



Western States Petroleum Association  
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**Catherine H. Reheis-Boyd**  
Executive Vice President and COO

August 19, 2009

Clerk of the Board  
Air Resources Board  
1001 "I" Street, 23<sup>rd</sup> Floor  
Sacramento, CA 95814  
*Via electronic mail to <http://www.arb.ca.gov/lispub/comm/bclist.php>*

Re. Western States Petroleum Association's Comments on the California Air Resources Board's Modified Text and Additional Documents for the Low Carbon Fuel Standard

Dear Clerk of the Board:

This letter contains comments by the Western States Petroleum Association (WSPA) on the modified Low Carbon Fuel Standard (LCFS) regulatory text and supporting documents released on July 20, 2009. WSPA is a non-profit trade organization representing twenty-eight companies that explore for, produce, refine, transport and market petroleum, petroleum products, natural gas and other energy products in California and five other western states.

Our overriding comments at this point are the same as the ones we shared in our April 21 letter to ARB submitted before the adoption hearing. The main points are that our members are very concerned because there are many key elements of the LCFS program that are incomplete, lack clarity, are questionable from an economic/interstate commerce perspective, and are not in harmony with the federal programs.

WSPA believes ARB needs to complete all elements of the regulation before, 1) proceeding with any adoption hearing in the first instance, and, 2) requiring regulated parties to initiate efforts to comply. We do not believe it appropriate for ARB to hold an adoption hearing and then proceed to continue to work major aspects of the regulation in following months in a piecemeal fashion.

The 30 day package does little to complete the details of the regulation that are needed for planning and compliance purposes. Examples of items that need much more clarity in order for the regulation to be complete include: recordkeeping and reporting requirements; credit trading details; the role of ARB in credit trading markets; the treatment of high carbon intensity crude oil (HCICO); and, confidentiality provisions.

Without additional clarity on these issues, our industry still does not have the tools it needs to move forward with compliance efforts.

Since the regulation is one of the most far reaching and complex regulations ARB has proposed, it is understandable that many of the details regarding the implementation and compliance will take time to develop which is why we believe ARB's hearing on this item was premature.

We are disappointed, however, with the lack of progress being made on all these fronts to work through the details and provide our industry with a clear roadmap.

Reporting requirements begin in four months time and our members need to be initiating activity on many aspects of the regulation now, not in 2010. We understand that some elements of the regulation that the Board will need to address will not occur until the spring of 2010. This fails to be an acceptable or admirable rulemaking process.

Our more detailed comments on the modified regulatory text are attached. Please let me know if you have any comments or questions, or contact my staff Gina Grey at 480-595-7121.

Sincerely,



c.c. D. Simeroth – ARB  
for distribution to all staff

## WSPA Comments on Proposed Modified Text

### **Confidentiality of LCFS information submitted to ARB**

- Relates to both Reporting Requirements (section 95484 (c)(3)(C)), Demonstration of Physical Pathways (section 95484(d)(2)), and LCFS Credits and Deficits (section 95485(c))

The LCFS requires regulated parties to submit information to ARB which includes fuel volume, carbon intensity (“CI”) values of each blend stock, credits, and deficits generated under the program. In addition, regulated parties are required to submit evidence of physical pathways used for each transportation fuel and blend stocks regulated by ARB. Where a regulated party has developed a “new fuel pathway”, they are also required to submit data, calculations and other documentation supporting the proposed pathway, and how the carbon intensity values were derived.

Our position is that this type of information is confidential business information, and should be protected as “trade secret” under the LCFS regulation. Under the California Public Records Act, trade secrets are exempted from disclosure, and are defined as “any formula, plan, pattern, process, tool, mechanism, compound, procedure, production data, or compilation of information which is not patented, which is known only to certain individuals within a commercial concern who are using it to fabricate, produce, or compound an article of trade or a service having commercial value and which gives its user an opportunity to obtain a business advantage over competitors who do not know or use it.” *See* Gov’t Code § 6254.7.

Here, the regulated parties are required to submit sensitive data to ARB that includes CI values of specific fuels and blend stocks, the volume of fuels or blend stocks produced and distributed in the state, and data relating to fuel pathways. This information details business practices unique to each regulated party, that is known only by certain individuals in each company, and is confidential information used in the production and fabrication of commercial products. There is no doubt that this type of information qualifies as a “trade secret” under Cal. Gov’t Code § 6254.7.<sup>1</sup>

ARB regulations contain specific provisions relating to the treatment of confidential business information. While emissions data submitted to ARB is considered public information, the regulations specify that any person submitting information to ARB may designate information that is not emissions data as confidential “trade secret.” 17 CCR §§ 91010, 91011. ARB regulations also state the State Board shall not disclose all such data submitted as confidential “trade secret”. § 91011. In accordance with ARB’s own “trade secret” rules, other regulations passed by ARB have respected the exclusion of confidential trade secret information.

Under the Mandatory Greenhouse Gas Emissions Reporting regulation (§ 95100 et seq.), entities submitting information to ARB under the mandatory reporting rules may designate any information that is not emissions data as “trade secret,” and ARB must handle all such information according to 17 CCR §§ 91000 through 91022. *See* 17 CCR § 95106. Under ARB’s Zero Emissions Vehicle (“ZEV”) regulations, for many years ARB treated data submitted to ARB as confidential information exempt

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<sup>1</sup> The proposed LCFS regulation does contain a provision relating to submission of “trade secret” data related to the development of new fuel pathways. § 95486(f)(2). However, this provision fails to protect “the carbon intensity values, associated parameters, and other fuel pathway related information” obtained or derived from an application for a new pathway, all of which would also qualify as trade secret under Gov’t Code § 6254.7.

from public disclosure. According to the rationale under the ZEV regulations, while air pollution emissions data are always public records, information used to calculate emissions data can be trade secret. *See* ARB, Manufacturers Advisory Correspondence (MAC) 2006-03, Oct. 11, 2006.

The information regulated parties must submit to ARB under the LCFS is not emission data, and is highly proprietary. Much of this information relates to proprietary data, such as formulation of fuels and blend stocks, and is highly confidential within each company. The transportation fuel industry in California is a highly competitive market, and requires tremendous innovation in the development of low carbon fuels. The public disclosure of this type of information could dampen innovation and the development of new fuel pathways. ARB should reconsider the proposed LCFS regulation's treatment of confidential business information, as the proposed method is inconsistent with both the Public Records Act and ARB's own regulations relating to the disclosure of confidential information.

WSPA would be happy to work closely with ARB in addressing this issue.

#### **Applicability (section 95480.1 (a) and (d))**

To improve clarity, language was added in section 95480.1 (a) stating that the reporting and recordkeeping requirements and violations provision of the LCFS (sections 95484(c), (d) and (e), respectively) apply starting on January 1, 2010, and the remaining provisions of the LCFS regulation apply starting on January 1, 2011. This change clarifies the intent of the provision.

WSPA supports this change, as it does add clarity. Please also note, however, our concerns regarding protection of confidential information above, and the lack of specifics on many aspects of the rule.

#### **Reporting Requirements (section 95484(c) (3) (C))**

Pursuant to Resolution 09-31, staff modified the reporting requirements for residential charging stations to permit alternative reporting methods that are shown to the Executive Officer to be substantially similar to direct metering (also called "submetering"). This alternative reporting would be allowed prior to January 1, 2015, but only for those households and residences in which direct metering has not been installed; effective January 1, 2015, regulated parties would need to use direct metering to report the amount of electricity sold for transportation purposes at all residential charging stations if the regulated party chooses to generate credits, (section 95484(c) (3) (C) 1.).

WSPA believes direct metering should be the requirement to encourage installation of the infrastructure, and then a protocol should be provided for an alternative methodology that can be demonstrated to be equivalent. This would be consistent with the approach ARB has used in the rest of the regulation where all fuels are treated equally in terms of infrastructure costs, etc., and does not result in preferential treatment of the utilities. Our concern here is that some submetering methods may generate data resulting in inappropriate issuance of credits which our industry then funds through purchase. In addition, Advance Metering is being deployed by 2012, so there is no apparent reason why they cannot deploy it with a vehicle submetering option.

We suggest the following addition to this section:

(b). "for households and residences...the regulated party demonstrates through Section 95490 Enforcement Protocol to the Executive Officer's satisfaction..."

## **Demonstration of Physical Pathways (section 95484(d) (2))**

Pursuant to Resolution 09-31, staff modified the provisions for the demonstration of physical pathways to allow demonstrations by fuel producers who are not regulated parties. This would allow a regulated party to meet at least part of its physical pathway requirements by citing pathway demonstrations submitted by non-regulated party fuel producers whose fuels are used by the regulated party, (section 95484(d)(2)). Also, staff modified the provisions to clarify the effects a material change or non-material change would have to an approved physical pathway and when such changes have to be reported to the Executive Officer, (formerly section 95484(d)(2)(D), renumbered to 95484(d)(2)(F)). Further, staff clarified that LCFS credits based on an approved pathway can be claimed retroactively no earlier than January 1, 2011. (Formerly section 95484(d) (2) (E) 1. renumbered to section 95484(d) (2) (G) 1.). Finally, staff added a provision requiring the Executive Officer to post on the ARB website the names and contact information for regulated parties that have obtained approval for their physical pathways, as well as the transportation fuels subject to such approved physical pathways, (new section 95484(d)(5)).

At a minimum WSPA recommends the following language be added to 95484d (2) (B): "...submitted by any regulated or non regulated party..." We note that regulated parties may use the pathways of other regulated parties if they are identical.

The definition of importer in 95481(a)(24) indicates the importer is the person that owns the imported product when it is received into the import facility. The party best positioned to determine the combination of transportation methods used to transport the fuel to California is the product titleholder when the fuel/blend stock enters California, not the party that owns the fuel when it is received at the import facility. Therefore, for the purpose of demonstration of physical pathway, we recommend that the Importer be defined as the product title holder when the fuel/blend stock enters California, this may be a producer, buyer, or marketer.

The addition of deadlines to 95484d (2) (F) is appropriate in concept, but the deadlines are much too short. Established physical pathways are unlikely to change on such a short-term basis and as a result we suggest changes to physical pathway should be communicated as part of the quarterly reporting process.

In relation to 95484d(2)(G)(5), WSPA requests further information on ARB's commitment to provide a universal access website to all involved parties and to keep it up to date. The rule refers only to names and contact numbers. It would be ideal if the pathway approvals could be directly posted on line for use by all parties where a fuller description of the pathways is included.

References in the body of the physical pathway section need to be updated to reflect changes in reference numbering of this section made by ARB.

ARB should encourage the demonstration of physical pathways by producers, importers, and marketers as soon as practical given the importance of physical pathway to generation of LCFS credits. We are concerned that the level of detail requested in the demonstration of physical pathway language is excessive, impractical, and could discourage parties from registering physical pathways. For example, the requirement that "the regulated party must provide the name, mailing address, phone number and company name for each such person" involved in each segment of the fuel pathway would likely require the regulated party to list every possible company that could be involved both currently or in the future in order to cover all contingencies. This is excessive, impractical and adds complexity that isn't warranted for the demonstration of the physical pathway. In order to provide guidance to industry, WSPA recommends that ARB publish an example of physical pathway demonstration that would be acceptable to the Executive Officer.

## Facility Registration

Producers are best positioned to determine the carbon intensity of the low carbon fuels they produce and will be required to register with EPA under RFS2. Similarly ARB should require producers supplying biofuels to California or the entities that bring the biofuels into the state to register their production facilities. Registration should include the carbon intensity(ies) of the biofuel(s) produced at the production facility from the Look-Up Table. A listing of registered producers and their production facilities should be maintained on the ARB website and could be associated with the ARB carbon intensity look-up table.

## LCFS Credits and Deficits (section 95485(c))

Staff clarified that the prohibition on third-party sales, trades, or purchases of LCFS credits does not apply when the regulated party that owns the credits is exporting such credits for compliance with other greenhouse gas reduction initiatives, (section 95485(c)(1)(B)). Also, staff made grammatical edits to the language for clarity, (section 95485(c) (2) (A)).

Use of the revised language in 95485(c)(1)(B) seems to allow a third party, not related to the program, but perhaps regulated parties under other GHG initiatives, to purchase credits and retire them outside the LCFS credit pool. This would reduce the credit pool available for purchase and compliance use by our industry and inappropriately inflate the value of credits. This is of possible concern.

WSPA does agree, given the uncertainty of the size of the LCFS credit market, that ARB should make every effort to ensure regulated parties have access to the LCFS credits they may need for compliance. Allowing non-regulated parties or other entities the ability to acquire/trade LCFS credits could hinder the ability of obligated parties to comply with the law, and potentially distort the market for credits by artificially inflating the value of LCFS credits.

## Determination of Carbon Intensity Values (section 95486)

Staff added language to section 95486(b)(1) to clarify that the carbon intensity values in the lookup tables for the enumerated pathways are described in the supporting documents listed in section 95486(b)(1)(A) through (P), which are incorporated therein by reference. However, only the documents shown in (J) through (P) constitute entirely new supporting documents that are being added to the rulemaking record. These new supporting documents comprise a portion of the additional documents subject to the 30 day supplemental comment period described in this notice. By contrast, the documents shown in (A) through (I) were cited in the Staff Report and are already part of the rulemaking record. Initial Statement of Reasons (ISOR) at IV-6.

In addition, staff added language that would require regulated parties for gasoline, CARBOB, or diesel fuel derived from high carbon-intensity crude oil (HCICO) to calculate deficits relative to the carbon intensity standards in sections 95482 separately for the HCICO and non-HCICO feedstocks, (section 95486(b)(2)(A)2.). This new language was added pursuant to the Board's direction under Resolution 09-31.

## Treatment of High Carbon Intensity Crude Oil

The issue of the treatment of HCICO is an important one, and ARB needs to finalize the regulatory language on the treatment of HCICO. During the original 45 day comment period, WSPA expressed our concern that the original HCICO proposal would not maintain product fungibility and would be operationally unworkable. Unfortunately, the revisions included in this 30 day package address

neither of our concerns. WSPA recommends a different approach that will fully account for the carbon intensity impact of the use of HCICO, while preventing product differentiation

In addition to the fundamental issues described above, there remains considerable uncertainty around the implementation of the HCICO provisions. As a further demonstration of what types of issues are still outstanding, here are some questions we have:

- How will a refiner know if a new crude they decide to use is high carbon?
- How long will the use of a new crude need to be in order to necessitate the triggering of a carbon determination?
- Is a new crude considered high carbon intensity until demonstrated otherwise?
- Is the refiner using the crude responsible for the demonstration that the crude is not high carbon intensity?

Further, staff revised the public review and the Executive Officer approval process for the use of Method 2A or 2B (section 95486(f)(4) and (5)) to be consistent with the Administrative Procedure Act (Government Code section 11346 et seq.) in accordance with Resolution 09-31.

Section 95486(f)5 - ARB has removed the requirement for the E.O. to approve or disapprove a new pathway (Method 2A or 2B) within 45 days after the public review process and instead approve or disapprove an application in accordance with the applicable provisions of the Administrative Procedure Act (APA).

If the APA does not define a time schedule for approval or disapproval, or if it exceeds 90 days we request the Agency define a time for approval within 45 to 90 days, it should not be left open-ended.

### **Regulation Review (section 95489)**

Pursuant to Resolution 09-31, staff added extensive language specifying the substantive content of two Executive Officer reviews of the LCFS implementation (by January 1, 2012 and January 1, 2015, respectively), as well as the establishment of an advisory panel to participate in these reviews. The Board directed that such reviews be conducted in a public process, (section 95489(a)-(c)).

WSPA supports this change, but believes such reviews should be conducted at regular periodic intervals, perhaps every 3 years rather than just 2012 and 2015.

WSPA also requests that EER's be placed on the regulatory review list as an item that must be reviewed for possible revision during the periodic reviews.

### **Enforcement Protocols (new section 95490)**

Pursuant to Resolution 09-31, staff added a provision that permits the Executive Officer to enter into enforceable written protocols with regulated parties under specified conditions, (new section 95490).

WSPA supports these changes, and asks that such protocols also be allowed under section 95486; at least until more details are specified on HCICO calculations and the methodology for dealing with out-of-state GHG reduction programs are defined.