BP America, Inc

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Via Email
Kevin Kennedy
California Air Resources Board
1001 I Street, P.O. Box 2815
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Subject: AB32 Fee Regulation

Dear Kevin:

BP acknowledges the need to impose a fee on emitters in order to fund the administration of AB32, and we acknowledge that BP will be expected to pay a fair share of the fee. However, we are concerned that the current design of the fee collects a disproportionate amount of revenue from the refining sector and that the fee design is inconsistent with the legislative language which grants CARB authority to collect the fee.

The legislative language relating to the AB32 fee is as follows:

"The state board may adopt by regulation, after a public workshop, a schedule of fees to be paid by the sources of greenhouse gas emissions regulated pursuant to this division, consistent with Section 57001. The revenues collected pursuant to this section, shall be deposited into the Air Pollution Control Fund and are available upon appropriation, by the Legislature, for purposes of carrying out this division."

We believe the key phrase is "to be paid by the sources of greenhouse gas emissions regulated".

The summary of the Proposed AB32 Administrative Fee Regulation describes the fee as applying "only to certain entities from specific industry sectors" – a description that while accurate is a clear departure from the requirements of the enabling legislation that the fee be paid by the sources of emissions. Instead, the fee regulation as proposed will collect over 50% of the total fee from a refining industry that is responsible for approximately 4% of state emissions. As a refiner, we are comfortable with the portion of the regulation which imposes fees based on direct facility emissions. However, BP strongly believes that the proposed regulation, in its treatment of fees for fuel emissions, violates both the letter and intent of the legislation, sound regulatory principles and basic tenets of fairness.

For emissions attributable to the combustion of transportation fuels, the "sources of greenhouse gas emissions" are the vehicles in which the fuel is combusted. Although BP manufactures transportation fuels, the refinery is not the emitting entity for emissions from the combustion of transportation fuels, nor does the refinery control the efficiency of vehicles or the volume of fuel consumed for transportation. **We believe that both as a matter of basic fairness and as a requirement for compliance with AB32, the administrative fee should be collected at, or as close as possible to, the point of emission. In the case of emissions from fuels combusted for transportation, where it may not be practicable to collect a fee directly from individual fuel consumers, the fee should be assessed at the closet possible point upstream of the emitter – in this case at either the pump or at the rack.**

In meetings with your staff, and in reading the Proposed Regulation, it appears that CARB intends to apply the fee 'upstream" in order to "minimize the number of entities subject to the fee and reduce the complexity and the administrative burden of the fee." In doing so, CARB appears to design the fee to meet an objective not mentioned in the legislative language while at the same time ignoring an objective explicitly called for in the legislation – i.e. that the fees will be paid by the sources of greenhouse gases regulated.

CARB states as a reason for the upstream design an intention to reduce the administrative burden of the regulation. However there is no discussion of the relative administrative burden of a fee collected at the refinery versus a fee collected at the rack or pump. Moreover, there is no discussion or analysis of the increased administrative or financial burden placed on regulated parties, specifically refiners, by CARB's choice to implement an upstream fee. Without analysis or discussion, it is impossible to discern whether in fact an upstream fee reduces complexity and administrative burden – as CARB asserts.

In the case of refiners, shifting the collection of administrative fees away from the rack or pump to the refiners will increase the fee they are subject to by approximately a factor of ten. So, a refiner who would otherwise pay $500,000 in fees based on direct emissions will instead pay approximately $5,000,000 according to the proposed regulation. This is an unreasonable burden to place on a single sector and on individual companies, especially when better options are available. It would be quite a different scenario were CARB shifting a relatively small incremental burden onto a single sector in order to ease the administrative burden on many. But in this case, the Proposed Regulation shifts what would be a small burden on many – and concentrates a large burden on a few.

We do know that the state has found it feasible to design programs that efficiently collect fees on fuel at other points in the chain of commerce – primarily at the rack or at the pump. So, there should be no reasonable impediment to a similar system to collect the AB32 Administrative Fee for fuels in this manner.

Aside from the issues of fairness and compliance with the legislative language of AB32, CARB's design of the fee appears to hinge on the ability of those subject to the fee to recover the costs of the fee in the sales price (even though BP believes that ability to pass through is irrelevant to the question of the Proposed Regulation's adherence to the statute). CARB staff assert throughout the Proposed Regulation that regulated parties should be able to pass on the cost of the fee to downstream consumers - even though the regulation uses terms like "if" and "likely" regarding an entity's ability to recover its cost in the sales price. In fact, there is and can be no certainty in the ability of regulated parties to pass on these costs. It is a virtual certainty that the fee will not be recovered in its entirety at all times. As such the fee, as designed, clearly does not meet the requirement of the legislation.

In assessing ability to pass through or recover costs, CARB simply cannot assess ability to pass through the AB32 Administrative Fee in a vacuum. They must assess ability to pass through the cost of the fee in the context not only of the current differential cost of doing business in California (estimated by the ETAAC at 23 percent more than the national average - on top of the 32 percent higher cost burden U.S. manufacturers face when competing internationally) but also in the context of the totality of AB32 regulation. Refiners in California will be subjected to several costs that their competitors outside of California, who import product into the state, are not subjected. Examples of these costs beyond the cost of the AB32 fee include the cost of allowances for direct emissions as well as the cost of direct measures that CARB is implementing (including removal of the methane exemption, refinery flare rules and energy efficiency/co-benefit audits). All of these measures, fees and costs create competitive disadvantage for in-state refiners and contribute to leakage.

Finally, CARB should make clear in the rulemaking how the fee program will change in the event that the California cap and trade program is pre-empted by a federal cap and trade program. As we expect that a federal cap and trade system will cover both direct refinery emissions as well as transportation fuels, we expect that the majority of a fee on refiners, regardless of how the fee collection if designed, will go away in the event of federal pre-emption.

Please don't hesitate to contact me should you have questions regarding this correspondence.

Sincerely,

Ralph J. Moran
Director, West Coast Climate Change Issues
BP America, Inc.

cc (via email): Mary Nichols
Virgil Welch
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Jon Costantino