

January 27, 2020

Mr. Gavin Hoch
California Air Resources Board
1001 I ST
Sacramento, CA 95814

Subject: Resolution 20-2

Dear Gavin:

CARB has stated “the California Air Resources Board (CARB or Board) approved for adoption the proposed amendments to sections 2293.2 and Appendix 1 of title 13, division 3, chapter 5, article 3, subarticle 2 of the California Code of Regulations.” At the April 2020 Board hearing, members expressed concern with the proposed ADF changes and did not approve the proposed ADF language at that time, but rather requested the Executive Officer make additional changes to address the unprecedented number of objections to the proposed regulations voiced by industry stakeholders. There were varying Board member views expressed at the public hearing¹ and, based on CARB’s current proposed ADF, Cal Fueling does not believe the Board would approve such because there’s been nothing of concrete value reconciling stakeholder input. A review of the transcript yields the following in support of the view that the Board did not approve of the proposed ADF.

Initially, at page 114 of the transcript, in response to Ms. Mitchell’s stated concerns about the extensive number of issues raised by stakeholders, Mr. Corey states,

“I, too, would distill down the primary issues as being the lab testing -- the two-lab testing element that's been brought up several times, as well as really the preapproved status for the RD -- the renewable diesel, biodiesel blend mix.”

Thereafter, he notes that,

“I think there is room to go there, because -- and this is a suggestion, with respect to **testing is dynamic. The wealth of testing data is moving very quickly. And a reg, for instance, that hardwires the two-lab element in it doesn't provide as much flexibility in terms of making adjustments going forward.**”

At first, Mr. Corey hit the nail on the head and, as we’ve stated multiple times, confirms our concerns about emissions testing variability and the rigidity of the proposed ADF’s two-facility

¹ See State of California, Air Resources Board, Board Hearing Transcript. April 23 (2020). Page 116 (1620), Page 117 (7-17, 23-25), Page 118 (1-8, 23-25). Available at: <https://ww3.arb.ca.gov/board/mt/2020/mt042320.pdf>.

approach. Appendix 1, section (a)(2)(F)(2)² of the proposed ADF , although represented as a one-facility approach, is, on an even cursory review, actually a three-facility testing requirement. In order to conduct certification testing at one facility, one must conduct emissions testing at three facilities in order to determine which of the three CARB finds suitable to use for certification testing based on fabricated criteria which has no technical justification. While representing a purported one facility approach, CARB instead went the other way, putting forward what amounts to a three-facility approach.

At pages 114-115 of the transcript, Mr. Corey states,

“So a suggestion in the context of 15-day changes could be discretion, delegation, to the Executive Officer **to respond to that growing body of data and make adjustments as appropriate in terms of the -- moving the two lab to one lab**, for instance, as well as the previously defined status of the RD -- the renewable diesel biodiesel blend.”

Again, Mr. Corey stated in no uncertain terms that CARB would explore “**moving the two lab to one lab**”! In approving the resolution based on this representation, we don’t believe that Mr. Corey contemplated, nor was the Board approving, the approach in the current iteration of the proposed regulations that an applicant would, in actuality, need to test at three facilities in order to be able to conduct certification testing at one facility. This is clearly at odds with the simplified approach (true one facility) discussed between the Board and Mr. Corey. Requirement (a)(2)(F)(2)(a)(ii)(3) is an impractical appeasement option that makes zero technical sense and one that the Board would see right through and, in light of comments from the Board, not approve.

Specifically, I note that at Page 115, Mr. Corey states,

“The path that I'm describing would position the Board to still be able to vote today on the resolution, providing that's the direction that they provide to staff. So I'll stop there.” Thereafter, Vice Chair Berg recommended to “give the Executive Officer the discretion on both the lab and on the blending issue,” (i.e., the number of laboratories required for certification testing, and lower renewable hydrocarbon diesel blend ratios for approved ADF formulations).

However, Ms. Berg specifically noted that,

“Understanding lab testing from a manufacturer perspective and needing to rely on those tests, I haven't passed -- **two is not necessarily better than one. I think it's really important for us to understand where the breakdowns are and try to resolve from the breakdowns.** So I appreciated Mr. Corey's suggested resolution

² “Proposed Second 15-Day Modifications”, Appendix 1 of Subarticle 2. In-use Requirements for Pollutant Emissions Control, Sections (a)(2)(F)(1-5).

to be able to move this forward on both the blending and particularly the lab [support of chain of custody changes]. **I'm really, uncomfortable with the two lab, not because it's two labs necessarily, but I don't truly understand nor see that as a solution to the problem, because we're not really clear -- other than we know that we need better results in testing and to allow certifications to match real world, I'm not clear on what other steps really need to be resolved.** And so I would support and would offer to fellow Board members that we would move forward and give the Executive Officer the discretion on both the lab and on the blending issue **for further time to work with industry stakeholders.**”

While the Board “approved for adoption the proposed amendments”, staff has completely ignored the caveats that came with that approval. It’s abundantly clear from Ms. Berg’s statements that she had serious concerns about a two-facility approach, such that it is completely unrealistic to suggest that she, or the rest of the Board, would approve what amounts to a three-facility approach masqueraded as a one-facility option.

Questions:

1. Has CARB staff discussed with any of the new Board members imposing a de facto three-facility approach as a way of addressing the concerns raised by the public and the Board with the two-facility approach? If not, why?
2. How does CARB reconcile the concerns raised regarding a two-facility test scheme with offering a de facto three-facility testing regime?

Furthermore, staff have not worked with industry stakeholders and if they have it’s been behind close doors with those they prefer to work with instead of in open forums. The workshop conducted in June 2020 after the Board meeting was a one-way communication from CARB, which led to the first 15-day notice after which came stakeholder unanimous dissent with the proposed ADF certification testing procedures. There remains a gap between staff, Mr. Corey and the Board and stakeholders and one need look no further to confirm this than to read the transcript and comments submitted after the first 15-day notice. Since then, the Executive Officer, based on staff’s latest proposal, has not sufficiently considered nor addressed either the RD formulations or the certification testing concerns as directed by the Board. Regardless of the existing Resolution 20-2 given the ongoing divide between stakeholders and CARB, a public hearing should be conducted on the proposed ADF so that the new Board can adopt or reject it.

Questions:

1. In what way has CARB followed through with the Board’s instructions to work with stakeholders to address the concerns raised in the proposed regulations?
2. Has CARB spoken with any NOx Mitigant providers in an effort to understand their concerns with the proposed ADF? If not, why?

3. Why has CARB not planned to conduct a further public hearing, especially in light of the overwhelming objections to the proposed regulations?

Later in the transcript, at Page 118, Mr. Florez states,

“I have a question just for you, Richard, in terms of the ability to do this, and in some sense, the round robin approach as you look at this. I mean, does this allow you the discretion during this period to -- and after to adjust as we start to look at some of these lab questions that were raised during the presentation and through the fellow Board members just a question to you in terms of how you envision this going.”

Mr. Corey then responded,

“I believe that authority, because we're talking really in the context of a method and the application of that method to a regulation. And the language matters, so the details always matter, which would require us, through the 15-day, to work with stakeholders, counsel, and so on. But at the fundamental core of what we're talking about, would that delegation allow for an adjustment going forward to the number of labs, as well as the formulation status. My understanding is the answer is yes.”

Cal Fueling and others (for example, the National Biodiesel Board (“NBB”) and the Engine Manufacturers Association (“EMA”)) have all raised concerns about staff’s misperceptions of emission testing variability, including reproducibility and repeatability. In response, staff have incorporated a requirement for lab-to-lab reproducibility to be within 1% in order to run certification testing at a particular facility. Staff’s most recent work at CE-CERT wouldn’t meet such a requirement based on repeatability never mind reproducibility. As we’ve pointed out in a separate submission, there’s no technical basis for such a requirement and staff hasn’t justified it. While we eagerly await staff’s response in the Final Statement of Reasons, it will likely be without substance because there is no rational response that’s technically justified. In essence, staff have done nothing to clarify their variability concerns and instead have jumped to an illogical end game. Again, we don’t believe the Board would agree with staff’s proposed ADF changes regarding certification testing.

Relatedly, at Page 119, Mr. De la Torre states,

“I agree. I think we should let Richard work out the kinks of this procedural, I don't know, logistical process. But I do want to emphasize the thing that got my attention here was that **there was a discrepancy between lab results and real world results, which raises a red flag to me of what happened with Volkswagen and other OEMs on passenger vehicles.** And so we absolutely have to get this right to our comfort that it's working, that the results that are -- that we're getting in one place match the results we're getting somewhere else.”

Mr. De la Torre links “lab discrepancy” in the Volkswagen matter with the proposed ADF changes. If this insinuation alone isn’t enough to demand staff drill down into emissions test results to understand the inherent variability thereof, and determine what’s acceptable and what’s not, then its readily apparent that staff are unwilling to address this challenge and instead are pushing these responsibilities on to stakeholders.

Questions:

1. What additional testing has been done, or research reviewed, to ascertain the scope of the lab discrepancy issue and the proper methodology for addressing the same?
2. If none, on what basis is staff recommending the proposed ADF changes?

Finally at Page 123, during the vote Mr. Spearling indicates,

“I’m abstaining, because I am -- I’d like to see a lot more of the detail about how this will go forward. Thank you.”

Considering all of the above, we believe Mr. Spearling’s comment sums it up – there’s a need for the Board to see the detail and underpinning of the proposed ADF as it stands today which is a long way, in the wrong direction, from where it stood in April 2020. For CARB to advance forward with its independent recommendations without considering any of what stakeholders have offered is an injustice to all. Worse yet, staff have not done what the Board asked which is exactly why an open public hearing in front of the new Board is required. If CARB staff is confident about its approach, you would think that it would have no concern with presenting it to the Board for consideration in full, especially given the proposed regulations potential ramifications on the future of two of the leading replacements of fossil fuels.

Question:

1. Will staff schedule a public hearing on the proposed ADF so that stakeholders can express their views in an open forum and the new Board can hear for themselves the concerns stakeholders have as well we staff’s views and then rule as they should given that the proposed ADF may be a regulation that’s adopted on their watch?

Thank you for the opportunity to submit this comment.

Respectfully,

Patrick J McDuff

Patrick J. McDuff
CEO
California Fueling, LLC