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Arnold Schwarzenegger
Governor

January 11, 2008

Mr. Joe Sparano, President
Western States Petroleum Association
1415 L Street, Suite 600
Sacramento, California 95814

RE: PETITION TO RECONSIDER THE CALIFORNIA AIR RESOURCES BOARD'S
APPROVAL OF THE 2007 AMENDMENTS TO THE PHASE 3 CALIFORNIA
REFORMULATED GASOLINE REGULATIONS (CARFG3)

Dear Mr. Sparano:

On August 10, 2007, the California Air Resources Board (ARB or Board) received the Western States Petroleum Association's (WSPA) request for reconsideration (hereinafter, "Petition to Reconsider" or "Petition") of ARB's June 14, 2007 approval of various amendments to the CaRFG3 regulations. On August 15, 2007, October 11, 2007, November 15, 2007, and December 4, 2007, WSPA extended ARB's response to the Petition to October 15, 2007, November 15, 2007, December 4, 2007, and January 10, 2008, respectively. In the meantime, ARB staff and management held numerous meetings with WSPA to clarify WSPA's concerns and to discuss possible options. Based on these discussions, the rulemaking documents, and rationale provided in the Petition to Reconsider, this letter is to notify you that ARB has denied the Petition to Reconsider. However, as discussed below, ARB staff is committed to working with WSPA and the California Energy Commission (CEC) to ensure that the CaRFG3 regulations are implemented appropriately and to consider the interplay between the final regulation and the Low Carbon Fuel Standard (LCFS).

California Government Code section 11340.7(c) allows any interested person to request reconsideration of:

[A]ny part or all of a decision of any agency on any petition submitted. The request shall be submitted in accordance with Section 11340.6 and include the reason or reasons why an agency should reconsider its previous decision no later than 60 days after the date of the decision involved. The agency's reconsideration of any matter relating to a petition shall be subject to subdivision (a).

The energy challenge facing California is real. Every Californian needs to take immediate action to reduce energy consumption. For a list of simple ways you can reduce demand and cut your energy costs, see our website: <http://www.arb.ca.gov>.

California Environmental Protection Agency

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The Board may delegate any duty it deems appropriate to its Executive Officer (Health and Safety Code [H&SC] section 39515(a)). Moreover, the Board is conclusively presumed to have delegated any of its powers to the Executive Officer unless it has expressly reserved that power to itself (H&SC section 39516). The Board has not expressly reserved the power to act on rulemaking petitions. Therefore, it is appropriate for me to respond to WSPA's Petition to Reconsider, pursuant to my delegated authority.

I am denying WSPA's Petition to Reconsider for the following reasons summarized below and detailed in the enclosure to this letter.

ARB has longstanding authority to regulate motor vehicles and motor vehicle fuels to achieve the maximum degree of emission reduction possible from vehicular and other mobile sources in order to accomplish the attainment of the state standards at the earliest practicable date. As such, it is the Board's responsibility to determine the most effective approach to achieving this mandate. The Board's recent action required the refiners to mitigate permeation emissions beginning January 1, 2010, with an option for an alternative emissions reduction plan (AERP). The AERP sunsets January 1, 2012. The Board's action recognizes the need to expeditiously mitigate the permeation emissions while allowing refiners adequate time to make necessary refinery modifications.

The Board has made the appropriate findings for necessity, cost-effectiveness, and technological feasibility for the amendments, including the AERP and the compliance timelines.

The AERP does not unfairly penalize producers. It is an alternative means of compliance that preserves the emission reductions needed to mitigate the permeation emissions increases that result from ethanol blends.

ARB did not deny any interested party a fair opportunity to be heard. In addition, throughout the development of the proposed amendments, ARB communicated and coordinated with the CEC.

The 2007 CaRFG3 amendments were intended to implement H&SC section 43013.1 and are independent from the future LCFS. However, if there are any inconsistencies between the two programs, ARB will rectify them as part of our rulemaking for the LCFS.

ARB staff are committed to ensuring that we address a number of the concerns that WSPA has raised in the context of recent discussions. Specifically, we are committed

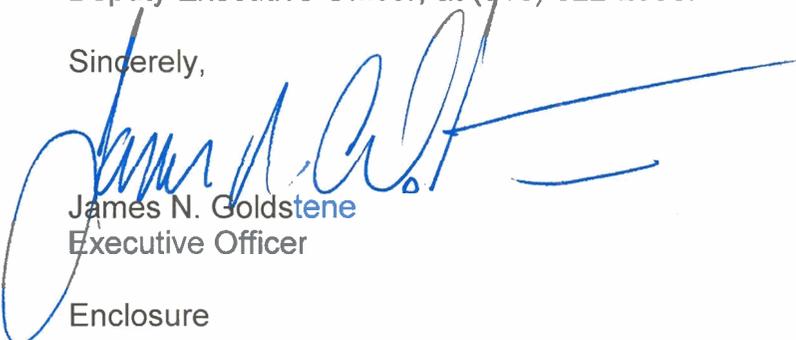
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to working with WSPA and the CEC to identify and resolve any issues associated with the logistical implementation of the amendments. These potential issues include, among others, supply implications, product fungibility, and any outstanding off-road permeation emission increase issues. To facilitate that effort, I have asked Bob Fletcher, Chief, Stationary Source Division, to convene a meeting of appropriate ARB, CEC, and WSPA staff as soon as practical to discuss these issues. In addition, I have asked Mr. Fletcher to report back to me no later than March 1, 2008, regarding the analysis and timeframes that will be undertaken to address WSPA's concerns.

In addition, as indicated in the adopting resolution, we are committed to working with WSPA on meeting the requirements of the California Environmental Quality Act for those producers that must make refinery modifications.

If you have any questions or comments, please contact Michael H. Scheible, Deputy Executive Officer, at (916) 322-2890.

Sincerely,



James N. Goldstene
Executive Officer

Enclosure

cc: Mary D. Nichols
Chairman

Michael H. Scheible
Deputy Executive Officer

Bob Fletcher, Chief
Stationary Source Division

ENCLOSURE

Response to the Western States Petroleum Association's Petition to Reconsider the California Air Resources Board's Approval of the 2007 Amendments to the Phase 3 California Reformulated Gasoline Regulations

The Western States Petroleum Association (WSPA) lists the following reasons why it believes the Air Resources Board (ARB or Board) should approve the Petition to Reconsider. The ARB staff response to each reason is addressed separately below.

1. WSPA Position: Government policies – not refiners – are responsible for the permeation and other emissions associated with adding ethanol to gasoline. WSPA contends that “flawed government policies have required the addition of ethanol to gasoline.” Therefore, ethanol-induced permeation “is a shared responsibility with the ethanol and auto industries, if not others.” As a result, WSPA contends that it “is inequitable to impose an infeasible compliance period for any refiners while forcing such companies to pay for an AERP to offset those emissions.”

ARB Response: We do not agree that refiners should not be responsible for taking steps to mitigate permeation emissions because of flawed government policies. As discussed below, the government policies have a reasonable scientific basis. In addition, the ARB has longstanding legislative authority to “endeavor to achieve the maximum degree of emission reduction possible from vehicular and other mobile sources in order to accomplish the attainment of the state standards at the earliest practicable date.” (Health and Safety Code [H&SC] section 43018(a).) As such, it is the Board’s responsibility to determine the most effective approach to achieving this mandate. The Board’s recent action required the refiners to mitigate permeation emissions beginning January 1, 2010, with an option for an Alternative Emissions Reduction Plan (AERP) that sunsets January 1, 2012. This action recognizes the need to expeditiously mitigate the permeation emissions and allows refiners adequate time to make necessary refinery modifications.

In addition, the government policy related to the use of oxygenates in fuels has a substantial basis. Both the U.S. Environmental Protection Agency and the Board required oxygenates because of the scientific determination that there were air quality and other benefits as determined during the respective rulemakings. Neither WSPA nor any of its members challenged those scientific findings. This basis is illustrated in the following discussion.

The Phase 2 California Reformulated Gasoline (CaRFG2) regulations, approved in 1992, set specifications for eight fuel properties: sulfur, aromatics, oxygen, benzene, 50 percent distillation temperature, 90 percent distillation temperature, olefins, and Reid vapor pressure. To comply with the oxygen content requirement, producers chose to use MTBE. Soon after CaRFG2 implementation, the presence of MTBE in groundwater began to be reported. An investigation and public hearings were conducted resulting in the issuance of Executive Order D-5-99 on March 25, 1999. The Executive Order directed the phase-out of MTBE in California’s gasoline. In response, the Board

approved the Phase 3 California Reformulated Gasoline (CaRFG3) regulations in December 1999, and amended them in July 2002.

In general, oxygenates such as MTBE and ethanol are used in gasoline to reduce the exhaust emissions of hydrocarbons and carbon monoxide and improve the octane rating. (ISOR page iv.) As indicated, ARB is mandated to expeditiously achieve the maximum degree of emission reduction possible from vehicular and other mobile sources. Furthermore, H&SC section 43830.8(a) provides, "The state board may not adopt any regulation that establishes a specification for motor vehicle fuel unless that regulation, and a multimedia evaluation conducted by affected agencies and coordinated by the state board, are reviewed by the California Environmental Policy Council established pursuant to subdivision (b) of Section 71017 of the Public Resources Code." "A multi-media evaluation was completed in January 2000 for California reformulated gasoline ethanol blends up to 10 percent." (Staff Member Cayabyab, Tr. at page 17.) To date, no oxygenate other than ethanol has completed a multimedia evaluation. (ISOR, page 6; Division Chief Fletcher, Tr. at page 30.)

Therefore, only ethanol has been evaluated for any significant adverse impact on public health or the environment, including emissions of air pollutants, including ozone forming compounds, particulate matter, toxic air contaminants, and greenhouse gases; contamination of surface water, groundwater, and soil; and disposal or use of the byproducts and waste materials from the production of the fuel. (H&SC section 43830.8(c).) Thus, the government policy is not flawed.

During the 1999 public hearing, the Board recognized that permeation emissions from ethanol in gasoline may be an issue and directed the staff to investigate with the understanding that additional modifications may be required. Through a co-funded research study with the Coordinating Research Council, the permeation emissions were quantified. This led ARB staff to propose the 2007 Amendments to the CaRFG3 regulations. (ISOR pages iv-v). The modifications were required in order to ensure that regulations adopted pursuant to Executive Order D-5-99 maintain or improve upon emissions and air quality benefits achieved by the Phase 2 California reformulated gasoline regulations (CaRFG2) as of January 1, 1999 (H&SC section 43013.1). As such, the Board has taken reasonable actions to expeditiously mitigate the permeation emissions and comply with State law requirements.

2. WSPA Position: WSPA contends that the amendments fail to satisfy the necessity criteria in Government Code section 11349.1(a) because the record fails to demonstrate evidence to support the two-year compliance schedule or the Alternative Emission Reduction Plan (AERP).

ARB Response: The 2007 amendments to the CaRFG3 regulations meet the necessity standard because they implement H&SC section 43013.1(b)(1). Support for this determination is provided below.

In order to meet the "necessity" standard of Government Code section 11349.1 the record of the rulemaking proceeding shall include:

- (1) A statement of the specific purpose of each adoption, amendment, or repeal.
- (2) Information explaining why each provision of the adopted regulation is required to carry out the described purpose of the provision. Such information shall include, but is not limited to, facts, studies, or expert opinion. When the explanation is based upon policies, conclusions, speculation, or conjecture, the rulemaking record must include, in addition, supporting facts, studies, expert opinion, or other information. An "expert" within the meaning of this section is a person who possesses special skill or knowledge by reason of study or experience which is relevant to the regulation in question. (Title 1, California Code of Regulations section 10(b).)

Indeed, the rulemaking documents identify the specific purpose of the 2007 CaRFG3 amendments. The proposed amendments are generally designed to address the emissions impacts associated with the replacement of MTBE with ethanol pursuant to the provisions of H&SC section 43013.1. (ISOR, pages v, xvi, xvii, 1, 6, 10, 11, 16, 43, 52, and 57; Chairperson Sawyer, Tr. at page 1; Executive Officer Witherspoon, Tr. at page 2; Staff Member Cayabyab, Tr. at page 4; WSPA Chief Operating Officer Reheis-Boyd, Tr. at page 60.)

In addition, the specific purposes for the two-year implementation period of the updated Predictive Model (with the use of an AERP) were also identified. In the Staff Report, ARB staff noted that the CaRFG2 program is a major component of the California State Implementation Plan (SIP), which is a comprehensive strategy designed to attain federal air quality standards as quickly as possible. (ISOR, page xviii, 54.) Furthermore, "section 43018(a) of the H&SC directs the Board to endeavor to achieve the maximum degree of emission reduction possible from vehicular and other mobile sources in order to accomplish the attainment of the state ambient air quality standards at the earliest practicable date." (emphasis added) (Resolution 07-21, page 1.) Therefore, there is a clear need to move expeditiously to mitigate emissions impacts.

During the June 2007 Board hearing, Deputy Executive Officer Scheible stated, "[T]he environmental impact of permeation is occurring today. We believe that there is a compelling case, as you just heard, with the San Joaquin Valley with the South Coast to do everything we can to reduce emissions as early as possible." (Deputy Executive Officer Scheible, Tr. at page 66.) "It's a way of mitigating the impact of the increased permeation emissions as soon as possible so we get the smog reduction benefits." (Deputy Executive Officer Scheible, Tr. at page 99.) Thus, there is a need to move expeditiously to reduce permeation emissions.

During the June 2007 hearing, the staff identified the need to provide the AERP as an option. This action recognized that some producers would need more time to produce fully compliant fuel pursuant to the revised predictive model. At the hearing, Staff member Cayabyab stated, "While some producers can make compliant fuel today, others will need to make modifications to their refineries." (Staff Member Cayabyab, Tr. at page 5, see also Deputy Executive Officer Scheible, Tr. at page 40.) "Some producers will be able to supply complying fuels by 2010, while others will need until 2012." (Staff Member Cayabyab, Tr. at pages 4-5, see also Deputy Executive Officer Scheible, Tr. at page 66.)

In addition, testimony from the California Energy Commission (CEC) staff supported the staff's determination that some refiners would need additional time to make refinery modifications. The CEC "obtained information and ranges for these various aspects of a typical project to make refinery modifications" and concluded that project completion "does coincide with staff's proposal of December 31, 2011." (CEC Representative Schremp, Tr. at pages 39-40.) MathPro, Inc., CEC's consultant, also corroborated the findings in their testimony: "our results to date are generally consistent in terms of refining costs, investment requirements, so on with what you've heard from the CARB staff and Gordon Schremp from CEC." (CEC Consultant Hirshfeld, Tr. at pages 44, 49.)

Consequently, the staff proposed that December 31, 2009, was a sufficient date for producers to certify fuel formulations that mitigate the increase in permeations along with the option using the AERP option. Staff was also able to determine that the producers would have sufficient time to certify formulations that could fully mitigate permeation emissions with the use of the AERP option until December 31, 2011. (ISOR, page xxi.) "This [December 31, 2009] date was chosen as the earliest practical date to implement either alternative fuel formulations or AERPs." (ISOR, page xvii.)

The specific purposes of the AERP were also included in the rulemaking proceeding. In particular, the AERP was included to help mitigate permeation emissions for a limited time period (ISOR, page v, 49), to enable earlier mitigation (ISOR, page viii, 27; Staff Member Cayabyab, Tr. at pages 15-16), to facilitate compliance (Staff Member Cayabyab, Tr. at pages 15-16), and to increase flexibility for producers. (ISOR, page viii, 27.)

An AERP would allow a producer the option of creating emission reductions from other sources to fully mitigate any emissions increase from permeation not otherwise mitigated from the producer's fuel formulation. (ISOR, page viii.) As stated in the notice, "To mitigate the excess emissions associated with permeation from on-road vehicles, the refiners can...use the Predictive Model to develop an alternative fuel formulation. Using this approach will likely require the use of a very low sulfur fuel content and ethanol amounts approaching 10 percent by volume. As such, refinery modifications are needed to produce the very low sulfur fuels and rebalance the production to

accommodate the higher ethanol contents. Therefore, the staff is proposing a second option, referred to as an alternative emissions reduction plan (AERP)." (Notice, page 3.)

The addition of an AERP would also enable mitigation of ethanol permeation effects more expeditiously and increase flexibility for producers to comply with the requirement to mitigate any increase in emissions associated with the use of ethanol blends. Producers will be required to certify fuel formulations or use an AERP to mitigate the increase in permeation emissions starting in December 31, 2009. The AERP is an option that allows producers to continue to produce the desired amount of complying fuel without significant refinery and/or infrastructure modifications in lieu of cutting back on production or fully complying with the predictive model. (ISOR, page viii, 27-28.) Producers would be able to produce a complying alternative fuel formulation (without the use of an AERP) beginning in 2012 with no loss in production due to the completion of appropriate refinery projects. (ISOR page 49.)

Therefore, ARB staff concludes that the necessity standard has been met.

3. WSPA Position: Significant facility modifications will be required at many, if not most, of the State's refineries in order to produce complying gasoline; these modifications will require at least four years to plan, design, permit, and construct.

WSPA contends that producers need to change their fuel parameters, purchase equipment, and re-design, construct, and implement changes to refinery operations. Distribution terminal operators may have to modify or add tanks, upgrade blending pumps, and expand truck handling facilities. Permits and reviews under the California Environmental Quality Act will be required for construction or modification of facilities. More particularly, WSPA believes that time for compliance is unreasonable and, according to CEC, could increase the risks of supply difficulties and associated increases in fuel prices for California consumers and businesses. In support of this claim, WSPA references the CEC presentation made at the June 14 hearing where the CEC indicated that it would take between 45 and 59 months (3.7-4.9 years) for producers to complete modifications required for compliance. In addition, WSPA referenced the CEC's recommendation that the compliance deadline be extended from December 31, 2011 to January 13, 2013.

ARB Response: As discussed in ARB Response 2, ARB staff agrees that some facilities may need to make significant facility modifications. As such, the ARB staff designed the regulation to reflect this fact, consistent with CEC recommendations. With the June amendments, the Board has approved the expeditious implementation of requirements to mitigate permeation emissions beginning in 2010 and this is entirely consistent with State law. In fact, the Board has approved interim options that can be used until 2012 to ensure that there are available and cost-effective options to reduce emissions.

To make CaRFG3 gasoline comply with the proposed amendments, producers will most likely choose to blend in higher amounts of ethanol. The addition of more ethanol is expected to decrease the exhaust emissions of hydrocarbons while increasing the exhaust emissions of NOx. (ISOR, page x, xvii, 54.) In order to reduce the NOx emissions to compliant levels, staff expects producers to decrease the sulfur level in their formulations. (ISOR, page x, 44-45.) Therefore, the majority of the capital expenditures are expected to go towards removing sulfur from the gasoline. (ISOR, pages 44-45.) However, these expenditures, and the associated delays, are not required if the producer does not increase the ethanol content or does not use ethanol in its formulation – avenues which are available to producers under the amendments.

As discussed above, some producers can make compliant fuel today or will be able to produce compliant fuel by 2010, so delaying all mitigation of permeation emissions until 2012 is unreasonable. ARB has the legal responsibility to ensure that maximum emission reductions are achieved (H&SC section 43018; ISOR, page 4) and to do so expeditiously (Resolution 07-21, page 5), quickly (ISOR, page xviii, 54), and at the earliest practicable date (Resolution 07-21, page 1).

While CEC's presentation states that "The majority of refiners indicated they need between 45 and 59 months to complete their projects to comply with the revised predictive Model" (CEC presentation at slide 22), the project time lines actually portray a different story. The CEC's presentation at slide 24 indicates that if the refiners commenced their design and engineering in January 2008 (7 months after the Board hearing on this item), all construction would be complete in January 2012. "And that does coincide with staff's proposal of December 31st, 2011." (CEC Representative Schremp, Tr. at page 40.) If, however, the refiners waited until April 2008 (10 months after the Board hearing) to begin their design and engineering, all construction would be complete in January 2013 (CEC presentation at slide 24). As noted by ARB Deputy Executive Officer Scheible, "The Energy Commission ... time line starts at the time they assume the Office of Administrative Law approves final regulation. And they anticipate that may not occur until early in 2008. Many of the steps refineries have to take, planning and preliminary design of an EIR, that type of thing, they are perfectly capable of doing as soon as they recognize the decision the Board is going to make and the regulations that are going to go through. Our track record with OAL is very good, so they can pretty surely anticipate if the Board decides today what the final regulations will look like in terms of the performances standards. We think they'll [the refineries] start earlier and therefore gain time." (Deputy Executive Officer Scheible, Tr. at page 41.)

4. WSPA Position: None of the evidence supports a conclusion that either the December 31, 2009 deadline or the December 31, 2011 deadline is technologically feasible or cost-effective. WSPA points to ARB staff's claim that full compliance could not be achievable until 2012 (4 years), Valero Energy Corporation's claim that 4-6 years is needed for full compliance, WSPA's claim that a full four-year plus is needed, CEC's claim that possibly 5 years is needed, and BP's claim that 3-4 years is needed.

ARB Response: The updated Predictive Model and full compliance by all refiners by 2012 are technologically feasible. In addition, the AERP is cost effective. As noted previously, some producers can already produce complying gasoline. Therefore, the updated Predictive Model is technologically feasible. Also, as discussed above, full compliance by all refiners by 2012 is technologically feasible.

In terms of the cost-effectiveness of the proposed amendments, “Staff estimates that the proposed amendments to the CaRFG3 regulations will increase gasoline production costs by between 0.3 to 0.8 cents per gallon of gasoline.” (ISOR, page xiii, 46.) However, ethanol costs have been lower per gallon than gasoline blendstocks, on average and taking into account the favorable tax treatment given to ethanol. Provided this price advantage continues, staff expects there to be a small cost advantage to using ethanol relative to gasoline production based on the spot market prices of gasoline. (ISOR, page xiv, 46.) Staff estimated the cost of the AERP at 0.5 cents per gallon. (ISOR, page xiv, 46; see also ISOR, page 33-34.) Staff also estimated the total cost to the end user to be about \$36 per year or about 1.3 percent of total annual fuel costs for a typical California driver. (ISOR, page xiv, 48-49.) “The cost to consumers is in that range consistent with the Air Board staff proposal you just heard today.” (CEC Representative Schrepf, Tr. at page 38.) MathPro’s conclusions were “generally consistent in terms of refining costs, investment requirements, so on with what you’ve heard from the CARB staff and Gordon Schrepf from CEC.” (CEC Consultant Hirshfeld, Tr. at page 44.) Specifically, “Increasing refining costs ranging from a penny to a penny and a half. And a loss in fuel economy consistent again with what you’ve heard on the order of one to one-and-a-half percent as a result of ethanol’s fuel.” (CEC Consultant Hirshfeld, Tr. at page 49.)

With the increase in permeation emissions associated with ethanol estimated to be about 18.4 tpd in 2010, 12.1 tpd in 2015, and 8.1 tpd in 2020, the proposed amendments are cost-effective with a goal toward achieving the maximum degree of emission reduction possible from gasoline pursuant to H&SC section 43018(a). The resolution states that, “Since the approved amendments are designed to preserve the emissions benefit of the CaRFG2 program, there is no cost-effectiveness value that can be assigned to the amendments *per se*; however, since the amendments provide additional flexibility to refiners and importers, they are expected to make the overall CaRFG3 regulations more cost-effective while preserving the emissions benefit of the CaRFG2 program.” (Resolution 07-21.)

5. WSPA Position: ARB precedents establish a four-year compliance period in its previous revisions to fuels regulations. WSPA notes that the schedule for the 2007 CaRFG3 amendments is contrary to ARB’s established precedents. Specifically, the time for compliance with prior CaRFG rulemakings was typically about four years. WSPA’s Exhibit C lists 12.5–51 months for various CaRFG rulemakings. WSPA argues

that four years is required for compliance; otherwise, it will not be cost-effective and technologically feasible since it is at odds with ARB's long-standing practice.

ARB Response: ARB has not established a precedent for a four-year compliance period. WSPA's Exhibit C, listing 12.5–51 months for various CaRFG rulemakings, actually undermines its claim that ARB has "established precedents" for a four-year compliance period. To adopt a four-year compliance period based on policy, as opposed to a technical basis, due to perceived "established precedents," would be arbitrary and capricious. As discussed above, some producers can already produce complying gasoline, others can use the AERP to comply in a cost-effective manner, and full compliance by 2012 is technologically feasible. In this case, we have implicitly recognized that refiners that need to make modifications will need four years, which is the reason we have provided alternatives for the 2010 compliance dates.

6. WSPA Position: The AERP unfairly penalizes producers that cannot comply with the unreasonable and unjustified two-year deadline set by ARB. WSPA states that "[t]he AERP 'option' is the only way for refiners who cannot come into compliance with the new regulatory requirements by the end of 2009 to avoid civil and criminal penalties imposed by the Health & Safety Code." Therefore, the AERP is not an alternative form of compliance, but rather, an additional requirement that imposes severe penalties.

ARB Response: ARB staff incorporated the AERP into the regulation as a flexibility option for producers to expeditiously mitigate permeation emissions. Producers are not required to use an AERP to come into compliance with the new regulatory requirements. There are several options that producers can choose to come in to compliance with the 2007 CaRFG3 regulations without using the AERP. Another option would be to use the Predictive Model to adjust the eight regulated fuel properties to offset the permeation emissions and make a complying blend. In meetings held in conjunction with ARB staff, CEC staff, and individual producers, some producers indicated that they could make complying fuel blends by the 2010 deadline with slight to no refinery modifications and virtually no change in production volumes. Others indicated that they could produce complying blends, but with a reduction in production volumes.

7. WSPA Position: Resolution 07-21 does not even purport to make the statutorily required determination that the adopted regulations are necessary, cost-effective, and technologically feasible based on a preponderance of scientific and engineering data in the record. WSPA asserts that ARB exceeded its statutory authority under H&SC section 43013(a) and (e). Furthermore, the data in the record does not demonstrate the technological feasibility and the cost-effectiveness of the December 31, 2009 deadline for compliance.

ARB Response: The 2007 amendments to the CaRFG3 regulations are necessary, cost-effective, and technologically feasible. WSPA's necessity argument has been

previously addressed in ARB's Response to comment 2. WSPA's cost-effectiveness argument has been addressed in ARB's Response to comment 4.

With regard to WSPA's technological feasibility argument, as discussed above, some producers can already produce complying gasoline and others can use the AERP to comply in a cost-effective manner. Furthermore, as ARB stated in the Staff Report, "Table 25 lists several fully compliant potential future in-use alternative gasoline formulations capable of fully mitigating on-road permeation emissions using different oxygen levels of 0, 2, 2.7 and 3.5 percent by weight. Staff chose the listed formulas to demonstrate the types of blends that can pass the proposed Predictive Model...The table is intended to demonstrate that a wide variety of California gasoline formulations can comply if the proposed Predictive Model is adopted." (ISOR, pages 43-44.) Therefore, full compliance by 2012 is technologically feasible.

8. WSPA Position: The additional AERP is not authorized by H&SC section 43013. WSPA claims that since the AERP does not fall within ARB's regulatory authority under H&SC section 43013(a), it is void. Furthermore, absent a showing of technological feasibility and cost-effectiveness, ARB has exceeded its authority.

ARB Response: The AERP is not invalid, because ARB has broad authority to adopt such a plan.

Title 13, California Code of Regulations section 2265.5, "Alternative Emission Reduction Plan (AERP)," was proposed under the authority of sections 39600, 39601, 43013, 43013.1, 43018, and 43101, H&SC; and *Western Oil and Gas Ass'n. v. Orange County Air Pollution Control District*, 14 Cal.3d 411, 121 Cal.Rptr. 249 (1975).

The H&SC provides, "The state board shall do such acts as may be necessary for the proper execution of the powers and duties granted to, and imposed upon, the state board by this division and by any other provision of law," (H&SC section 39600), including "...adopt[ing] standards, rules, and regulations...necessary for the proper execution of the powers and duties granted to, and imposed upon, the state board by this division and by any other provision of law." (H&SC section 39601(a).) H&SC section 43013.1 requires ARB to "...ensure that regulations for California Phase 3 Reformulated Gasoline (CaRFG3) adopted pursuant to Executive Order D-5-99 ... maintain or improve upon emissions and air quality benefits achieved by California Phase 2 Reformulated Gasoline in California as of January 1, 1999, including emission reductions for all pollutants, including precursors, identified in the State Implementation Plan for ozone, and emission reductions in potency-weighted air toxics compounds." In adopting these regulations, ARB "...shall endeavor to achieve the maximum degree of emission reduction possible from vehicular and other mobile sources in order to accomplish the attainment of the state standards at the earliest practicable date." (H&SC section 43018.)

In *Western Oil & Gas Assn. v. Orange County Air Pollution Control Dist.* (1975) 14 Cal.3d 411, the plaintiff's (gasoline manufacturers) challenged the air pollution control districts' (districts) and ARB's authority to regulate lead in gasoline. The court observed that the districts and ARB are "...granted broad and sometimes overlapping powers over air pollution, but none of them is expressly authorized to regulate the lead content of gasoline." (emphasis added) (*id* at page 414.) Noting that there is no express restriction in the statutes as to the manner in which implementation may be accomplished, the court said, "The Legislature's failure to pass additional statutes cannot be deemed an express intent to prohibit the board from exercising the power it already had to specify fuel additives; such an implication would be unjustified in the light of the more reasonable inference that the Legislature did not intend to deprive the ARB of the only feasible means to achieve the Legislature's previously stated goal." (*id* at page 420.)

Likewise, the Legislature neither expressly authorized ARB to adopt an AERP nor restricted the manner of implementing H&SC section 43013.1. In light of ARB's broad authority and the holding in *Western Oil*, ARB may adopt an AERP for purposes of ensuring that the CaRFG3 regulations preserve the emission benefits of CaRFG2.

Furthermore, ARB has not exceeded its authority because, as addressed in ARB's Response to comments 2, 4, and 7, the 2007 amendments to the CaRFG3 regulations are cost-effective and technologically feasible.

9. WSPA Position: ARB has denied interested parties a fair opportunity to be heard and has failed to communicate and coordinate with the CEC. WSPA asserts that "ARB's staff was allowed to testify at length," but testimony of non-ARB witnesses, e.g., CEC, was limited to just three minutes. Therefore, "the hearing fell far short of providing interested parties a fair opportunity to be heard."

ARB Response: ARB did not deny any interested party a fair opportunity to be heard. In addition, throughout the development of the proposed amendments, ARB communicated and coordinated with the CEC.

As is standard for ARB's Notices, ARB stated, "The public may present comments relating to this matter orally or in writing at the hearing, and in writing or by e-mail before the hearing." (Notice, page 7.) No witness was denied the opportunity to comment orally or to submit written comments. All written comments submitted before and at the hearing were considered, as were all e-mails submitted before the hearing. As is customary at ARB's hearings, and as was consistently applied at the June 14, 2007 hearing to consider the 2007 amendments to the CaRFG3 regulations, all witnesses were afforded three minutes to present oral comments (this was in addition to any written comments). ARB has determined that this is a reasonable limitation, in accordance with Government Code section 11346.8(a), in order to afford others a fair opportunity to comment.

10. WSPA Position: The December 31, 2009 implementation date adopted in Resolution 07-21 may be anticipating the needs of the low carbon fuel standards (LCFS), and if so, the State is not well-served by policies that will force fuel providers in the early years to acquire supplies of ethanol rather than making the necessary plans and investments to deliver advanced low carbon fuels necessary to meet the 2020 greenhouse gas (GHG) reduction goals set by the Governor and Legislature. WSPA claims that the 2007 CaRFG3 amendments are more intended to meet the needs of the LCFS than addressing permeation emissions, that the LCFS and predictive model rulemakings be closely coordinated, and that the short compliance period for the predictive model will jeopardize the success of low carbon fuel technology necessary for the LCFS.

ARB Response: The 2007 CaRFG3 amendments were intended to implement H&SC section 43013.1 and are independent from the future LCFS. However, if there are any inconsistencies between the two programs, ARB will rectify them as part of our rulemaking for the LCFS.

The 2007 CaRFG3 amendments do not require ethanol use in gasoline. Producers have the option of putting from zero to ten percent by volume oxygen in gasoline. A fully compliant non-oxygenated gasoline blend is a viable option for producers. Staff is working to align the LCFS with the 2007 CaRFG3 amendments because staff believes that producers will choose to increase ethanol use in gasoline due to the economics of the situation. However, the 2007 CaRFG3 amendments do not require increased ethanol use, nor do they require ethanol use at all.

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