Western States Petroleum Association
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California Air Resources Board
1001 "I" Street
Sacramento, CA 95814
Via electronic mail to addressees

Dear ARB Staff:

Re. **Western States Petroleum Association's Comments on the California Air Resources Board's Request for Additional Comments at August 5, 2009 LCFS Workshop**

This letter contains comments by the Western States Petroleum Association (WSPA) on information provided to the public during ARB staff's LCFS workshop held August 5. 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.

ARB staff requested comments on several presentations made during the workshop that provided additional concepts on some of the outstanding program components. Unfortunately, the presentations and subsequent Q&A periods did not provide sufficient details in many cases for us to respond in a definitive fashion. This continues to concern our companies since there is still a lack of demonstrable program feasibility. We are hopeful that additional workshops and meetings will be held in a timely fashion to continue working on this extremely complex regulation, although we still question the overall LCFS viability.

WSPA has provided in the attached, comments on:

- Confidentiality provisions,
- Compliance and reporting tool,
- New fuel pathways – procedures and guidelines,
- Future certification program,
- Credits for off-road electric transportation,
- Electricity – regulated party definition and credits,
- Credit trading issues, and,
- Fee schedule provisions.

Please let me know if you have any comments or questions, or contact my staff Gina Grey at 480-595-7121.

Sincerely,

Western States Petroleum Association's Comments on August 5 LCFS Workshop Issues

Confidentiality Provisions

ARB's treatment of data submitted through the LCFS reporting procedures raises concerns relating to possible disclosure of trade secrets and other confidential business information. Current regulatory language contains no provision for the designation of confidential information submitted to ARB in quarterly and annual reports, and only includes limited protection of confidential data submitted to ARB relating to development of new fuel pathways. It is critical that the LCFS regulation address protection of trade secret and confidential business information submitted to ARB by regulated parties.

"Trade secret" in the proposed LCFS regulation is defined in the same manner as the California Public Records Act ("CPRA"). *See* § 95486(e)(3)(C). The CPRA defines "trade secrets" as including, but not limited to "any formula, plan, pattern, process, tool, mechanism, compound, procedure, production data, or compilation of information which is not patented, which is known only to certain individuals within a commercial concern who are using it to fabricate, produce, or compound an article or trade or a service having commercial value and which gives its users an opportunity to obtain a business advantage over competitors who do not know or use it." Gov't Code § 6254.7.

Much of the information to be submitted to ARB in quarterly and annual reports, as well as data submitted to ARB in applications for new fuel pathways, clearly qualifies as "trade secret" under the CPRA. In addition, ARB regulations directly address how the agency must handle confidential business information submitted by regulated parties. *See* 17 CCR §§ 91010, 91011.

ARB regulations contain specific provisions relating to the treatment of confidential business information. While emissions data submitted to ARB is considered public information, the regulations specify that any person submitting information to ARB may designate information that is not emission data as confidential "trade secret." 17 CCR §§ 91010, 91011. ARB regulations also state that the State Board shall not disclose any such data submitted as confidential "trade secret". 17 CCR § 91011.

Protecting confidential business information, such as the data required to be submitted to ARB under the LCFS, is critical to protecting competitively sensitive business information that is unique to each regulated party, and that is known only to certain individuals in each company. Accordingly, WSPA recommends specific changes to the regulatory language, in order to safeguard the proprietary interests of the regulated parties, and to meet the legal requirements of the California Public Records Act and ARB regulations.

Competitive Information -- Quarterly and Annual Reporting

Much of the data required to be submitted to ARB in quarterly and annual reports is sensitive confidential business information that should be protected from public disclosure. For example, Table 3 on page A-32 of the Proposed LCFS Regulation Order requires regulated parties to submit sensitive information not generally known outside each individual company. This includes the amount of fuel or blendstock produced, the Carbon Intensity (CI) of the fuel or blendstock, and credits and deficits generated each quarter and each year.

The public release of this information would effectively disclose confidential business information to competitors of the regulated parties under the LCFS. The amounts of credits and deficits held by each company are considered extremely sensitive pieces of information in the fuel industry, and public disclosure could affect the credit and fuels markets in California. Even if the total amount of credits and deficits were not disclosed, the disclosure of the total volume of fuels and blendstocks in combination with the CI of each fuel or blendstock would reveal the amounts of credits or deficits held by each company.

Another concern with the quarterly and annual reporting is the use of the Compliance and Reporting Tool (CRT) to report compliance with the LCFS. In ARB's August 5, 2009 slides, the key features of the CRT include possible mass data uploads, and automated credit and deficit calculations, banking and tracking. These features raise concerns about the lack of any ability to mark data as confidential or trade secret in the CRT program, leading to inadvertent disclosures.

It is understandable that some of this information may be necessary for ARB to ascertain the effectiveness of the program. Clearly, ARB is trying to address the need to balance governmental transparency with the need for competiveness in the fuel industry, as ARB discussed in the LCFS Credit Trading Issues slide presentation on August 5, 2009.

Therefore, WSPA recommends that any public disclosure of the data submitted to ARB in quarterly and annual reports aggregate all data and de-identify the regulated parties, so as to protect confidential information contained in the reports. This is standard practice in the industry and in public reports prepared by the California Energy Commission (the "CEC"). *See* 20 CCR § 1370 (requiring all unaggregated data collected by the CEC through Petroleum Information Reports to be held in confidence). Also, the CRT program should allow for a user to designate sensitive information as confidential trade secrets in a contemporaneous and effective manner.

Accordingly, we suggest the following language be added to Reporting Requirements section 95484(c), as 95484(c)(6):

(6) Treatment of Trade Secret Information

(A) A regulated party that submits data in quarterly and annual compliance reports, as specified in sections 95484(c)(3) and 95484(c)(4) should identify any confidential data submitted as trade secret, and all such data shall not be considered public records; "trade secret" has the same meaning as defined in Government Code section 6254.7.

(B) ARB will aggregate all data gathered from the quarterly and annual compliance reports prior to public disclosure, so as to protect confidentiality of reporting parties. All regulated parties will be de-identified prior to public disclosure of any such data.

<u>New Fuel Pathways -- Protection of Method 2A and 2B Data Submittals</u>

Another area of concern is the limited protections for confidential business information submitted to ARB in applications for new fuel pathways. Section 95486(f)(2)(A) provides some protection of information identified as trade secret that is submitted in support of a proposed Method 2A or 2B fuel pathway.

However, the current protection of trade secrets in the LCFS regulation is inadequate, as section 95486(f)(2)(B) provides that once an application is approved, the CI values, associated parameters, and other fuel pathway-related information will be incorporated into the Lookup Table and made

public. This provision lacks any clear protections of trade secret and confidential business information that could be made public by incorporation into the Lookup Table.

As ARB is aware and the record of the LCFS rulemaking demonstrates, the development of new fuel pathways is a highly competitive field, where innovation and competition between producers of new fuels is closely linked to maintaining confidential business information. Indeed, one of the main objectives of the LCFS program is to provide strong incentives for innovation in the development of new fuels, which will require ARB to evaluate and approve new fuels pathways.

Based on past ARB programs with similar goals to promote innovation, it is ARB's intent to encourage innovators to disclose proprietary information to ARB on a confidential basis as early as possible in the development of new fuels and their associated production, transportation, storage and distribution technologies. Some of these fuels will be inextricably linked to the development of new vehicles capable of using the fuels, and information about the new vehicle techniques should be eligible for confidential treatment by ARB.

ARB recognizes this need. ARB's LCFS Credit Trading Issues slide presentation on August 5, 2009, noted that a major issue relating to disclosure of data is the need to protect the competitiveness among fuel producers in order to foster innovation that will lead to new fuel pathways. Data relating to new fuel pathways clearly qualifies as "trade secret" under the CPRA definition, as a formula, process, procedure, or production data "known only to certain individuals within a commercial concern." Gov't Code 6254.7(d). *See generally Masonite Corp. v. County of Mendocino Air Quality Management District*, 42 Cal. App. 4th 436, 446 (1996) (holding that information that would reveal "production data" qualifies as a trade secret under Govt. Code § 6254.7(d).).

It is critical that the provisions relating to the development of new fuel pathways assure the non-disclosure of confidential "trade secrets."

Therefore, WSPA suggests the following changes to the language in section 95486(f)(2), to assure that confidential data related to development of new pathways to compliance are properly treated as trade secrets:

(B) If the application is approved by the Executive Officer, the carbon intensity values, associated parameters, and other fuel pathway-related information obtained or derived from the application *not designated as confidential trade secret* will be incorporated into the Method 1 Lookup Table for use on a free, unlimited license, and otherwise unrestricted basis by any person.

(C) All information submitted to support a Method 2A or Method 2B pathway shall be aggregated and applicants will be de-identified, to protect confidentiality.

Compliance and Reporting Tool

WSPA is concerned about the timing of the availability of the "compliance and reporting tool". Reporting requirements begin in January 2010, and based on the current state of the tool, it appears there will not be a well-vetted product available for our use in time. Further, we want to emphasize that the tool should be simple, should have sufficient confidentiality protections built in, and should be just an accounting tool that aggregates quarterly data. In other words, companies should be able to use the tool as an accounting assist if they so desire, but there should be no requirement that any intermediate entries be made in between the required quarterly reports.

New Fuel Pathways - Procedures and Guidelines for Regulated Parties

Comments on Method 2A Application Process:

- The application should include sufficient data to allow staff to perform an uncertainty analysis (also applies to Method 2B).

- The application should include information on whether or not the proposed changes result in any compositional changes to the fuel and whether or not any such changes impact either greenhouse gas or criteria pollutant emissions when the fuel is burned.

- The document should specify that the energy content of the fuel should be based on lower heating value (pg. 5).

- The removal of the volume-based substantiality requirement for Method 2A modifications to fuels that are produced in total quantities less than 10 million gallons per year is a good idea. This will enable Method 2A changes for new fuels while they are still at the pilot scale, thereby encouraging innovation (pg. 6).

- The scientific defensibility requirement for Method 2A changes should be based specifically on only those CA GREET inputs being modified (pg. 6).

- CARB should reserve the right to determine the acceptability of journals for the purpose of establishing Scientific defensibility (also applies to Method 2B).

- The language of the last bullet on page 7 is not consistent with the regulations as currently written. It should be made clear that any use of the modified value before written approval is a violation. This includes PTD documentation and quarterly reports, not just the annual report (also applies to Method 2B).

Comments on Method 2B Application Process:

- The type of feedstock and feedstock production process should be added to the list of required descriptions (pg. 9).

- The application should include an assessment of the impact of scale on the pathway analysis. Staff should take scale differences into consideration in the determination of the appropriate carbon intensity value so as not to penalize commercial scale projects based on pilot or demonstration scale data. Staff should consider binning new pathways by production rate (e.g., 10-50 Mgpy, 51-100 Mgpy, and 101+ Mgpy).

Comments on Sections III and IV on Indirect Effects:

- It should be specifically recognized that diversion of a feedstock from its current use to the production of a fuel can create an indirect effect due to its replacement by some substitute. In addition, the substitute could possibly have a land use change impact associated with it.

- Table 1 contains a number of inaccuracies, including:

    1. Fossil CNG and LNG have no land use effects on carbon intensity.
    2. Fossil electricity has no land use effects on carbon intensity.
    3. Nuclear electricity has no land use effects on carbon intensity.
    4. Electricity derived from old solar, wind, and hydro has no land use effects on carbon intensity.
    5. Biomass electricity can have land use effects on carbon intensity.
    6. Hydrogen produced from fossil fuels has no land use effects on carbon intensity.
    7. Hydrogen produced via electrolysis has no land use effects on carbon intensity regardless of the source of electricity.

Future Certification Program

WSPA agrees that streamlining the process for making Method 2A and 2B changes will be beneficial to the program. However, such streamlining should involve enhancements to the procedures as outlined in the guidelines document, rather than eventual replacement of the guidelines document with some other process.

Under no circumstances should adoption of a certification program include the removal of the lookup table carbon intensity values from the LCFS regulations, as was suggested by staff at the August 5, 2009 Workshop. WSPA believes that the lookup table carbon intensity values must be an integral part of the regulations. The carbon intensity values of fuels and fuel components are the currency of the LCFS: all compliance determinations are based on these values. Investment decisions will be made based on these values, and changes to them will create the risk of stranded capital. Therefore, these values should be explicitly included in the regulation, the same way that the Predictive Model equations are included in the CaRFG regulations. Any permanent changes to these values should only be possible through a public rulemaking process.

In furtherance of the technology innovation goals of the LCFS, it is also important to recognize the need for flexibility, especially in the determination of carbon intensity values for novel fuel pathways that are critical to the success of the program. Such cases could perhaps be accommodated by either an expedited rulemaking process or a provision to grant temporary approval until the rulemaking process can be completed.

Credits for Off-Road Electric Transportation

- There needs to be a rigorous method to quantify electricity usage. The preferred option would be direct metering.

- The regulated party should be required to determine which fuel is being displaced – LPG, gasoline, or diesel. Also, if LPG is being displaced, would the credits estimates be based on the gasoline standard?

- Staff needs to develop appropriate EERs for electricity versus the fuel being displaced. This can have a substantial impact on the credits estimates since diesel engines are inherently more efficient than spark-ignited LPG and gasoline engines.

- There should be a requirement that entities wanting to claim credit identify whether a) they have moved into an alternative fuel due to existing federal, state or local requirements; and b)

whether they received any government funding/incentives (in which case they should not be able to claim credit).

Electricity - Regulated Party and Claiming a Credit

- The point of credit generation requires clarification. Slide 3 from the Workshop suggests that LCFS regulation allows credit generation by the load-serving entity, bundled charging infrastructure provider if applicable, owner of charging equipment if contract with electricity provider, and homeowner if there is a contract with the electricity provider. It is not clear who will decide which entity receives the credit for a kWh delivered as fuel and on what basis this decision will be made. Staff should provide greater details on this point.
- WSPA's members' CHP plants are barred by existing law from being "load serving entities" (LSEs) for this purpose. The ability of any party but the utilities to sell electricity to a party for fuel is barred by AB1X, Water Code section 80260. If the point of credit generation is placed at the LSE level, this barrier must be removed to expand competition.
- As discussed in our 30 day comments, ARB appears to be recommending the utilities be off the hook for direct-metering until 2015. Instead, WSPA believes direct-metering should be required to encourage installation of infrastructure. Since Advance Metering is being deployed by 2012, there's no apparent reason why it can't be deployed with a vehicle submetering option.
- A key issue has always been the generation mix that is assumed to serve the vehicles (e.g., renewable, coal, gas-fired). This issue is important, so ARB staff needs to address this further before the state moves forward.
- Related to 4, it could be argued that ARB may be double counting AB 32 reductions if ARB is relying on renewable generation in the resource mix. The RPS program, up to 33%, already has a Scoping Plan target, and that target is assumed to be separate from the LCFS target. If, however, the load forecast used in developing the GHG savings for the RPS program already assumed increased PEV penetration, there would be double counting. WSPA doesn't know how the forecast was developed, but assumes it was based on a forecast assuming some growth in PEVs. We request that ARB provide us with additional details.

Credit Trading Issues

What should the credit trading provision accomplish?

ARB should develop, through the LCFS regulations, a simple and workable credit market. Our members has read and heard varying versions of what ARB staff is suggesting.

Some have interpreted the existing regulations to indicate that ARB is attempting to do this by allowing credits that are generated in a compliance period to be traded before the end of the compliance period. Others heard at a workshop that credits be "submitted" in the quarterly report before trading.

In addition, some understand ARB wants to provide flexibility and supply of credits by incorporating the ability to buy and sell credits based on the projected credit balances for the compliance period. Others have heard ARB indicate that credits can only be traded after they are "submitted", meaning they can only come from prior compliance periods.

WSPA suggests the regulations should be revised to allow obligated parties to trade credits after a compliance period has ended to meet their obligation for that period. If ARB does not provide for this flexibility, then the supply of credits will always be lagging behind the market demand by one compliance period. This in turn could lead to higher credit prices and increased cost to obligated parties and consumers with no benefits.

What is ARB's Role in the LCFS Credit Market?

WSPA recommends that ARB should look at the U.S. EPA credit trading regulations for RFG Benzene credits, gasoline sulfur credits, motor vehicle diesel fuel sulfur credits, and MSAT II benzene credits when defining its role in the credit market. All of these existing credit markets function well and smoothly with minimal EPA involvement. In these programs, the EPA accounts for compliance by checking the reports submitted by buyers and sellers for consistency. Similarly, WSPA strongly recommends that ARB's role in the LCFS credit market be limited to compliance validation. ARB should not provide clearing services or facilitate trades.

ARB should also review the U.S. EPA credit trading regulations concerning invalid credits. To protect the buyers of credits, EPA regulations require that sellers must use their valid credits to meet their credit sales obligations before meeting their compliance obligation or use for banking (see CFR 80.67 (h)(3)(iii) "Where any credit transferor has in its balance at the conclusion of any averaging period both credits which were properly created and credits which were improperly created, the properly created credits will be applied first to any credit transfers before the transferor may apply any credits to achieve its own compliance"). WSPA also suggests ARB consider regulatory language requiring both obligated and non obligated parties that sell invalid credits to purchase valid credits or incur a deficit in order to replace any invalid credits that they sold to obligated parties.

In summary, ARB's involvement should be limited to:

1. Normal compliance checking of annual compliance reports
2. Normal compliance checking and matching of credit purchases and sales.

What trading data should ARB collect and what data must be protected in order to assure a sound credit trading market?

ARB should limit its trading data collection to annual reporting of:

1. Names of buyers and sellers of LCFS credits along with the number of credits and the vintage of the credits, and the transaction date. WSPA would support ARB's listing of the names and contact information of buyers and sellers (not identified as either) for those parties that voluntary choose to submit this information to CARB for posting.

2. ARB must limit data disclosure to industry aggregated data. Disclosure of LCFS credit market data in total market aggregate and industry aggregated level will provide sufficient information for parties to understand how well the LCFS market and the regulation is functioning. Company specific credit data such as balances, purchases/sales volumes and prices, and transaction partners is confidential business information and disclosure of company specific data could cause competitive issues and risk seriously disrupting the LCFS credit market.

To be clear, WSPA wants to state that there should be no reason for ARB to collect purchase/sell price information and we are opposed to this.

WSPA strongly suggests that ARB establish a working group of regulated parties and key stakeholders to develop clear rules for how to buy and sell LCFS credits at minimum administrative burden and cost. The system should build on existing credit trading programs such as the U.S. EPA Reformulated Gasoline Benzene credit, gasoline sulfur, and motor vehicle diesel fuel credit programs.

Fee Schedule Provisions

Due to the lack of any definitive information from ARB regarding a proposed fee schedule for the LCFS program, WSPA declines to comment on this subject at this time. However, WSPA expressly reserves the right to provide such comments once more information on any proposed fee schedule is forthcoming.

Without prejudice to the foregoing, WSPA notes the ARB Office of Climate Change is developing its own AB 32 administrative fee, currently scheduled for adoption by the Board in September. Before proceeding with a separate fee or charge related to LCFS regulatory work, the LCFS program staff and the Office of Climate Change need to provide clarity and certainty, at a minimum, that PYs and contracts associated with certification of new fuel pathways are not being included in the funding base for both fees.

Further, any fee associated with certification of new fuel pathways would need to comply with basic legal fee requirements, including reasonable nexus between the fee, the fee payer, and the funded regulatory activity, and a fair apportionment of the fee among fee payers.

Finally, it will be helpful to those providing comments on any LCFS fee proposal for the LCFS regulatory staff to provide an estimate of program costs (including PYs, contracts, and other costs) for pathway certification, other LCFS regulatory activity, and LCFS enforcement activity, for the current and any future fiscal years for which estimates are available.