



**Western States Petroleum Association**

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**Catherine H. Reheis-Boyd**

Executive Vice-President and Chief Operating Officer

February 13, 2009

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

**Re: Western States Petroleum Association Comments on the Air Resources Board  
January 27, 2009 Concept Workshop on AB 32 Administrative Fee Regulation:**

Dear Ms. Chang:

On January 27, 2009, the California Air Resources Board ("CARB") Office of Climate Change held a workshop on CARB's AB 32 Administrative Fee Regulation Concept. This letter provides the comments of the Western States Petroleum Association ("WSPA") on the concept for the Administrative Fee Regulation 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 petroleum products through policies that are socially, economically and environmentally responsible.

WSPA does not disagree with adoption of a fair, economy-wide, prospective and transparent AB 32 administrative fee to recover the reasonable costs of state AB 32 administrative activities related to the fee-paying entities. However, we are disappointed that CARB did not present a concrete proposal at the workshop. We are also disappointed with the conceptual approach generally described at the Workshop.

While WSPA is dedicated to working with CARB in development of this fee program, due to the lack of detail we can offer only general comments, but will identify many of the significant issues that need to be addressed and questions that remain unanswered.

Applicability of AB 32 Administrative Fees Must Be Broad-Based, Equitable and Emissions-based

In describing the administrative fee concept, CARB staff characterized the proposed fee concept as “economy-wide.” However, staff then stated that the fee would only be imposed on four fuels (gasoline, diesel, coal and natural gas) and on process emissions from petroleum refineries and cement plants.

WSPA believes the proposed fee cannot be reasonably described as “economy wide” or “broad-based” when it applies only to these four fuels and to process emissions from just two source categories.

CARB has stated that the objectives for the AB32 fee program should include that it is fair, equitable, broad-based, transparent and simple. The AB32 statute requires that the fee should be “paid by the sources of greenhouse gases regulated”.

Therefore, we believe a program that imposes a fee only on select sectors based on their use of select fuels does not meet the stated objectives or the legislative intent of AB 32. While WSPA understands the need to attempt to balance the objectives of equity and administrative ease, we believe the current CARB proposal significantly misses achieving this balance.

AB 32 requires that administrative fees be equitable

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 fee schedule attempts to cover all sources regulated under AB 32. This 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.

We believe that in order for CARB to deliver a fee regulation that meets the stated objectives of fairness, equity, broad-based, transparent and simple 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 – as close as possible to the point of GHG emissions. If there is difficulty levying a fee directly on emitters, instead of looking for a different point to levy the fee (ie going upstream), CARB should consider other fee collection methods.

For example, we believe that a fee program should start by imposing a fee on all those required to report emissions under the AB 32 reporting rules. Second, in order to capture emissions from transportation fuel, a fee should be imposed on fuel users.

Third, a similar user fee could be imposed on those who are below the reporting threshold such as small commercial/industrial and residential natural gas users. Fourth, other means should be investigated to allow the fee to cover as close to 100% of state GHG emitters as is practical.

If only one or a few categories are singled out for the AB 32 fee schedule, 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. AB 32 fees should be borne equitably over all sectors and sources within sectors.

### Revenue Needs – CARB Must Identify Reasonable, Specific and Direct Program Costs

As declared by Speaker Nunez in his August 31, 2006 Letter of Legislative Intent (copy attached), CARB must identify the direct costs incurred in administering the reporting and emission reduction and compliance programs established by AB 32. However, no information or documentation has been provided to the public that would fulfill this requirement.

In fact, we believe there are still many unanswered questions:

- How are CARB's AB 32 "revenue needs" determined?
- How are activities of CARB and other state agencies determined to be AB 32 related?
- Are the costs associated with implementation of the Governor's Executive Order S-13-08 (regarding California's "Climate Adaptation Strategy"), or any other adaptation-related costs, included in determining the amount of the proposed fee?
- How are the costs of those agency activities determined?
- 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)?

To begin addressing these concerns, WSPA suggests the following steps should be taken. CARB staff should:

- Go through the Measure Development Matrix (presented during the January 29, 2009 Scoping Plan Workshop) and identify those measures whose development and administration costs are intended to be recovered by the administrative fee, and identify the PY's involved in developing and administering those measures;
- Review different options for fee payment that include a reasonable nexus between the regulatory activity (expressed in terms of burdens imposed and benefits conferred) and the fee payer; these options need an equitable apportionment of the fee among the fee payers; and,
- Develop and publicly release the underlying data on the AB 32 PYs, and the measures and other AB 32 administrative activities whose costs are to be covered by the administrative fees.

### AB 32 fees should be transparent to consumers

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 subject to the fee). In our view, a fuel-based fee, imposed somewhere upstream of the ultimate consumer, cannot be transparent.

### AB 32 Fees Must Not Be Retroactive

At the Concept Workshop, CARB staff stated that the agency intends to include in the AB 32 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 were said to total approximately \$57 million, and their repayment is proposed to occur over three years.

WSPA's view is that if for any year CARB sets the AB 32 fee at a level to repay the loan from the Motor Vehicle Account or replenish previous Air Pollution Control Fund monies, the funds repaid would either be used by the DMV to carry out the provisions of the Vehicle Code and any other laws related to vehicles or the use of highways, in the case of the Motor Vehicle Account. Or, the funds would be used for non-AB 32 air pollution control activities under Division 26 of the Health and Safety Code, in the case of the Air Pollution Control Fund.

In either situation, the fees collected under AB 32 fee authority but used to repay or replenish another account would not be used for the "purposes of carrying out" AB 32, as required by the AB 32 fee authority, even if those funds were initially deposited into the Air Pollution Control Fund. Therefore, such fees are not authorized under AB 32.

Similarly, the additional revenue would be an improper tax because such revenue would exceed the cost of administering AB 32 for that year and would be levied for an unrelated revenue purpose.

For these reasons, any CARB AB 32 charges in the future that are in excess of the revenue required to administer AB 32 in any given fiscal year, and are not used for the purposes of carrying out AB 32, will constitute an unlawful and unauthorized tax.

#### Other Issues and Questions

As noted above, the lack of detail in the Fee Regulation Concept raises numerous issues and questions. WSPA respectfully requests that CARB address these issues when it releases the proposed administrative fee regulation:

- AB 32 requires that CARB consider and address GHG emissions from the generation of electricity imported into the state. However, the fee regulation concept does not address electricity generation in state or out of state. This inequity should be addressed.
- The fee regulation concept does not appear to provide for imposing any fees on emissions of GHGs other than CO<sub>2</sub>. Does CARB intend to recover its administrative costs related to regulation of these emissions from the AB 32 fee regulation?
- Please explain the decision to only impose a fee on petroleum-based transportation fuels, rather than all transportation fuels that are 'sources of greenhouse gas emissions' such as ethanol and biodiesel. Given that these fuels are the ones on which a benefit is conferred by the Low Carbon Fuel Standard, one might argue that a fee exclusively on these fuels to cover the cost of development of the LCFS would be legally defensible.
- As described in the Concept Workshop, the proposed AB 32 administrative fee would in some manner be imposed "upstream" on the four specified fuels. Where in the chain of commerce would the fee be imposed on each of the four fuels, and how would that work in practice?

- WSPA is concerned that the proposed fee concept would result in some emissions being subject to the fee twice. How will refinery process emissions be determined, and how will those emissions be distinguished from emissions due to refinery combustion of fuel subject to the fuel fee?
- To ensure that the fee remains equitable, emissions-based, and connected with reasonable direct program costs, WSPA strongly urges CARB to include a sunset provision in the fee regulation, so that the fee will expire unless CARB has undertaken a new fee rulemaking to reconsider all elements of the fee. This review and reauthorization could be performed in connection with the five-year Scoping Plan update required by AB 32.

WSPA appreciates the opportunity to comment on the AB 32 Administrative Fee Regulation Concept Workshop. Please feel free to contact me at this office or Michaelen Mason of my staff at (916) 498-7753

Sincerely,

A handwritten signature in black ink, appearing to read "Catharine A. McInerney-Boyd". The signature is fluid and cursive, with the first name being the most prominent.

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