that was provided to the ARB by the CEC. To do this, the Joint POU's request that the ARB provide a copy of the CEC's entire record of proceedings with the ARB's referral notification, and include a provision that delegates express authority to the Executive Officer to extend the 30-day deadline to provide all relevant information in cases where a reasonable extension may be warranted to ensure that the evidentiary record is complete. These requests are addressed in turn below.

### A. CEC Findings Subject to Further Review

The distinction between the CEC's role in determining whether a POU is in compliance with the RPS mandate and the ARB's role in determining if penalties are warranted in the event of noncompliance must be clearly reflected in the regulation. One of the most significant problems with ARB staff's initial proposed draft was that it gave express deference to recommendations by the CEC on issues outside the scope of the CEC's authority. The Revised Draft largely addressed this issue by removing the deference language and, instead, clarifying that "the Executive Officer shall make an independent determination based upon all relevant evidence . . . ."<sup>1</sup> The Joint POU's appreciate the acknowledgement and clarification contained in the Revised Draft regarding this issue.

However, the language in the Revised Draft should be further clarified due to the fact that it could be interpreted such that the entire record developed by the CEC will be "considered as fact" and will not be "subject to further review." Since the CEC's statutory authority is limited to a determination of *if* a violation has occurred, not to the amount of the penalty, the extent to which the CEC's record will not be subject to further review must reflect this limitation. This limitation is demonstrated by California Public Utilities Code section 399.30(p)(1), which provides that "Upon a determination by the Energy Commission that a local publicly owned electric utility **has failed to comply with this article**, the Energy Commission shall refer the failure to comply with this article to the State Air Resources Board . . . ." Therefore, the ARB should only accept as fact and not subject to further review the CEC's finding of non-compliance.

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<sup>1</sup> Proposed Renewable Portfolio Standard Program Enforcement Regulation, May 5, 2016, at § 60098(b).

It is possible that the full record developed by the CEC could include that agency's findings relevant to its determination of what may be an appropriate penalty, or may include findings regarding its consideration of factors that are included within the list of items that the ARB must consider pursuant to the Health and Safety Code ("HSC") and its own penalty policy. While it is within the CEC's discretion to make these findings, the ARB's Executive Officer must make an "independent determination" based on a review of the relevant evidence in deciding the appropriate penalty amount. That determination may differ from the findings or characterizations in the CEC's record, and deference to those matters in the CEC record would be both unlawful and could create a conflict in the record.

At the May 5 Workshop, staff's presentation described this part of the Revised Draft as follows: "ARB will treat CEC's violation determination as fact." The Joint POU's support this characterization, and recommend that the enforcement regulations be revised to accurately reflect that description. Specifically, the Joint POU's recommend the following revision to Section 60097(b):

~~The record developed by the California Energy Commission in determining that a violation has occurred shall be considered as fact by the Board and shall not be subject to further review.~~ The California Energy Commission final determination of non-compliance shall be considered as fact by the Board and shall not be subject to further review.

#### B. Completeness of the Evidentiary Record

In order for the ARB's enforcement process to be fair and transparent to an affected POU, that POU must know what information the CEC provided to the ARB. The Revised Draft does not currently include a mechanism for transmitting the CEC's record to the affected POU, which is concerning because the POU has only 30 days to provide all relevant information. The receipt of the CEC's record will allow the POU to fully respond to all of the evidence, including materials and findings that are not part of the compliance determination, as well as determine what additional information the POU should provide to ARB to directly respond to Section 60097(c). Section 60097(c) of the Revised Draft provides that the "Executive Officer shall provide the affected local publicly owned electric utility with the opportunity to submit information relevant to the penalty determination in addition to that contained in the record transmitted by the California Energy Commission." The ability to provide this information is critically important, as information that is determinative of what may be an appropriate penalty is not necessarily the same information that would be submitted to or used by the CEC in determining whether the POU was in compliance with the RPS program.

Moreover, the RPS compliance and verification process involves a substantial amount of information and documentation. The CEC's noncompliance hearing will likely generate numerous additional documents. Given the large amount of information likely to be contained in the CEC's record, there is the potential for information to be included that the POU was not aware of or for some documents to have been unintentionally excluded. The only way for a POU to be able to adequately perform a review of the record referred by the CEC, is for a copy to be

provided directly to the POU. The Joint POUs recommend that the Revised Draft be revised to ensure: (1) that the POUs are provided with a complete copy of the CEC's record at the time of the ARB's referral notification; and (2) that the regulation delegate authority to the Executive Officer to extend the 30-day deadline for cases where more time may be necessary for the affected POU to confirm that all relevant information has been provided to the ARB for consideration. The Joint POUs therefore recommend the following revisions to Sections 60097(a) and 60097(c):

(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 shall promptly provide written notice to the affected local publicly owned electric utility of such referral and the commencement of the Board's enforcement process under this Article (Referral Notification). The Referral Notification shall include a copy of the entire record received by the Executive Officer from the California Energy Commission (which copy may be provided in an electronic format).

...

(c) The Executive Officer shall provide the affected local publicly owned electric utility with the opportunity to submit information relevant to the penalty determination in addition to that contained in the record transmitted by the California Energy Commission. Relevant information, includes, but is not limited to information relevant to any of the factors set forth in Health and Safety Code sections 42403, 43024, or otherwise relevant to the Board's implementation of Public Utilities Code Section 399.30, subdivision (p). The local publicly owned electric utility will have 30 calendar days from the date of the ~~referral notification~~ Referral Notification under section 60097(a) to provide all relevant information. The Executive Officer may extend the 30-day period upon timely receipt of a written request from the affected local publicly owned electric utility detailing that more time is necessary to provide all relevant information. The Executive Officer may request additional information during the penalty determination process.

## **2. Joint POUs' Request for Regulatory Guidance on ARB's Unique Enforcement Authority over the RPS Program.**

While ARB has considerable experience and expertise with enforcement actions, the agency is in a unique position vis-à-vis the POU RPS Enforcement Regulation. Unlike ARB's existing authority, a determination of potential penalties associated with a POU's non-compliance with the RPS regulations must include application of both ARB's enforcement authority under the HSC, as well as consideration of comparability of the penalty with those adopted by the CPUC for retail sellers. This is a challenging task because the HSC predicates penalties on violations of hourly or daily emissions standards, whereas the RPS program requires utilities to accumulate megawatt hours of eligible renewable energy over multi-year compliance periods. Accordingly, compliance cannot be achieved or measured on a daily basis. If compliance cannot be achieved

or even measured on a daily basis, then a traditional application of per day violations in the HSC and the ARB's Penalty Policy is inapposite.

The CPUC has recognized this paradigm and structured penalties for retail sellers on a per renewable energy credit ("REC") basis. This penalty structure differs from the HSC conceptually, thus creating real uncertainty in how ARB will reconcile these two structures and exercise its RPS enforcement authority. Because of this unique aspect of ARB's enforcement authority, a POU's ultimate liability is unknown and could vary to a significant degree. In order to ensure that there is a common understanding and application of the interrelated rules applicable to ARB's enforcement and penalty authority regarding the RPS program, the POU's urge ARB to develop guidance on the overarching manner in which ARB will reconcile these different facets of its authority.

Because of the nature of the RPS program, there are noncompliance scenarios that present unique situations for RPS enforcement purposes. In each of those instances, ARB should provide the regulated community with a suitable policy that fits the method of compliance with predictable consequences to deter noncompliance. Discussion and clarification regarding how such scenarios will be treated and how application of the rules will be interpreted is essential to ensure that there is commonality in the manner in which ARB handles these penalty proceedings. Without parameters around these interpretive issues, there is the potential for inconsistent application of these factors in penalty proceedings. The POU's respect ARB's desire to avoid publishing a "penalty schedule" or otherwise telegraphing the parameters of a potential settlement in instances where mitigating – or exacerbating – factors directly impact the appropriate penalty amount. However, clear direction on how the ARB plans to reconcile and address these issues is crucial to understanding both the totality of the penalty process, and to ensure that the ARB's understanding of the process is transparent and applied equally at the onset of all penalty proceedings and settlement discussions, and before the ARB conducts any individual, case-by-case review of specific mitigating or exacerbating circumstances.

While it may not be practical to include these general parameters in the actual regulation, it is necessary to inform the POU's how ARB intends to adapt the HSC to the multi-year RPS procurement targets. The Joint POU's believe that these interpretive matters are best addressed through agency-issued guidance, developed in collaboration with the affected stakeholders, and made available to compliance entities in advance of any proceedings in which they would be applied. The Joint POU's respectfully request that ARB staff convene future meetings with stakeholders to discuss these issues as soon as practicable, in order to avoid potential ambiguities in the event of an actual noncompliance referral from the CEC.

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The Joint POU's appreciate the opportunity to provide these comments on the Revised Draft and the May 5, 2016 workshop.

Respectfully submitted on behalf of the Joint POU's,



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Enclosure: Joint POU Proposed Revisions

## JOINT POU PROPOSED REVISIONS

### **Proposed Renewable Portfolio Standard Program Enforcement Regulation**

Adopt new sections 60095, 60096, ~~and 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, subdivision (p) of the Public Utilities Code.

NOTE: Authority cited: Sections 39516, 39600 and 39601, Health and Safety Code; and Section 399.30, Public Utilities Code. Reference: Sections 38580, 39516, 42402, , 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 (Board). The Executive Officer may impose penalties pursuant to the authority delegated by and consistent with this Article.

NOTE: Authority cited: Sections 39516, 39600 and 39601, Health and Safety Code; and Section 399.30, Public Utilities Code. Reference: Sections 38580, 39516, 42402, 42402.1, 42402.2, 42402.3, 42402.4, 42403, and 43024, 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 shall promptly provide written notice to the affected local publicly owned electric utility of such referral and the commencement of the Board's enforcement process under this Article (Referral Notification). The Referral Notification shall include a copy of the entire record received by the Executive Officer from the California Energy Commission (which copy may be provided in an electronic format).

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- (b) ~~The record developed by the California Energy Commission in determining that a violation has occurred shall be considered as fact by the Board and shall not be subject to further review.~~ The California Energy Commission final determination of non-compliance shall be considered as fact by the Board and shall not be subject to further review.
- (c) The Executive Officer shall provide the affected local publicly owned electric utility with the opportunity to submit information relevant to the penalty determination in addition to that contained in the record transmitted by the California Energy Commission. Relevant information, includes, but is not limited to information relevant to any of the factors set forth in Health and Safety Code sections 42403, 43024, or otherwise relevant to the Board's implementation of Public Utilities Code Section 399.30, subdivision (p). The local publicly owned electric utility will have 30 calendar days from the date of the Referral Notification under section 60097(a) to provide all relevant information. The Executive Officer may extend the 30-day period upon timely receipt of a written request from the affected local publicly owned electric utility detailing that more time is necessary to provide all relevant information. The Executive Officer may request additional information during the penalty determination process.
- (d) In implementing this Article, the Executive Officer will utilize the Board's enforcement authority and policies.

NOTE: Authority cited: Sections 38580, 39516, 39600, 39601, 42402, 42402.1, 42402.2, 42402.3, 42402.4, 42403, and 43024, Health and Safety Code; and Section 399.30 (p), Public Utilities Code. Reference: Sections 38580, 39516, 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) The Executive Officer may determine a civil penalty for some or all violations set out in the notice of violation in a manner consistent with Part 6 (commencing with section 38580) of Division 25.5 of the Health and Safety Code. Any civil penalty imposed shall be comparable, but not necessarily identical to any relevant penalties adopted by the California Public Utilities Commission for noncompliance by retail sellers. Comparability is a case-by-case determination based on the circumstances of a violation and any other common features of both the affected local publicly owned electric utility and retail sellers.
- (b) In determining whether a civil penalty should be imposed or the amount of such civil penalty if a civil penalty is to be imposed, the Executive Officer shall make an independent determination based upon all relevant evidence, including but not limited to the record of proceedings transmitted by the California Energy Commission, any recommendations of the California Energy Commission, and information submitted by the affected local publicly owned electric utility pursuant



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to section 60097(c) of this Article.

NOTE: Authority cited: Sections 38580, 39516, 39600, 39601, 42402, 42402.1, 42402.2, 42402.3, 42402.4, 42403, and 43024, Health and Safety Code; and Section 399.30, Public Utilities Code. Reference: Sections 38580, 39516, 42402, 42402.1, 42402.2, 42402.3, 42402.4, 42403, and 43024, Health and Safety Code; and Section 399.30, Public Utilities Code.