



Western States Petroleum Association
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Catherine H. Reheis-Boyd
President

March 15, 2010

Edie Chang
California Air Resources Board
1001 I Street
Sacramento, CA 95812

Re: Western States Petroleum Association Comments on the Air Resources Board February 26, 2010 Modified Text for the Proposed AB 32 Cost of Implementation Fee Regulation

Dear Ms. Chang:

On February 26, 2010, the California Air Resources Board (CARB) published a "Notice of Public Availability of Modified Text and Availability of Additional Documents" providing proposed amendments to the AB 32 Cost of Implementation Fee Regulation (Fee Regulation) approved by the Board on September 25, 2009 by Resolution 09-36. These proposed amendments were issued in response to the Board's direction to CARB staff to modify the text of the Fee Regulation in accordance with modifications specified in Resolution 09-36.

This letter provides comments from the Western States Petroleum Association (WSPA) on the proposed amendments to the Fee Regulation and on other issues and concerns we have with the Fee Regulation itself.

WSPA is a non-profit trade organization representing twenty-eight companies that explore for, produce, refine, transport and market petroleum, petroleum products, natural gas and other energy products in California and five other western states.

Our organization is dedicated to working toward ensuring that Californians continue to have reliable access to petroleum and petroleum products through policies that are socially, economically and environmentally responsible.

WSPA appreciates the opportunities we have had to discuss our concerns with CARB staff, and to provide these comments on the Fee Regulation. Our understanding of CARB staff's position on our concerns is included in this letter. WSPA would appreciate CARB's confirmation that our understanding on these issues is correct.

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Entity-Level Reporting

WSPA member companies will be subject to the proposed Fee Regulation both for their direct greenhouse gas emissions at refineries and other facilities and for the volumes of fuel they produce or import for sale in California. While each refinery will have the information needed to allow reporting under the Fee Regulation for that refinery, since refineries are not generally responsible for fuel marketing and distribution they are not likely to have the information needed for meeting the reporting requirements for fuels. Moreover, since a company may have fuels enter commerce at different terminals or other facilities in California, it would be administratively more efficient for the company to be able to report that information on a single state-wide basis (i.e., at the “entity” level).

Reading the reporting requirement of section 95204(b) (“All entities subject to this article must report . . .”) in conjunction with the applicability language in section 95201(a) and the section 95202 definitions of “entity,” “producer” and “production facility,” WSPA concludes that entity-level reporting is allowable under the Fee Regulation. However, the text of the regulation is not explicit on that point. We suggest that CARB either amend the regulation or provide a clear interpretation that entity-level reporting is acceptable.

We understand that CARB staff agrees that entity-level reporting is acceptable, and that companies may meet their overall reporting obligations under the Fee Regulation by reporting using multiple “entities.” We also understand that each “entity” must be set up in the reporting system by CARB staff prior to use, and that corporate-level reporting entities or those reporting fuels information may have to access the pertinent portions of the reporting tool in a different manner and will be billed separately. We further understand that information collected under the LCFS reporting tool may be used.

Our members have advised that at this time, they do not have sufficient information regarding the specific reporting fields and other details of the reporting requirements to be able to fully align their internal data collection systems with the reporting program. WSPA appreciates the opportunity to review the beta testing site once it is up and running. WSPA encourages CARB to formally make its on-line reporting tool and details of the reporting fields available as soon as possible. This will help assure that entities subject to the Fee Regulation will be able to complete their reports in an accurate and timely manner.

June 1, 2010 Reporting Deadline

As proposed to be amended in the February 26 notice, section 95204(c)(1) and (2) specify that data for the 2008 calendar year must be reported by the later of March 1, 2010 or 30 days after the effective date of the Fee Regulation and that data for calendar year 2009 must be reported by the later of June 1, 2010 or 30 days after the effective date of the Fee Regulation.

WSPA is concerned that facility greenhouse gas emission data for 2009 and later calendar years will not have been verified in accordance with the Mandatory Reporting Rule by the June reporting deadline and that reporting entities might be deemed to be out of compliance with the Fee Regulation reporting requirement for reporting unverified data. WSPA understands from our discussions with

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CARB staff that verification of the data reported for the Fee Regulation need not be verified. We would appreciate confirmation on this point.

WSPA is also concerned that the requirement for reporting of both 2008 and 2009 data in 2010 will lead to ARB billing reporting entities for the AB 32 cost of regulation fee for both 2008 and 2009 during 2010. WSPA's view is that such a double billing is not authorized under Health and Safety Code section 38597 and is not appropriate under the Fee Regulation.

Again, our understanding is that this is not CARB staff's intent, and that while both 2008 and 2009 data will be reported in 2010, the fee billing in 2010 will only be for 2008 emissions and fuels data. Bills for 2009 data will be issued in mid-2011, and thereafter the bill for emissions and production during a given calendar year will be issued about 18 months after the end of that calendar year (i.e., 2010 emissions will be billed in mid-2012, etc.).

Enforcement Concerns

Section 95204(c) requires reporting of certain information that is not currently required by the Mandatory Reporting Regulation, including fuels production and import data. While our members anticipate that most of this information will be available, with respect to 2008 and 2009 data in particular CARB's adoption and proposed amendment of the Fee Regulation after the end of the calendar year means that certain data and records contemplated by the Fee Regulation may not be available.

WSPA believes that entities reporting under the Fee Regulation should not be subject to potential liability for any failure to have created or retained records that were not required at the time and encourages CARB to clarify the Fee Regulation in that regard. We suggest that CARB add language such as the following to Section 95204(c) to assure that these issues are avoided: "For the 2008, 2009, and 2010 calendar year reports, best estimates may be used for any data that was not required to be collected and reported under the Mandatory Reporting Regulation." We understand that this language is generally consistent with CARB staff's intended approach on this point.

Section 95206(c) provides, among other things, that submission of incomplete or inaccurate information is a violation of the Fee Regulation. Section 95206(d) specifies that "failure to pay the full amount of any fee required" is also a violation. One possible reading of these two provisions is that an underpayment resulting from inaccurate reporting would be considered a violation even if the originally calculated fees and any supplemental fees based on corrected data were paid on time in accordance with the entity's fee billing from CARB. WSPA's view is that double penalties (i.e., liability under (c) and (d)) are not appropriate in this circumstance, and that penalties should be imposed under (d) only in cases where an entity fails to make a timely payment of the amount of fees billed.

Our understanding is that CARB staff intended (d) to address non-payment of billed fees, and not calculation errors that would be subject to penalties under (c). We request that CARB confirm this understanding, and further that (d) be revised to read: "*Payment Violations*. An entity's failure to pay the full amount of any fee billed to that entity in accordance with this subarticle shall constitute a

singe, separate violation of this subarticle for each day or portion thereof that the fee has not been paid after the fee is due.”

Operational Control

The definition of “Operational Control” in section 95202(a)(71) generally mirrors the analogous definition in the Mandatory Reporting Regulation. However, the definition in the Fee Regulation excludes the following concluding sentence that is included in the definition in the Mandatory Reporting Regulation: “In any circumstance where this authority is shared among multiple entities, the entity holding the permit to operate from the local air pollution control district or air quality management district is considered to have operational control for purposes of this article.”

Facilities operated by WSPA members may include process units or entire facilities where operating responsibility is shared among more than one company (entity). In order to clarify the ultimate responsibility for a facility’s compliance with the Fee Regulation in circumstances such as these, WSPA requests that that quoted sentence from the Mandatory Reporting Regulation be added to the definition of “Operational Control” in the Fee Regulation.

Exclusion of Exempt Fuels

Section 95201(b) exempts liquefied petroleum gas and propane from the Fee Regulation. The reporting provision for refinery gas in section 95204(f)(4) provides an equation for excluding emissions from natural gas combustion from the reporting for emissions from combustion of refinery fuel gas, but does not address liquefied petroleum gas and propane. From our discussions with CARB staff, we understand that staff’s view is that commingling of exempt fuels with non-exempt fuels subjects the otherwise exempt fuels to the fee requirement, and that combustion of a pure exempt stream (such as butane) should be exempt from the fee and therefore not be included in emissions reporting. We also understand that ARB will re-evaluate this position so that all exempt fuel consumers are treated equally, whether the pure fuel is combusted alone or in combination with other fuels.

We also note that section 95204(e) similarly does not provide a mechanism for excluding biodiesel (also exempt under section 95201(b)) from the calculations for the total amount of fuels sold or supplied for use in California. WSPA respectfully requests that CARB add language to the Fee Regulation to establish a consistent approach for regulated entities to make these adjustments to their calculations of reportable emissions.

The applicability provision for “First Deliverers of Electricity” in section 95201(a)(4)(A) specifies that fees shall be paid for megawatt hours of electricity generated through combustion of fossil fuels, but does not include electricity generated through combustion of renewable fuels. In contrast, there is no such exclusion for combustion of renewable fuels at petroleum refineries. WSPA believes that all sectors should be treated equitably, so that emissions from combustion of renewable fuels would either be included in the reporting for all sectors or for none.

Time to Respond to Data Requests

The record retention requirement in the section 95204(i) requires that entities subject to the Fee Regulation make retained data available within five business days of a request from CARB staff. In contrast, the Mandatory Reporting Regulation provides a 20 business day period for responding to a CARB request for documents or records. Our members believe that five days will be unworkable as a practical matter in many cases, but that requests could generally be satisfied within 20 business days.

Accordingly, we recommend modifying section 95204(i) to match the 20 day requirement in the Mandatory Reporting Regulation. We also suggest that CARB specify that the 20 days runs from the entity's receipt of the request, since our members have no control over the length of time required for the request to get from CARB to the regulated entity.

Incorrect Cross-References

We have identified two cross-references in the text of the regulation that we believe are incorrect. First, the text for the certification statement to be provided in connection with each report by a regulated entity states that the "report has been prepared in accordance with subchapter 105, article 1, sections 95100 to 95133, title 17, California Code of Regulations." Sections 95100 through 95133 constitute the Mandatory Reporting Regulation, not the Fee Regulation. Accordingly, we believe that the proper citation for this certification would be "subchapter 105, article 3, sections 95200 to 95207, title 17, California Code of Regulations."

Second, the definition of "biodiesel" in section 95202(a)(10)(A) references title 40, Code of Federal Regulations, part 70 as providing the requirements for registration of motor vehicle fuels and fuel additives. Part 70 actually contains the requirements for the federal stationary source operating permit program under Title V of the Clean Air Act. It appears that CARB intended to reference 40 CFR Part 79, regarding fuel and fuel additive registration.

Fuel Fee Rate

WSPA understands that under section 95203(c) CARB will establish a uniform per-gallon fee applicable to production of gasoline and diesel, using the emission factors specified in the table in section 95230(d). Please confirm that this understanding is correct.

WSPA appreciates the opportunity to comment on the February 26, 2010 modified text of the proposed Fee Regulation. Nothing in these comments supersedes or rescinds WSPA's comments on the proposed Fee Regulation included in our letters dated June 22, 2009 and September 2, 2009 (which are hereby incorporated by reference), and WSPA expressly retains its legal rights in accordance with those comments.

Please feel free to contact me at this office or Michaelleen Mason of my staff at (916) 498-7753 if you have any questions.

Sincerely,

A handwritten signature in blue ink that reads "Cathy A. Boyd". The signature is fluid and cursive, with the first name "Cathy" being the most prominent.

cc: Mary Nichols
James Goldstene
Ellen Peter
Jon Costantino
Bruce Tuter
Jeannie Blakeslee
Michaelleen Mason