

DOCKETED	
Docket Number:	23-OIR-01
Project Title:	Petitions for Rulemaking
TN #:	249240
Document Title:	Request for Reconsideration of WSPA Petition for SB 1322 Rulemaking and Stay of Penalties
Description:	N/A
Filer:	Ngoc Tran
Organization:	California Energy Commission
Submitter Role:	Commission Staff
Submission Date:	3/16/2023 2:34:20 PM
Docketed Date:	3/16/2023



Sophie Ellinghouse

Vice President, General Counsel & Corporate Secretary

February 15, 2023

The Honorable David Hochschild
California Energy Commission, Chair
715 P Street, MS-14
Sacramento, CA 95814

RE: REQUEST FOR RECONSIDERATION OF WSPA PETITION FOR SB 1322 RULEMAKING AND STAY OF PENALTIES

Dear Chair Hochschild,

Thank you for the opportunity to speak at the California Energy Commission's (CEC) Business Meeting on January 25, 2023, about agenda item 17, the Western States Petroleum Association's (WSPA) Petition to Request a Rulemaking Hearing to implement the "California Oil Refinery Cost Disclosure Act," Senate Bill (SB) 1322 (2022).¹ The petition explained that SB 1322 introduces novel reporting terms that will require refiners to change the way they gather and report data. Without clarifying guidance from the CEC, best informed through a rulemaking, these key terms are vague and contradictory, rendering any reporting under the bill burdensome, inaccurate, and inconsistent.

The CEC denied WSPA's petition because it claimed that pending legislation could contextualize, clarify, and refine SB 1322's terms, and elected instead to postpone its decision about whether to clarify the law until *after* the Legislature acts. SB 1322 breaks new ground in imposing novel reporting requirements on refiners. But the decision to deny rulemaking and enforce SB 1322 without further clarification is flawed for at least two reasons. First, if the Legislature is indeed poised to clarify the law, refiners should not have to comply without the benefit of this much-needed clarity. Second, if the CEC wishes to postpone its decision about whether SB 1322 is unclear until after the Legislature acts, it would be unfair and arbitrary to not also postpone enforcement of SB 1322 as to refiners (that is, to enforce the law *before* making that decision).

Instead, the CEC should initiate a rulemaking but delay action—and stay refiners' reporting requirements—until after the Legislature has time to act. Accordingly, under Government Code section 11340.7(c), I am writing on behalf of WSPA and its members to request that the CEC reconsider its denial of WSPA's petition and stay its hand in enforcing SB 1322's reporting requirements until such much-needed clarification is provided by the Legislature and/or CEC. The CEC's brief letter and optional reporting form transmitted to refinery executives on February 6, 2023, is much appreciated, but does not provide the necessary clarifications sought in WSPA's petition on behalf of the refiners.

¹ CEC Business Meeting Agenda (Jan. 25, 2023), <https://bit.ly/3RuQeFk>.

Indeed, the CEC’s letter acknowledges that industry may have “more than one definition for any of the terms in statute” and that multiple “definitions or meanings” would need to be further explained.

BACKGROUND ON WSPA’S PETITION FOR RULEMAKING

WSPA filed its formal petition for rulemaking with the CEC on January 6, 2023. The petition presented to the CEC reflects input from refinery operators, regulatory-compliance specialists, finance officers, and legal counsel from across WSPA’s member companies. The petition pointed out that key pieces of SB 1322’s reporting mechanism are unclear or misleading. For example, the law asks refiners to provide “estimated valuations of costs” associated with the low-carbon fuel standard and cap-at-the-rack program without providing any guidance on how to arrive at such estimates. And the list of transaction types in Public Resources Code section 25355(a)(3), such as “spot pipeline sales,” potentially contains overlapping categories and could result in double-counting of wholesale gasoline sales.

At first, CEC staff appeared to support the petition. Before the petition was filed, CEC staff stated in a letter to WSPA that they would “propose that the Commission adopt an order instituting rulemaking to initiate a proceeding to evaluate how best to interpret and make specific the requirements of SB 1322.”² And the petition itself benefited from extensive guidance from and collaboration with CEC staff. But after publicly noticing the petition for consent agenda approval, and about a week before the January 25 Business Meeting, the CEC reversed course and requested that WSPA withdraw the petition. WSPA did not do so given the need for clarity.

At the meeting, CEC staff opposed the petition on the basis that proposed legislation could refine and clarify SB 1322.³ The CEC staff recommendation noted that a bill pending in the Legislature, SB 2, “relies on and refines the term ‘gross gasoline refining margin’” and “adds substantial content related to costs and prices.”⁴ Although CEC staff recognized that SB 2 could provide much-needed clarity to the existing law—for example, because it “adds substantial context” to the costs described by SB 1322—they nonetheless maintained that SB 1322 was “clear as written” and “can be complied with.”⁵ At the meeting, staff indicated that they “wish to wait and see the outcome of the pending legislation” before engaging with the rulemaking process.⁶

I addressed this proposed wait-and-see approach at the meeting. As I stated then, “If you intend to delay your rulemaking responsibility due to the pending legislation, then [you] should also delay the obligations under SB 1322 to prevent the potential conflicts your staff has identified.”⁷

The CEC denied the petition—but not without acknowledging the potential clarifying effect of future legislation on SB 1322’s terms. In its order, it states that pending legislation “could also potentially address” unclear terms in existing law, and notes that it would wait for legislation “before initiating a

² Letter from Kari Anderson, CEC Senior Att’y, to WSPA CEO Catherine H. Reheis-Boyd (December 16, 2022).

³ Sen. Bill. No. 2 (2023-2024 1st Ext Sess.), introduced by Senator Skinner, would adopt Public Resources Code section 25355.5.

⁴ Aleecia Gutierrez, Memorandum, CEC Staff Recommendation on Petition for Formal Rulemaking Regarding SB 1322 Implementation 2 (Jan. 23, 2023).

⁵ *Id.* at 4:15:57–4:16:03.

⁶ Zoom recording, CEC Business Meeting at 4:16:40, <https://bit.ly/3RtHNu9>.

⁷ *Id.* at 4:13:19.

rulemaking *for the purpose of considering whether to clarify terms in SB 1322* and ensure consistency and accuracy in its interpretation and implementation.”⁸

REQUEST FOR RECONSIDERATION AND STAY OF REPORTING AND ENFORCEMENT

The CEC should reconsider WSPA’s petition for at least two reasons. First, if the Legislature *does* pass legislation that clarifies and contextualizes SB 1322, refiners should have the benefit of that clarity and context before being forced to comply with the law’s as-yet-unclear-and-unworkable terms. And, second, whatever the Legislature does, the CEC should not impose the law’s novel reporting requirements on refiners *before* deciding whether to clarify those requirements. Instead, the CEC should grant the petition but stay rulemaking on—and enforcement of—SB 1322 until after the Legislature decides whether and how to pass further legislation that would clarify and contextualize SB 1322. Proceeding with enforcement of SB 1322 now, without providing the clarity and context that the CEC itself admits may be necessary, would unfairly put the cart before the horse.

1. Pending legislation could indeed contextualize and clarify SB 1322’s terms, and refiners should not have to guess at what those terms mean before the Legislature (or CEC) provides this much-needed context. SB 1322 writes on a blank slate: Never before have refiners been asked to estimate the costs of California’s environmental regulations or tabulate “crude oil . . . received and intended to be refined” in a given month. Pub. Res. Code, § 25355(b). If, as the CEC acknowledges, the Legislature could help regulators and industry members understand these new requirements, the CEC should hold off on enforcing the law until everyone involved can benefit from this legislative guidance.

2. Regardless of what the Legislature does, it would be unjust to acknowledge the need for a potential rulemaking, but enforce the law before deciding whether such a rulemaking is in fact necessary. The CEC’s order states that it wishes to “allow[] the legislative process to conclude before initiating a rulemaking for the purpose of considering whether to clarify terms in SB 1322.” In essence, the order recognizes that the CEC may have to clarify the terms in SB 1322 while postponing doing so while the Legislature deliberates further. But if SB 1322 is unclear, then the CEC should act now to clarify it, or else delay enforcement of it until after the CEC or Legislature clarifies it. An act-now, decide-later approach would be unfair to refiners, placing them in the impossible position of guessing at what to report, and would also put the CEC in the awkward position of aggregating and publishing potentially misleading and contradictory data to the public.

Forcing industry members to comply with reporting requirements that the CEC itself acknowledges may need clarification would also give rise to unnecessary and avoidable constitutional issues. *See People v. Garcia*, 2 Cal. 5th 792, 804 (2017) (espousing “a preference for avoiding the unnecessary resolution of constitutional question”). States may not enforce laws that are “so vague that [people] of common intelligence must necessarily guess at [their] meaning.” *E.g., In re Sheena K.*, 40 Cal. 4th 875, 890 (Cal. 2007) (citations omitted). And the First Amendment limits States’ ability to compel businesses to make disclosures that are both controversial and misleading. *E.g., CTIA - The Wireless Ass’n v. City of Berkeley*, 928 F.3d 832, 847 (9th Cir. 2019).

Fortunately, SB 1322 vests the CEC with authority to forestall the law’s reporting and enforcement provisions—authority the CEC should exercise here, in the interests of fairness, accuracy, and sound

⁸ California Energy Commission, Order Denying Petition for Rulemaking 2–3 (Order No. 23-0125-17, Jan. 25, 2023) (italics added).

public policy. Public Resources Code section 25362(a) provides that all penalties for failure to report are stayed if the refiner “has timely filed objections with the commission . . . and the commission has not yet held a hearing on the matter.” On behalf of its members, WSPA has and hereby does timely object to the inconsistent, unfair, misleading, and inaccurate reporting called for by SB 1322, and would renew this objection (as may some or all of our members) whenever any refiner is notified of a failure to timely report information called for by SB 1322. We further request that you schedule a hearing to clarify these requirements via the rulemaking process, and that such a hearing on the matter be held *after* the Legislature has passed clarifying legislation currently before it.

* * * *

WSPA understands why the CEC does not want to act on statutory provisions that could soon be clarified and contextualized by the Legislature. Neither do WSPA’s members. Accordingly, the CEC should reconsider its denial, initiate rulemaking, and postpone any hearing on the matter until the Legislature can provide the requisite clarity and context, thereby suspending for the time being SB 1322’s reporting requirements (or at least its penalties).

We look forward to the opportunity to engage with you in good faith on the foregoing, and to your response to this request.

Sincerely,



Cc: The Honorable Siva Gunda, California Energy Commission, Vice Chair
The Honorable Andrew McAllister, Commissioner
The Honorable Patty Monahan, Commissioner
Mr. Drew Bohan, Executive Director
Cathy Reheis-Boyd, WSPA
Shant Apekian, WSPA
Tanya DeRivi, WSPA