



Western States Petroleum Association
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Catherine H. Reheis-Boyd
Executive Vice-President and Chief Operating Officer

April 24, 2009

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

**Re: Western States Petroleum Association Comments on the Air Resources Board
AB 32 Administrative Fee Regulation Draft Regulatory Language**

Dear Ms. Chang:

On April 20, 2009, the California Air Resources Board ("CARB") Office of Climate Change held a workshop to discuss revised Draft Regulatory Language for CARB's AB 32 Administrative Fee Regulation. This letter provides the comments of the Western States Petroleum Association ("WSPA") on the draft Administrative Fee Regulation language as presented at the Workshop.

WSPA is a non-profit trade organization representing twenty-eight companies that explore for, produce, refine, distribute 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 Americans, including Californians, continue to have reliable access to petroleum and other energy products through policies that are socially, economically and environmentally responsible.

As stated in our March 11, 2009 letter commenting on CARB's first workshop on the fees regulation (copy attached and incorporated herein by reference), WSPA agrees with the concept of a fair, economy-wide, prospective and transparent AB 32 Administrative Fee, provided that the fee is imposed to recover the reasonable costs of state AB 32 administrative activities related to the fee-paying entities.

WSPA's March 11 letter identifies five key characteristics for the fees regulation: the fee program should be broad-based and economy-wide; the fee program should be equitable; the fee should be emissions-based; program costs to be recovered by the fee should be reasonable,

direct, and prospective, with the actual costs accurately determined and documented, and transparent; and. the fee should be transparent to the ultimate GHG emitter.

Despite the changes made in the current draft of the regulation, CARB's conceptual structure for the administrative fee regulation and the draft regulatory language developed to implement that concept are fatally flawed. The current CARB draft contains none of the key characteristics we identified in our previous letter.

Those characteristics are reiterated in detail below.

The AB 32 Administrative Fee Regulation Must Be Broad-Based and Economy-Wide

The revised draft regulation continues to significantly miss achieving CARB's own objectives for the fee program – that it be fair, equitable, broad-based, transparent and simple. Although electricity importers have been added to the sectors that would be subject to the fee, the small selection of industries subject to the fee requirement still can hardly be considered “broad-based” or “economy-wide.” Similarly, while staff asserts that the revised draft now applies to 85% of the state's greenhouse emissions, this is still not an economy-wide approach.

The AB 32 Administrative Fee Regulation Must be Equitable

As stated in our previous comments, CARB's approach to the proposed Administrative Fee Regulation is not equitable, and even the inclusion of imported electricity and the other recent revisions did nothing to make it equitable.

The Administrative Fee Regulation would apply to only six of the many source categories that are or will be regulated under AB 32, and covers only 85% of the state's GHG emissions. Applying fee requirements to only a few source categories means that sources in those categories will bear all the implementation costs of CARB's AB 32 program, while other non-paying sectors of the economy are not burdened.

CARB staff believe that the entities subject to the fee regulation will be able to pass their costs on to their customers, so that the person or entity who ultimately combusts the fuel and is the actual GHG emitter will indirectly pay the fee as part of the price of its fuel. In this indirect manner, the CARB expectation is that the fee would then become equitable and broad-based.

However, in competitive markets for commodities such as transportation fuels, the presumption that costs such as the AB 32 administrative fee can simply be passed along to customers is false. It is market factors that determine the value of commodities.

Unless CARB establishes a specific mechanism for passing the fee along the chain of commerce to the ultimate customer, the fee is being paid by the entities specified in the draft rule, and cannot be considered equitable.

The AB 32 Administrative Fee Regulation Must Be Emissions-Based

As we previously commented, AB 32 requires that “the sources of greenhouse gases” regulated under AB 32 be the entities that pay the AB 32 administrative fee. Although the revised version of the draft fee regulation now makes “the reported emissions associated with coal combustion” subject to the fee, this change still does not make the rule emissions-based, when taken as a whole.

If CARB develops and includes in the regulation a specific mechanism to assure that the fee is passed on to the ultimate emitter, the fee could then be considered emissions-based and equitable. However, without such a mechanism, WSPA believes that the fee as proposed is not consistent with AB 32.

CARB Must Identify the Reasonable, Direct Program Costs to be Recovered by the Fee

The revised draft of the proposed fee regulation includes minor additional specificity regarding the costs that CARB intends to recover as part of the “required revenue.” CARB has not responded to any of the questions and issues we raised with respect to how CARB and other state agencies will actually identify the direct costs incurred in administering the reporting and emission reduction and compliance programs established by AB 32.

Despite repeated requests for AB 32 implementation cost information, no information or documentation has been provided by CARB.

AB 32 Fees Should be Transparent to Emitters

WSPA believes that all AB 32 fees and charges should be transparent to the ultimate fee payer (i.e., the entity responsible for release of the GHG emissions which were subject to the fee). This transparency is needed to help assure accountability and to send clear price signals to the regulated community. In our view, a fuel-based fee, imposed upstream of the ultimate consumer, cannot be transparent and so is the wrong approach to take in this regulation.

Other Issues

WSPA has identified our broad concerns with the regulation’s structure and CARB’s approach to assessment and collection of this fee. WSPA also has the following additional concerns with specific provisions of the revised draft of the fee regulation.

- **Inconsistent Handling of Renewables**
The revised draft regulation would subject oxygenates (which are renewable fuels) to the fee (§95201(a)(2)), but specifically excludes biodiesel and renewable diesel (§95201(b)(5) and (6)). WSPA suggests that all renewables should be treated similarly.
- **Reporting Tool Upgrade for Fee Reporting**
CARB’s GHG Mandatory Reporting Rule mandates a specific GHG emission calculation methodology for refinery GHG emissions from fuel mixture systems. In many refinery fuel systems, different fuel gases are blended prior to combustion. Generally, refinery vent gases are blended with natural gas and propane to assure a consistent fuel supply to refinery combustion devices. To prevent double collection of fees for natural gas (for which the fee is already collected upstream of the refinery) and inappropriate collection of fees for propane (which is exempt), CARB should revise the definition of refinery fuel gas and amend the reporting tool to ensure that refineries have the ability to eliminate emissions from propane and natural gas from the refinery mixed fuel gas emissions.

Additionally, if fuel quantities are intended to be reported using the reporting tool, the tool must be amended to allow appropriate entries.

- **Agency Costs for Defense of the Fee Regulation**

CARB has included in the scope of “Total Required Revenue” “any amounts required to be expended by CARB in defense of this article in court.” §95203(a)(3). WSPA believes it is both inappropriate and unlawful for CARB to include in a fee the costs of the agency’s defense of that fee. The statutes and court rules governing litigation provide ample opportunity for CARB to seek to recover its costs, and in some cases, attorneys’ fees, if it prevails on a challenge to the fee regulation. This provision should be removed from the proposed rule.

For all the reasons described above, WSPA continues to object strongly to the current administrative fee structure proposed by CARB. WSPA believes there is one or more possible administrative fee approaches that would be consistent with the principles described above.

WSPA is dedicated to continue working with CARB to develop a legally sound, reasonable and broad-based AB 32 Administrative Fee. We would be happy to meet with CARB staff to discuss such approaches.

Please feel free to contact me at this office or Michaelen Mason at (916) 498-7753 if you have any questions. We will contact your staff shortly to schedule a meeting to discuss further our perspectives and concerns.

Sincerely,

A handwritten signature in black ink, appearing to read "Catherine A. Boyd". The signature is fluid and cursive, with the first name "Catherine" written in a larger, more prominent script than the last name "Boyd".

cc: Mary Nichols
James Goldstene
CARB Office of Chief Counsel
Jon Costantino
Bruce Tutor
Jennie Blakeslee



Western States Petroleum Association

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Catherine H. Reheis-Boyd

Executive Vice-President and Chief Operating Officer

March 11, 2009

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

**Re: Western States Petroleum Association Comments on the Air Resources Board
AB 32 Administrative Fee Regulation Draft Regulatory Language**

Dear Ms. Chang:

On February 25, 2009, the California Air Resources Board ("CARB") Office of Climate Change held a workshop to discuss the Draft Regulatory Language for CARB's AB 32 Administrative Fee Regulation. This letter provides the comments of the Western States Petroleum Association ("WSPA") on the draft Administrative Fee Regulation language as presented at the Workshop.

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

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

California has taken a leadership role on climate change issues, and particularly the state's groundbreaking climate change legislation -- the California Global Warming Solutions Act of 2006 (AB 32). That means climate change regulatory activities occurring in California are being closely watched in Washington D.C. with regard to potential federal legislation and regulation.

As leaders in this area, we all must make sure that the regulatory program, including administrative fees, is done right the first time, since California is likely establishing the model for programs regionally as well as nationally.

WSPA agrees with the concept of a fair, economy-wide, prospective and transparent AB 32 Administrative Fee imposed to recover the reasonable costs of state's AB 32 administrative activities related to the fee-paying entities. However, we believe that the approach taken by CARB in developing the administrative fee regulation concept and the draft regulatory language developed to implement that concept are fatally flawed.

WSPA believes the state's AB 32 administrative fee program should have the following key characteristics: the fee program must be broad-based and economy-wide; the fee program must be equitable; the fee must be emissions-based; program costs to be recovered by the fee must be reasonable, direct, and prospective, with the actual costs accurately determined and documented, and transparent; and, the fee must be transparent to the ultimate GHG emitter.

CARB's proposal has none of these characteristics. Each characteristic is addressed in more detail below.

The AB 32 Administrative Fee Regulation Must Be Broad-Based and Economy-Wide

AB 32 authorizes CARB to establish "a schedule of fees to be paid by the sources of greenhouse gases regulated pursuant to [AB 32]." Health and Safety Code § 38597. This language proposes that the administrative fee regulation should cover all sources regulated under AB 32.

Such an approach would include sources subject to the mandatory GHG reporting regulation adopted in 2007 as well as sources in industry sectors that are identified in CARB's AB 32 Scoping Plan as slated for GHG emissions regulation. CARB itself has stated that its objectives for the AB 32 Administrative Fee Program include establishment of a program that is fair, equitable, broad-based, transparent and simple.

The draft regulation significantly misses achieving these objectives. CARB's regulatory concept and the text of the draft regulation propose to assess fees only from manufacturers and importers of four fuels (gasoline, diesel, coal and natural gas) and on process emissions from petroleum refineries and cement plants.

As indicated by CARB staff, this approach was taken in part for "administrative simplicity." In addition, the slides presented by CARB at the workshop spell out that the proposed fee would cover only about 75% of the state's greenhouse emissions.

WSPA believes the proposed administrative fee does not meet the legislative intent of AB 32 or CARB's stated objectives. And, it certainly cannot be reasonably described as "economy wide" or "broad-based" when it applies only to four fuels and to process emissions from just two source categories, and to only 75 % of statewide GHG emissions.

We note in particular that the proposed administrative fee would not apply to electricity importers, despite AB 32's express inclusion of GHG emissions from imported electricity in the definition of "statewide greenhouse gas emissions."

The AB 32 Administrative Fee Regulation Must be Equitable

AB 32 authorizes CARB to adopt "a schedule of fees to be paid by the sources of greenhouse gas emissions regulated pursuant to [AB 32]." AB 32 also specifies that the Scoping Plan, which includes the administrative fee regulation, "take into account the relative contribution of each

source or source category to statewide greenhouse gas emissions.” Health and Safety Code § 38561(e).

Court decisions on regulatory fees and various provisions of AB 32 support the concept that any fee must be equitable. For example, in *Sinclair Paint Co. v. State Bd. of Equalization* (1997) 15 Cal.4th 866, the California Supreme Court reviewed and upheld a fee that was based on paint manufacturers’ market share.

In contrast, in *California Farm Bureau Federation v. California State Water Resources Control Board* (Jan. 17, 2007, Third Appellate Dist., C050289; Petition for Review pending), the Court of Appeals rejected a fee program that applied to only 40% of the facilities regulated under a program of the State Water Resources Control Board (“State Board”).

The court determined that the State Board had failed to demonstrate “the basis for determining the manner in which costs are apportioned, so that charges allocated to a payor bear a fair or reasonable relationship to the payor’s burden on or benefits from the regulatory activity.” *Id.*, at 40. Consequently, imposing a fee on only one category or a few categories of GHG sources would not result in a regulation that is “equitable.”

CARB’s approach to the proposed Administrative Fee Regulation is not consistent with these concepts. The Administrative Fee Regulation would apply to only six of the many source categories that are or will be regulated under AB 32, and covers only 75% of the state’s GHG emissions.

Applying fee requirements to only a few source categories means that sources in those categories will bear all the costs of CARB’s AB 32 program, while other non-paying sectors of the economy are not so burdened.

One specific example of inequity in the administrative fee proposal is the situation related to transportation fuels. CARB’s workshop presentation on the proposed administrative fee indicated that about 50 to 60% of the total fee revenue would be paid by manufacturers and importers of transportation fuels. However, the only Scoping Plan measure related to transportation fuels is the Low Carbon Fuel Standard (“LCFS”).

While CARB has not provided any information about its AB 32 implementation costs, CARB’s costs for developing and eventually implementing the LCFS cannot possibly be 50 to 60% of the total AB 32 administrative costs. As a result, this aspect of the proposal would unfairly burden the transportation fuels sector.

Inclusion of all AB 32-regulated sources in the fee schedule would be the first step to an equitable administrative fee program.

For example, the mandatory GHG emissions reporting regulations include emissions reporting from “sources or categories of sources that contribute the most to statewide emissions.” CARB’s AB 32 Scoping Plan must “take into account the relative contribution of each source or source category to statewide greenhouse gas emissions...”

When it adopts emission reduction measures under AB 32, CARB must “consider the significance of the contribution of each source or category of sources to statewide emissions of greenhouse gases.” Thus, the most significant GHG emission source categories are likely to be

covered by the reporting regulation, the Scoping Plan, and/or the eventual GHG emission control requirements, providing numerous sources for inclusion in a broad-based fee schedule.

The AB 32 Administrative Fee Regulation Must Be Emissions-Based

AB 32's language requiring that any adopted schedule of fees is "to be paid by the sources of greenhouse gases regulated pursuant to this division..." requires that CARB's administrative fee schedule apply to sources of greenhouse gas emissions.

Clearly, process GHG emissions from refineries and cement plants would meet this criterion. However, manufacturing or importing the four fuels covered by the proposed fee regulation (gasoline, diesel, coal and natural gas) does not represent a source of greenhouse gas emissions.

Fuels in and of themselves are not "sources of greenhouse gases." The "source" of GHG emissions related to use of these fuels is the facility or equipment in which the fuel is combusted. Combustion clearly does not occur at the producer/importer level as used by CARB in the proposed regulation, so fuel producers and importers cannot be considered "sources of greenhouse gas emissions."

We believe that in order for CARB to deliver a fee regulation that meets the stated objectives of fairness, equity, broad-base, transparency and simplicity, and that meets the legislative intent, the regulation must begin with the presumption that the fee should be levied as directly as possible on those responsible for the emissions – in other words, as close as possible to the point of actual GHG emissions.

If CARB believes that it would be administratively difficult to levy a fee directly on emitters, instead of attempting to assess the fee at a different point in the chain of commerce (i.e., applying the fee farther upstream), CARB must consider other fee collection methods.

CARB Must Identify the Reasonable, Direct Program Costs to be Recovered by the Fee

In its workshop presentation on the proposed administrative fee regulation, CARB indicated that the AB 32 "revenue requirement" (i.e., the amount of state costs that the fee is intended to recoup) will be determined from "AB 32 expenditures budgeted for Fiscal Year for all State agencies based on approved State budget."

In WSPA's view, this top-down budget approach is an inadequate and inappropriate methodology for determining the revenue needs for the fee program. We believe that CARB must instead identify the direct costs incurred in administering the reporting and emission reduction and compliance programs established by AB 32.

Despite repeated requests for AB 32 implementation cost information, no information or documentation has been provided by CARB.

Following are examples of the many unanswered questions regarding CARB's AB 32 costs:

- How are activities of CARB and other state agencies determined to be AB 32 related?
- Is any effort made to identify costs that are related to "sources of greenhouse gas emissions regulated" under AB 32? If so, how?

- Are the costs associated with implementation of the Governor's Executive Order S-13-08 (regarding California's "Climate Adaptation Strategy"), or any other climate change adaptation-related costs, included in determining the amount of the proposed fee?
- Do the identified agency costs include the costs of any agency activities that are not related to the proposed affected entities (i.e., emissions from combustion of the four listed fuels or refinery and cement plant process emissions)?
- How do CARB and other agencies assure that their AB 32-related costs are “reasonable?”

There is ample precedent for a cost-based approach. For example, air pollution control and air quality management districts carefully identify and calculate stationary source-related program costs in the process of identifying the district costs to be recovered through stationary source permit fees.

Due to the scope of AB 32, and of California’s climate change activities generally, the budget-based approach proposed by CARB could easily result in CARB’s imposition of fees to recover the costs of agency activities that are not directly related to “the sources of greenhouse gas emissions” regulated under AB 32.

In addition to CARB’s anticipated future costs, the draft administrative fee regulation would include in the administrative fee an amount intended to provide funds for repayment of AB 32 program startup loans made to CARB and CalEPA from the Motor Vehicle Account, the Air Pollution Control Fund, and other state accounts. These loans are estimated by CARB to total approximately \$57 million, and their repayment is proposed to occur over three years.

A regulation allowing collection of funds in excess of current program needs, such as the proposal to collect fees for past agency activities that were otherwise funded, raises serious concerns that the charge is in reality a tax rather than a fee. Apportionment of the costs of the regulation in a manner unrelated to the burden of the regulation also makes the charge more like a tax.

When some regulated parties are asked to pay for regulation of others who are not subject to the charge (as is the case here), the charge becomes a pure revenue measure rather than a means of paying for a self-contained regulatory program. Where the charge is apportioned on the ability to pay, ease of collection, or likelihood of compliance, its purpose is to raise revenue rather than regulate.

The regulated entity is not paying for the burden it creates or the cost of regulating its own activities. Instead, it is serving a more general governmental purpose of subsidizing a program for the general welfare. In short, the regulated entity is paying a tax.

WSPA’s position is that if for any year CARB sets the AB 32 administrative fee at a level to repay the purported “loan” from the Motor Vehicle Account or to replenish previous Air Pollution Control Fund monies, this charge is a tax, not a fee.

Similarly, any program fee request for the current fiscal year that is not imposed on all who are subject to the Scoping Plan violates AB 32 mandates, is under-inclusive and is an improper tax, not a fee.

AB 32 Fees Must be Transparent to Emitters

CARB's approach to the AB 32 Administrative Fee Regulation would impose the administrative fee in a manner that in many cases is far upstream of the actual point of GHG emissions. If the fee payer then simply includes the fee as part of the cost of fuel sold to those downstream in the supply chain, the administrative costs of AB 32 implementation will never be clear to the ultimate GHG emitter - the source or individual that actually combusts the fuel and thereby releases CO2 to the atmosphere.

This is in direct contrast to most, if not all, other environmental fee programs, under which the fee is imposed directly on the actual emitter/discharger, who can then see directly the costs for which it is responsible.

If CARB is assuming that administrative fee costs imposed upstream on fuel manufacturers and importers will be passed on to the ultimate fuel user in a way that clearly identifies the administrative fee component of the fuel price to the consumer, we would appreciate an explanation as to how such a process would work.

WSPA believes that all AB 32 fees and charges should be transparent to the ultimate fee payer (i.e., the entity responsible for release of the GHG emissions which were subject to the fee) in order to help assure accountability and to send clear price signals to the regulated community. In our view, a fuel-based fee imposed upstream of the ultimate consumer, will not be transparent.

For all the reasons described above, WSPA strongly objects to the current administrative fee structure proposed by CARB.

However, WSPA believes that one or more possible administrative fee approaches would be consistent with the principles described above. We are dedicated to continue working with CARB to develop a legally sound, reasonable and broad-based AB 32 Administrative Fee, and would be happy to meet with CARB staff to discuss such approaches.

Please feel free to contact me at this office or my staff Michaelen Mason at (916) 498-7753 if you have any questions. We will contact you shortly to schedule a meeting to discuss further our perspectives and concerns.

Sincerely,



cc: Mary Nichols
James Goldstene
CARB Office of Chief Counsel
Jon Costantino
Bruce Tutor
Jennie Blakeslee