Western States Petroleum Association
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President

September 15, 2014

Edie Chang (echang@arb.ca.gov)
California Air Resources Board
1001 I Street,
Sacramento, CA

Re: Comments on Proposed Changes to ARB Regulations: Mandatory Reporting Rule (MRR), Cost of Implementation Rule (COI), and Cap and Trade (C/T)

Dear Ms. Chang:

As you know, since passage of AB 32 in 2006, the Western States Petroleum Association (WSPA) has been an active stakeholder in the many rule-making processes conducted by the Air Resources Board. In July of this year, ARB released a series of proposed regulations asking for comment during a 45-day public review period. WSPA has reviewed the proposed regulations and recognizes that many of the changes are needed to clarify ambiguous language or to support existing programs.

We have also identified areas that need further clean-up or clarification. Due to the narrow window of time ARB has designated for this rulemaking, it may not be possible to identify appropriate regulatory language to remedy all of these issues in the current rulemaking cycle. Bearing this in mind, we offer the following comments both to help guide work during this comment period and for consideration in future rulemakings to address remaining deficiencies in the regulations.

Finally, we offer overarching comments and recommendations that pertain to all future rulemaking specifically with respect to the implementation schedule and process improvements that would beneficially affect how ARB identifies, develops, and promulgates proposed changes in rules, regulations and guidance.

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General

Timing of Implementation and Non-Retroactivity

Any amendments related to implementation (effective date) of new regulations covering data collection, calculation, processing, etc. for all three regulations must be attached to a feasible implementation schedule. For example, regulations adopted in 2014 covering annual data collection and reporting requirements should apply to data collected in 2015 and reported to ARB in 2016. This lead time is necessary to allow the regulated entity to implement any changes to data collection and reporting procedures that may be necessary to comply with the new requirements. In many cases, technology must be acquired and adopted, labor resources must be on-boarded, and training must be performed to adequately and competently implement the requirements of these rules. A minimum 1 year implementation period should follow all adopted rules.

> ***Recommendation:*** For changes in the regulation that affect data collection and reporting for purposes of compliance or record-keeping, such provisions will apply to data collected and reports submitted during the calendar year following the effective date of the regulation. For example, regulatory changes that take effect January 1, 2015 shall apply to data collected in 2015 and reports submitted in 2016.

Rulemaking and Rule Adoption Need for Process Improvements

WSPA continues to be concerned with the last-minute changes proposed for inclusion in MRR regulations and others that appear either in guidance or via ARB instructions to verifiers. Most recently, for example, our members have heard from verifiers that ARB has instructed them to pass along agency-desired changes in natural gas reporting and hydrogen content (of fuels). They have also received direct, but informal requests from ARB to correct liquid CWB throughput volumes for temperature changes. Notwithstanding the concerns that arise when the ARB announces proposed changes through verifiers or other ad-hoc means, these changes must, for consistency and clarity, be raised in a more formal regulatory context.

As a practical matter, a truncated process that involves Board adoption of proposed regulatory changes during the same week the formal 45-day public comment period closes, and then relies on post-hearing changes to address issues identified during the public comment period, will inevitably lead to confusion and failure to resolve important issues. This is certainly not the process envisioned in the California Administrative Procedures Act (APA). While informal, pre-rulemaking dialogue is helpful to identify and resolve some issues in advance of the formal rulemaking process, it should not be used as a substitute for a meaningful formal rulemaking process. Both ARB and the regulated community need to have adequate time to analyze proposed changes, understand their potential impact on facility operations and identify additional changes that may be necessary to mitigate those impacts. For future rulemakings, WSPA urges ARB to adhere to the formal rulemaking process established by the APA and allow sufficient time to address public comments ***in advance*** of Board adoption rather than through abbreviated post-hearing changes.

In addition, ARB recently indicated that it cannot make substantive post-hearing changes to regulations unless they pertain to the regulatory language proposed in the original 45-day public

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notice. ARB asserts that such changes would require another round of rulemaking and a separate 45-day public notice and comment period. Yet ARB announced in a September 8, 2014 e-mail that it now seeks to incorporate in the MRR regulation the above noted temperature adjustment for liquid throughputs by way of post-hearing changes and a 15-day public notice and comment period. It is not clear how ARB can consider this change to fall within the scope of the 45-day notice while at the same time rejecting other important technical fixes, such as necessary revisions to holding limits, or revising requirements concerning corporate associations. If ARB can reconcile a change in reporting requirements for liquid throughputs in a post-hearing package with the "sufficiently related" standard in the APA, then other technical changes should also be eligible for the post-hearing 15-day process.

In this regard, WSPA specifically requests ARB include in its post-hearing changes revisions to MRR Section 95103(k)(10) that would allow operators to demonstrate through engineering methods that a product meter is accurate and, if approved by their verifier, data from the meter should not be subject to a finding of non-conformance. WSPA members have expressed to ARB in the past their concerns that a qualified positive verification in this instance is neither appropriate nor acceptable because the classification is, in and of itself, pejorative.

> ***Recommendation*:** ARB should establish a consistent practice of incorporating technical changes to existing regulations through the formal rulemaking process. This would allow needed improvements to be implemented in a more transparent fashion.
>
> ARB should also convene periodic (perhaps every 60-90 days) meetings with the regulated industry, verifiers and interested stakeholders to identify issues that COULD BE addressed in the future (either in guidance or future rulemaking). Periodic meetings would surface issues at a much earlier stage in the process and reduce the frequency with which last minute guidance or rulemaking is needed. Such an improvement would: 1) assist in building in time to review possible impacts, understand how impacts could be addressed or mitigated, provide input to the ARB and then make needed changes to facilitate implementation of the regulation; and 2) improve communication between and among ARB, stakeholders and qualified verifiers. Finally, these process improvements would reduce the need for the abbreviated regulatory process that has recently been the norm and reduce the tendency to clarify rule ambiguities through guidance.

Mandatory Reporting Regulation

Additional Reporting Requirements – Primary Refinery Products

Any new data collection and reporting provisions that are not directly related either to allocation of emission allowances or to assessment of fees necessary to cover the cost of implementing AB 32 programs should be eliminated from the regulation. ARB should reconsider the need amend to primary refinery product reporting requirements. The practical effect of the proposed regulation is it will distract entities from the ongoing task of compliance and create an additional reporting burden that should not be done through the MRR regulation.

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Incorporating the proposed reporting provisions would create an annual reporting obligation, which may not be necessary to achieve the objectives sought by ARB. More importantly, it would create uncertainty as to whether the data is subject to existing regulatory requirements for measurement accuracy, material misstatement, third party verification, etc. This uncertainty exists despite the fact that it would have no bearing on allowance allocations to the regulated entity.

> ***Recommendation:*** Remove the Primary Refinery Products Reporting Provisions from the MRR regulation because they are not related to allowances or fees. Any additional data sought by ARB should be clearly justified, the intended use of the data disclosed and the data should be gathered by non-regulatory means, such as a one-time survey. At a minimum, if ARB believes it must require submittal of the data through the regulation, it should be subject to a reasonable sunset provision such as 2 years.

Clarification Needed

WSPA requests clarification on the following technical issues.

- Is § 95103 (h)(1) a reference to 95103 (m)(1)(A)? 95103 (m)(1)(A) [as shown in the proposed regulation] does not appear to exist.

- § 95103 (h)(4): WSPA does not agree with the elimination of best available methods for measuring by-product hydrogen. The by-product hydrogen is not currently incorporated into the CWB calculation and resultant allocations so it should not be subject to the more stringent accuracy requirements.

- § 95103 (l): We do not believe the phrase "may elect to" should be changed to "must". Since there is no "missing data" provision in the regulation, operators should have the flexibility to include or exclude data at the operator's discretion. However, if an operator is required to include data that is not within ±5% accuracy, then ARB must confirm that the data will not be subject to a finding of non-conformance.

  WSPA needs more clarification in the interpretation of: 1) temporary use of meters in case of equipment failure; 2) ability to exclude CWB data following verification without risk of non-conformance; and 3) ability to exclude CWB data in advance if included or specified in the company's monitoring plan.

- MRR § 95113 (l)(3), which appears to support the COI regulation, requires that "for transportation fuel products listed in Table MM-1, the operator must report CARBOB as RBOB…". The term "transportation fuel products" does not appear in table MM-1 and is not defined in ARB regulations. Please specify what products in Table MM-1 are referenced by this provision.

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Also, it seems this provision is just trying to identify gasoline-range fuel used in California and blended with ethanol. By definition, this is only CARBOB. Conventional gasolines and CBOBs would only be exported outside of California and the other fuels (i.e., distillates) are not blended with oxygenates, in which case it is not clear why Table MM-1 is referenced at all in this provision. Moreover, § 95113 (l)(3) is even more confusing in light of proposed § 95113 (m)(1). How is (m)(1) different from (l)(3)?

- § 95103 (m)(1) appears to imply that § 95103 (m)(2) and (3) are only applicable to facilities proposing a permanent change to a lower-tier emissions or product data reporting method.

  ***Recommendation*:** If WSPA's interpretation is correct, we recommend the following changes (in red) to add clarity:

  (m)(2): When proposing a permanent change to a lower-tier in a monitoring or calculation method to the Executive Officer, an operator or supplier must indicate why the change in method is being proposed…, and include a demonstration of differences in the data estimated under the two methods.
  (m)(3): When permitted, a change to a lower-tier in method must be made after the completion of monitoring for a data year...except in the circumstances described in part (m)(4).

- § 95103 (m)(1) is amended to limit the ability of reporting entities to change from a lower tier calculation method to a higher tier calculation method following notice. WSPA believes entities should be able to improve their data monitoring or calculation at any time during the year. Improved data is of value to both the entity and ARB.

  Recommendation: WSPA recommends the following changes (in red) to the second sentence in this provision:

  Permanent improvements to emissions monitoring or calculation methods do not require approval in advance by the Executive Officer ~~however, the operator or supplier must notify ARB prior to January 1 of the year the new method is implemented.~~

Cost of Implementation (COI)

WSPA has reviewed the proposed changes to the COI regulation and offers the following comments and recommendations.

Consistency in Requirements – Record Retention (§ 95204(i)).

The MRR and COI record retention requirements should be made consistent. § 95204(i) should just reference MRR (§ 95105) which specifies a 10 year retention requirement, but requires submittal within 20 days following a request, instead of 5, and allows the records to be kept out of state. There is no need for the COI regulation to be different, much less more restrictive in these areas.

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***Recommendation*:** Modify this section to read, "Entities subject to this sub-article must maintain copies of the information reported pursuant to the applicable sections of the Mandatory Reporting Regulation~~. and provide them to an authorized representative of ARB within five business days upon request. Records must be kept at a location within the State of California for five years~~."

Clarification Needed

WSPA requests clarification on the following technical issues.

- § 95201(c) references B100 and R100 for biodiesel and renewable diesel, respectively. The terms in the MRR have been changed to recognize that these may be B99+ and R99+ in § 95121(d), Table 2. The MRR terms are more accurate and the COI regulation should be further amended to incorporate the MRR terms.

- The emission factors in § 95203(d) are proposed to be removed and instead Table MM-1 is referenced for entities reporting pursuant to § 95204(e) – fuel providers. An averaging technique is mentioned, but it is unclear which fuel grades will be included from Table MM-1, how they link to gasoline and diesel, and how these grades will be averaged. This process needs to be explicitly described so that regulated parties understand how ARB will use the data.

- § 95204(b) specifies that all entities subject to this sub-article are required to certify reports pursuant to the requirements of MRR. ARB should be specific as to which sections in MRR are being incorporated by reference.

- What is the justification for the significant increase in the emission factor and corresponding fee for catalyst coke? We see no basis for the change since the regulation was first adopted.

Cap and Trade (C&T)

Corporate Associations

WSPA members have participated in a joint industry group coordinated by the California Manufacturers & Technology Association seeking a clear compliance pathway to satisfy the corporate association disclosure requirements included in the C&T regulation. WSPA members have filed numerous comments over the past 18 months expressing grave concerns over the expansion of the disclosure requirements to non-registered entities that became effective on July 1, 2014. WSPA is grateful for ARB's issuance of guidance on July 29 in response to these concerns permitting companies to file their SEC Form 10-K list of subsidiaries to satisfy the disclosure requirements as they apply to unregistered entities.

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WSPA supports the Joint Industry Proposal for changes to § 95830, 95833, 95912 and 95923 presented to ARB staff on August 22, 2014. In particular, WSPA urges ARB to retain disclosure of the SEC Form 10-K list of subsidiaries as a compliance option. WSPA also supports changes to the regulatory investigation disclosure requirements included in § 95912 that must be included in an auction application attestation. Even if it applies to the list of SEC affiliates, the requirement remains too broad, creates an undue burden on industry and provides ARB with limited value. WSPA recommends limiting the disclosure of regulatory investigations to the auction participant only and to adjust the time frame from 10 years to 5 years in a manner consistent with most statutes of limitation.

While we would prefer for ARB to include the Joint Industry Proposal as a whole in the regulation to reflect the full spectrum of compliance options, we understand ARB is considering, as an interim step, making certain post hearing changes that link the regulatory requirements to updated guidance. It is our understanding that the guidance would complement the post-hearing changes until such time that the regulation can be re-noticed to incorporate the Joint Industry Proposal. We appreciate ARB's collaboration with the Joint Industry Group toward a workable solution on this issue.

ARB also proposes to change the timeframe for updating information on employee and indirect corporate associations not registered in CITSS or a linked jurisdiction to an annual reporting requirement [§ 95830 (f)(1)]. WSPA supports this change. We further recommend ARB include reporting of consultants and advisors in this section as shown below (in red).

Recommendation:

(f) Updating Registration Information.

(1) Registered entities must update their registration information as required by any change to the provisions of section 95830(c) within 30 days of the changes becoming effective. When there is a change to the information registrants have submitted pursuant to section 95830(c), registrants must update the registration information within 30 calendar days of the change unless otherwise specified below. Updates of information provided pursuant to section 95830(c)(1)(l) ~~and (c)(1)(J)~~ may be updated at least annually ~~each calendar quarter~~ [this prior language was struck in the 45 day change] instead of within 30 calendar days of the change. If changes in information submitted pursuant to section 95830(c)(1)(H) are related to entities registered in the Cap-and-Trade Program, the information must be updated within 30 calendar days. <u>If changes in information submitted pursuant to section 95830(c)(1)(H) are related to entities which are not registered in the Cap-and-Trade Program or in a GHG ETS to which California has linked pursuant to sub-article 12, the information must be updated at least annually, instead of within 30 calendar days of the change.</u>

<u>Consistency in Terms</u>

There is an inconsistency in terms between § 95830(c)(1)(H) and the changes ARB has proposed in § 95833 (b),(d) and (e). We believe the use of the generic term "corporate association" in § 95830 (c)(10(H) could unintentionally be applied to indirect corporate associations where neither are registered in CITISS. This seems contrary to ARB's intent.

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***Recommendation*:** WSPA recommends the following language change (in red) to § 95830(c)(1)(H).

(H) Identification of all other registered entities ~~pursuant to this article~~ with whom the entity has a ~~corporate association,~~ direct corporate association, or indirect corporate association pursuant to section 95833, and a brief description of the association. An entity completing an application to register with ARB and for an account in the tracking system must provide all applicable information required by section 95833.

Holding Limits

WSPA continues to be concerned that the current holding and purchase limits are extremely restrictive. The outcome will likely be a constrained market that limits participants' flexibility to comply at the lowest incremental cost. The conservatively low holding/purchase limits disproportionately impact those entities with large compliance obligations, particularly those sharing holding limits and purchasing limits with one or more directly related entities. Furthermore, this problem will be compounded in 2015, since the compliance obligations of fuel providers are typically much higher than the increase in the holding limit. These constraints leave such an entity no alternative other than to prematurely move large quantities of compliance instruments to its compliance account, rendering useless the multi-year compliance period flexibilities and exposing the company to significant risks of stranded assets in the event of operational or corporate activity changes over the compliance period.

As you are aware, the Emissions Market Assessment Committee (EMAC) recognized these concerns in its November 8, 2013 report and offered two possible recommendations: 1) consideration of adjusting or scaling the holding/purchase limits based upon the compliance obligation for a particular entity, and 2) consideration of additional flexibility in movement of compliance instruments from the compliance account, including allowing a portion of the compliance instruments to be removed and offered for resale into the market. The opinion of the EMAC was that making these modifications would provide additional flexibility to the regulated entity, while still preserving the goal of preventing market manipulation.

Recommendation: ARB should adopt the recommendations prepared by the EMAC. ARB should place specific emphasis on scaling of holding/purchase limits that reflects the size of the entity's obligation, and provides increased flexibility and control by the regulated entity with respect to management of the accounts.

Suppliers of Transportation Fuels and Renewable Diesel

In § 95121(a), ARB is proposing a new requirement to report volumes of renewable diesel supplied. Note that renewable diesel can be blended to diesel product both at the refinery and at the terminal. Reporting (e-GGRT) forms should be modified to allow for reporting volumes from either but prevent the possibility of double-reporting of the volumes and double-obligation under Cap-and-Trade.

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Additionally, it is very likely that significant renewable fuel blending may occur upstream of terminal rack locations, particularly for renewable diesel which will be much more likely to be blended at refineries. Because blend percentages will vary depending on operational circumstances and product availability, it will likely be difficult to accurately track the precise movement of those renewable fuel volumes from the refinery (or bulk blending facility) to the point where the blended product is dispensed into a truck at the terminal rack. It would therefore be beneficial to add a paragraph to the § 95121 reporting procedures to clearly allow a reporting party to report the total renewable fuel blended upstream of the terminal rack and subtract it from the total blended product delivered to market.

> ***Recommendation:*** WSPA recommends the following paragraph be added to follow § 95121(d)(1-4).
>
> "(5) Refiners who blend renewable fuels at a refinery or bulk facility and displace blendstock or distillate fuel oil may report the total volume of renewable fuel blended at the refinery or bulk facility and subtract the displaced volume from the blendstock and distillate fuel oil totals reported under paragraphs (1) through (4), provided it can be demonstrated that the renewable fuel volume was not reported under paragraphs (1) through (4) by the refiner or any other party."
>
> As an illustration of how this might work, a reporting party could blend renewable diesel at a refinery and report the total renewable diesel volume blended for the year. That party would then calculate the total CARB diesel volume delivered to market per § 95121(d)(1-4) and subtract the renewable diesel volume. The remainder would be reported as CARB diesel delivered. Following this reporting, the reporting party's verification auditors would confirm that the reporting party ensured the credit for the renewable diesel volume was not claimed elsewhere, either through clear product transfer documents or contractual agreements.

Thank you for reviewing these comments. Should you have questions, feel free to contact me at this office or Mike Wang of my staff (cell: 626-590-4905; mike@wspa.org).

Sincerely,

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