Western States Petroleum Association
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Catherine H. Reheis-Boyd
President

April 25, 2012

Clerk of the Board
Air Resources Board
1001 I Street
Sacramento, CA 95814
Via e-mail to: http://www.arb.ca.gov/lispub/comm/bclist.php

Re: **Western States Petroleum Association — Comments on April 10, 2012 Proposed Amendments to the Low Carbon Fuel Standard Regulations**

Dear Clerk of the Board:

The Western States Petroleum Association (WSPA) hereby submits comments on ARB's proposed amendments to the Low Carbon Fuel Standard (LCFS), as made available for public review and comment on April 10, 2012 in accordance with Resolution 11-39 adopted by the Air Resources Board (ARB) at its December 16, 2011 hearing. WSPA is a non-profit trade association representing twenty-six companies that explore for, produce, refine, transport, and market petroleum, petroleum products, natural gas and other energy supplies in California and five other western states. Our members comprise the majority of the regulated parties under the LCFS program.

We understand that, at this time, ARB is soliciting comments only on those proposed changes that are reflected in the Modified Regulation Order included as Attachment 2 to the April 10, 2012 Notice of Availability of Modified Text (the "15-day package"). However, over the past several years, and most recently on December 15, 2011, WSPA has commented extensively on ARB's efforts to develop an LCFS, and has raised numerous significant legal and technical concerns with the rule. Many, if not most, of these concerns remain unresolved. WSPA respectfully requests that ARB address these issues at the earliest possible opportunity.

Despite the Ninth Circuit Court of Appeal's decision on April 23, 2012 to stay the District Court's orders and judgments in the ongoing LCFS litigation (see "Order" (Document 54), *Rocky Mountain Farmers Union v. Goldstene*, No. 12-15131), WSPA remains concerned that ARB released the current proposal during a period when the lower court's injunction against enforcement of the LCFS was in full force and effect. The United States District Court for the Eastern District of California determined that the LCFS violates the dormant Commerce Clause of the U.S. Constitution and enjoined

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enforcement of the LCFS regulation on December 29, 2011. "Order on RMFU Plaintiffs' Preliminary Injunction Motion" (Document 259), *Rocky Mountain Farmers Union v. Goldstene*, No. CV-F-09-02234 LJO DLB, E.D. Cal., December 29, 2011. Under the terms of the injunction, ARB was barred from enforcing the LCFS during the pendency of the litigation.

The merits of the District Court's decision have not yet been addressed by the Court of Appeals, and the constitutionality of the LCFS remains in question. Although the injunction is no longer in effect, it should be noted for the record that ARB proposed to impose substantial new enforcement-related requirements on regulated parties during a time when the injunction was in effect and enforcement actions of all types were prohibited by court order. WSPA believes that the proposed LCFS modifications were impermissible under the explicit terms of the injunction if for no other reason than that ARB relied on its enforcement authority in Health & Safety Code sections 39600, 39601, 38510 and 38560 in proposing them (*see* ARB Resolution 11-39, December 16, 2011). The ARB's power to regulate under the Health and Safety Code is synonymous with its power to enforce. *See* Health & Safety Code §§ 39600, 39601, 38510 (bestowing upon ARB the power to regulate, and "to do such acts as may be necessary for the proper execution of the power and duties granted to" it); *see also* Webster's New Basic Dictionary (to regulate: "to direct or control in agreement with rules and laws"). The proposed modifications to the LCFS thus constituted an impermissible use of ARB's enforcement authority which violated both the terms and the spirit of the injunction.

Finally, WSPA's submission of comments on this 15-day package should not be construed as conceding the legal validity of the current or any amended version of the LCFS at any time. WSPA also reiterates that it does <u>not</u> support any regulatory approach which differentiates crudes based on carbon intensity.

A. <u>ARB's proposed data submittal requirements are extremely broad, unreasonable and overly burdensome.</u>

In the 15-day package, ARB is proposing to adopt substantial and burdensome reporting requirements, including new quarterly marketable crude oil name (MCON) reporting requirements under Section 95484(a)(6)(C)(1), and new annual MCON reporting requirements under Section 95484(b)(4)(B). The effect of staff's proposal would not only be to initiate reporting of crudes and volumes for crudes that are not imported, but also to extend the reporting requirement down to detailed information from the field level. The proposed amendments are overly broad and burdensome, and would subject refiners to an unreasonable risk of inadvertent noncompliance as framed.

The data which ARB proposes to require refiners to submit fall into three categories which are not mutually exclusive:

1. Data which are publicly available, and are therefore available to ARB without reporting by refiners.
2. Proprietary data, which may not be available to refiners in order for them to satisfy the reporting requirements.
3. Data which are variable or otherwise not precisely known.

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Since some of the data that would be required is publicly available, ARB can obtain it without mandatory reporting by refiners. In fact, it appears that ARB may have access to several datasets that contain the information required by Section 95484(b)(4)(B) which can be purchased. In this instance, ARB should purchase the data rather than requiring refiners to obtain the data for them.

Much of the data that ARB is requesting falls into the second category (proprietary data) that is considered commercially valuable trade secret information by the producers. In the 15-day package summary, ARB states "Staff has determined that this information is not available in the public literature for all MCONs and believes the regulated parties are in the best position to provide the information." Precisely because the data is not available in the public literature, with much of it being crude producer proprietary data not necessarily available to the regulated parties (California refiners), it is unreasonable and unrealistic to require California refiners to submit this data. Stating that "…the regulated parties are in the best position to provide the information" is misleading, and continues to ignore the fact that California refiners are not in a position to compel oil producers across the world to provide and verify this data.

Refiners have no authority to compel the production and disclosure of proprietary information from crude producers around the world and cannot legitimately be penalized for the lack of voluntary disclosure of such proprietary information by third parties who are beyond ARB's jurisdiction. In particular, given that crude producers will now be aware of ARB's imposition of an obligation on the refiners to produce confidential or commercially sensitive information to ARB, it is foreseeable that the producers will be extremely reticent to provide any such information to regulated parties in the future. Further, refiners would be unable to verify that any information provided by third parties is complete or accurate.

Commercially sensitive information, such as trade secrets, and other confidential commercial information is routinely protected from unauthorized disclosure and dissemination. *See, e.g.,* S*tadish v. Sup.Ct. (So. Calif. Gas Co.)* (1999) 71 Cal.App.4th 1130, 1144–1145 (an owner of a trade secret has a privilege to refuse to disclose the secret, citing Evidence Code); Evidence Code § 1060 ("…the owner of a trade secret has a privilege to refuse to disclose the secret, and to prevent another from disclosing it….")[1]; Code of Civil Procedure § 2031.060(b)(5) (court may order that a "trade secret or other confidential research, development, or commercial information not be disclosed….". Nothing in AB 32 or elsewhere in the Health and Safety Code authorizes the inspection or copying of any writing or thing that is privileged or protected from disclosure by law or otherwise made confidential, or authorizes ARB to require that a regulated party obtain trade secret information from a third party for disclosure to ARB. Even assuming refiners were in possession of third party crude producer proprietary data, this data is confidential and/or likely protected from disclosure pursuant to written confidentiality agreements. Requiring disclosure of such information to ARB would subject refiners

[1] "Except as otherwise provided by statute, the provisions of this division apply in all proceedings. The provisions of any statute making rules of evidence inapplicable in particular proceedings, or limiting the applicability of rules of evidence in particular proceedings, do not make this division inapplicable to such proceedings." Evid. Code § 910; *see also* Gov. Code §§ 11349.1(a)(4); 11349(d) (regulations must be consistent meaning "in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law.").

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to potential contractual or other liability for disclosure of confidential and/or protected trade secret information. A rule which purports to require WSPA members to breach confidentiality obligations, or face imposition of penalties by ARB, is unlawful, arbitrary and capricious, and an abuse of discretion.

ARB's powers to obtain information are limited by law, to protect against oppression, undue burden or expense (i.e., compliance would be unreasonably difficult and expensive), among other burdens. *See* Code Civ. Proc. § 2031.060(b); Gov. Code §§ 11349.1(a)(4); 11349(d). The source of information here -- field level files and information maintained by third parties located around the world -- is not reasonably accessible to refiners located in California. Refiners may not lawfully be subjected to the extraordinary and unreasonable burden and expense that would result if they were forced to collect this information (even assuming it is not confidential or privileged). See Code Civ. Proc. § 2031.060(c). Refiners are under no obligation to create a compilation of any information that does not currently exist.

The unavailability of proprietary data has the potential to have a significant impact on the petroleum refining industry in California, since it could limit the population of crudes available to California refiners to those for which data are available. WSPA is very concerned about the potential marketplace distortions that ARB could create with such a policy.

Even if data are available, many items may be variable or otherwise uncertain to the extent that only approximations are possible. By contrast, the proposed regulations would make refiners responsible for reporting actual data, not approximations. Even worse, some of these approximations would have to be obtained from third (or even further removed) parties, making their verification by refiners difficult or impossible.

WSPA understands that data availability is a substantial concern in ARB's implementation and enforcement of the California Average system approved by the Board in December 2011. In fact, WSPA and the CEC have expressed this concern to staff throughout the Crude Screening Workgroup discussions as well as the December rulemaking. An ARB directive that refiners somehow produce such data is not a solution to the fundamental problem. The fact that much of the data that <u>are</u> available do not possess the necessary certainty to ensure regulatory compliance greatly compounds this disconnect. WSPA members cannot be required to report data to which we may not have access and cannot be held accountable for data of which we are not certain and cannot verify.

Specific examples of data uncertainty/complexity would be:

- Normal field maintenance would result in the percentage of crude from a given field for a MCON to vary from month-to-month,
- Commingling of crudes at loading ports would result in unknown field volumes to a vessel's cargo, and,
- Economics may result in a constant change in the diluent being used in a heavy crude oil during a quarter or reporting period.

WSPA believes that ARB's data needs would be better served by staff acquiring publicly available data outside of the regulations. ARB should also work with the CEC to explore potential data sources

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and to maximize the utility of those data that are available. Finally, WSPA strongly recommends that ARB more closely align the models to be used in the determination of the California Average and 2010 baseline with the data that are available. Moreover, it is mandatory that disclosure of electronically stored information, even if from a source that is reasonably accessible, be limited if it is possible to obtain the information from another more convenient, less burdensome or less expensive source. *Id*. § 2031.060(f). Thus, to the extent that some of the data sought by ARB is already publicly available, including several datasets available for purchase, ARB can and should obtain this information without mandatory reporting by refiners. Forcing California refiners to obtain this data for ARB represents an abuse of discretion since the refiners are in no better position than ARB to obtain this publicly available information.

For these reasons, WSPA recommends that the 15-day package annual reporting requirement revisions in Sections 95484(b)(4)(B)(2) and (3) regarding MCON and oil field data be deleted. The reporting requirement should be limited to Section 95484(b)(4)(B)(1) as follows:

> *"1. MCON designation, volume (in gal), and Country (or State) of origin for each MCON supplied to the refinery during the annual compliance period;*
> ~~*2. For each MCON identified in paragraph 1. above, the constituent field names and the percentage of the MCON supplied from each field. For each MCON that includes a non-crude diluent, the type of diluent (e.g. natural gas condensate, naphtha, etc.) and the percentage of diluent in the MCON.*~~
> ~~*3. For each field identified in paragraph 2. above, the total annual volume produced by the field, the percentage produced using thermally enhanced oil recovery (TEOR), the percentage produced using oil sands mining, and the percentage that is upgraded to synthetic crude oil.*~~*"*

B. <u>ARB's data submittal requirements are not sufficiently related to the October proposal to be adopted with only 15-day notice.</u>

Under the Administrative Procedure Act, any regulatory change proposed to be adopted using the 15-day notice and comment process must be "sufficiently related to the original text that the public was adequately placed on notice that the change could result from the originally proposed regulatory action." *See* Gov't. Code § 11346.8(c). In the current proposal, ARB has made very substantial, and very burdensome, changes to the annual reporting requirements that were previously adopted for section 95484(b)(4). These changes are impermissible because they are not "sufficiently related to the original text" that the public had adequate notice of this possible change.

The LCFS regulation originally required annual reporting of volume and "marketable crude oil name" (MCON) for all imported crude oil. ARB's changes to the annual reporting requirement proposed in October 2011 added reporting of crude oil produced in California using TEOR and non-TEOR methods. When the proposed changes came before the Board on December 11, 2011, ARB staff

proposed various additional regulatory changes ("Attachment B"), none of which related to annual reporting of crude supplied to a refinery. Board Resolution 11-39, adopting the proposed changes, included direction to ARB staff to take specified additional actions, but made no mention of possible additional substantive changes to the reporting requirement. The current proposal would completely replace the reporting requirements adopted in December with an obligation to report not just the volumes and MCON of oil delivered to a refinery, but also the field names and detailed field-specific information. These changes bear no relation whatsoever to the original text of the LCFS regulatory changes proposed in October 2011, and therefore may not be adopted with only a 15-day notice and comment period.

C. LCFS credit facilitator/broker "blind transactions"

The proposed provision that allows an LCFS credit facilitator/broker to conduct a "blind transaction" where the buyer's and seller's identities are not disclosed to each other at the time of the transaction may help protect confidential business information. However, this can make it harder to determine the legitimacy of purchased credits. ARB needs to build in safeguard provisions to ensure the validity of these LCFS credits.

D. Correction to Table 3. Summary Checklist of Quarterly and Annual Reporting Requirements

WSPA agrees with the proposed deletion of Section 95484(b)(3)(A)4 reporting requirements for imported petroleum intermediates, blendstocks, and finished fuel. This reporting requirement "category" also needs to be removed from "Table 3. Summary Checklist of Quarterly and Annual Reporting Requirements".

Thank you for the opportunity to submit these comments. If you have any questions, or to discuss these issues, please contact me or my staff person Gina Grey (480-595-7121).

Sincerely,

c.c. R. Corey ARB
M. Waugh ARB
J. Courtis ARB
J. Duffy ARB

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