



Western States Petroleum Association  
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**Catherine H. Reheis-Boyd**  
President

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

March 8, 2012

Re: Western States Petroleum Association's Comments on the Notice of Public Availability of Modified Text and Availability of Additional Documents and/or Information: 2012 Amendment to the Clean Fuels Outlet Regulation

Dear Clerk of the Board:

This letter contains comments by the Western States Petroleum Association (WSPA) on additional modifications to the regulatory text and availability of additional documents and/or information provided to the public on February 22, 2012 in connection with the proposed 2012 Amendments to the Clean Fuel Outlet (CFO) Regulation.

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.

WSPA's overriding comments remain the same as those contained in our letter to ARB dated January 25, 2012 and our letter to Board Chairman Mary Nichols dated November 4, 2011, which we incorporate here by reference. Our principal points, as explained in those letters, include, but are not limited to the following: (i) ARB lacks legal authority to adopt the proposed amendments, (ii) the proposed amendments are not cost-effective and ARB has failed to provide an adequate cost-effectiveness analysis, (iii) the proposed amendments would result in an unconstitutional taking of property, (iv) the proposed amendments would violate the Commerce Clause, (v) the proposed amendments would violate Proposition 26 and the Due Process Clause's limits on the imposition of levies, charges or exactions, and (vi) ARB has failed to comply with the California Environmental Quality Act (CEQA). WSPA remains concerned that the proposed amendments would be invalid under these and other federal and California legal standards.

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The 15-day package does not address any of these concerns regarding the proposed amendments to the CFO Regulation, and we hereby preserve and incorporate our earlier comments on these issues. In addition, WSPA has a number of comments regarding the specific 15-day proposed amendment language. These comments are presented below:

#### Memorandum of Agreement (MOA)

1. The number of hydrogen outlets required under the CFO regulation before the sunset threshold is reached should be set equal to the number specified for the successful completion of the MOA and sunset of the CFO regulations which is proposed to be 100. There is no reasonable rationale for requiring 100 hydrogen outlets prior to the sunset under the MOA, and approximately 490 under the CFO regulation (as shown in Tables IV-2a and IV-2b of the ISOR). In order to make the CFO requirements equivalent, Section 2318 should be modified to read as follows:

*This Chapter 8 shall cease to apply to a particular designated clean fuel once the number of retail clean fuel outlets offering the designated clean fuel represent at least five percent of all retail outlets, or in the case of hydrogen, 100 fueling outlets.*

2. As written, Section 2404(a)(2)(C)3 fails to provide adequate time to identify and remedy problems encountered in the establishment of outlets under the MOA process. The thirty days provided to satisfy an element in question after receipt of a written notice from ARB, needs to be increased to at least six months.

In addition, the section as written does not provide ARB with adequate flexibility to address issues that arise under the MOA despite the best good faith efforts of the parties to the MOA and should be modified to specifically indicate that “satisfaction of an element in question” includes development and submission of a plan to remedy the “question” as expeditiously as possible.

#### Adjustments in Required CFO Outlets Based on Updated Manufacturer Projections

1. WSPA supports the adjustment of the number of required CFO outlets based on more recent data as proposed in Section 2304(a)(2)(F). This section needs to be revised, however, to explicitly state that only downward revisions in the number of required CFO outlets will occur. For example, on Friday March 2, 2012, General Motors announced that it would shut down production of the Chevy Volt for (at least) 5 weeks because the Volt had not met its sales projections for 2011. In contrast, it will not be possible to deal with upward revisions given the highly limited lead time available. It should also be noted that only limiting changes to required CFO outlets to downward adjustments is consistent with the related proposed language in Section 2307(f).

#### Minor Modifications

1. Under the guise of “minor modifications” ARB has made a change (new addition) to Section 2300 definitions, item 3 - Calendar Year - and several subsequently impacted sections where

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wording was changed to be consistent with this addition, allowing staff to move the first compliance year forward from 2016 (1/1/2016) to 2015 (5/1/2015) by seeking an auto survey soon and kicking off the program this summer.

This change is a surprise and we do not believe it was discussed during the hearing. We believe the earlier wording in Section 2311.5 (for example) was very clear in setting 2013 as the first compliance year, and that this revision is not at all minor since it accelerates the whole program by a year and should not be allowed in the 15 day package. WSPA already commented previously that we believe the timeline provided is unrealistically short so we do not understand why this revision has been included in the package.

2. The proposed modifications to Section 2302 (b)(1) regarding dispensing equipment are unreasonable. ARB must, in combination with vehicle manufacturers, establish and live with clear, unambiguous, completely standardized requirements for hydrogen dispensing equipment. It is completely inappropriate for ARB to allow vehicle manufacturers unlimited flexibility in designing their vehicles, and then expect fueling outlets to be capable of accommodating all of the non-standardized systems that are likely to be produced if ARB fails to develop and vigorously enforce hydrogen refueling standardization requirements for vehicle manufacturers.
3. The proposed modifications to Section 2307(d) would prohibit refiners/importers from ever closing CFO outlets that were required in previous years if the number of clean fuel vehicles decreases regardless of the number of clean fuel vehicles in operation. This is unacceptable. Regulated parties must be able to close CFO outlets if the number of clean fuel vehicles declines or vehicle deployments and fuel demand do not materialize as projected, since continued operation of all outlets will result in substantial economic losses.

Likewise, regulated parties should be able to adjust downward the number of projected outlets to be built if more recent projections reduce the estimated number of clean fuel vehicles. The original regulatory language should be restored and clarified to allow closing of CFO outlets if clean fuel vehicle populations decline or vehicle deployments and fuel demand do not materialize as projected.

4. The proposed modifications to Section 2315(d) effectively eliminates any financial liability for vehicle manufacturers related to inaccurate projections of clean fuel vehicles as penalties would only apply if an “intent to deceive” could be proven. As a result, vehicle manufacturers will likely provide ARB with the most optimistic clean fuel forecasts they can reasonably justify. Not the most plausible forecasts. This in turn will lead to a required number of CFO outlets that exceeds the actual need, and to unnecessary and unrecoverable costs to regulated parties that have not been assessed and evaluated by ARB.

The original regulatory language which would have imposed penalties on manufacturers for failing to meet clean fuel vehicle projections if actual production and sales of clean fuel vehicles did not equal 80 percent of the projections should be restored. Alternatively, the regulation should require indemnification of regulated parties by auto manufacturers if the regulated parties are required to build or finance CFO outlets based on projections that, in fact, overstate actual sales by greater than 20 percent.

If you have any questions regarding WSPA's comments please contact me or my staff Gina Grey (480-595-7121).

Sincerely,

A handwritten signature in blue ink that reads "Catherine A. Boyd". The signature is fluid and cursive, with the first name "Catherine" and last name "Boyd" being clearly legible.

c.c. Nancy McFadden, Executive Secretary, Office of the Governor  
Cliff Rechshaffen, Senior Advisor, Office of the Governor  
Matt Rodriguez, Secretary, California Environmental Protection Agency  
Mary Nichols, Chairwoman, California Air Resources Board  
James Goldstene, Executive Officer, California Air Resources Board  
CARB Board members