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## Idemitsu Comments on 23-OIR-03 Emergency Rule

*Additional submitted attachment is included below.*

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February 20, 2024

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Docket No. 23-OIR-03
715 P Street, MS-4
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Re: Comment on Emergency Rulemaking
OAL File No. 2024-0215-02E:
Revised SB X1-2 Spot Market Reporting Requirements

Dear All,

On behalf of Idemitsu Apollo Corporation ("Idemitsu"), we appreciate the opportunity to comment on the above captioned rulemaking (the "Emergency Rule") by the California Energy Commission ("CEC"). Idemitsu shares the CEC's stated goals and wants to collaborate with CEC to help see those goals through. The short time afforded industry participants like Idemitsu to review and comment on the Emergency Rule (made even shorter by the intervening long weekend) has, however, limited Idemitsu's ability to do so. Idemitsu therefore respectfully submits these comments with the respectful request that CEC slow down the process to open the door to the involvement of all affected market participants.

Idemitsu is a fuel reselling company located in Sacramento, California. Idemitsu is not a refiner in the United States. Rather, it is a reseller that buys and sells products, primarily to jobbers and independent gas stations. The volume of fuel Idemitsu is responsible for is only a small fraction of what refiners can produce on a single day. Nonetheless, Idemitsu plays an important role in the California transportation fuels market. Small resellers like Idemitsu keep refiners competitive by providing an alternative to refinery-direct sales. Moreover, Idemitsu plays a critical role for independent gas stations that are prevalent in economically disadvantaged and rural areas. This is because large refiners must supply their own branded gas stations first, meaning that independent gas stations cannot turn to these large refineries when the market is tight. Instead, it is resellers like Idemitsu who step in to ensure these independent gas stations

have fuel for their customers. So, for example, Idemitsu does not sell in markets located near refineries, such as San Francisco or Los Angeles. Rather, Idemitsu sells in outlying markets away from refineries, such as in rural agricultural areas.

As pertinent here, SB X1-2 created a new “daily report” requirement for “[r]efiners and nonrefiners” that “consummate spot market transactions,” Pub. Resources Code § 25354(*l*), and the CEC has now prepared the Emergency Rule for the asserted purpose of amending and adopting regulations to implement the daily reporting requirement. Idemitsu understands that CEC’s rulemaking goals are to (1) increase transparency, (2) decrease price spikes, and (3) increase liquidity in the marketplace. **Idemitsu agrees with and supports those goals.**

In reviewing the Emergency Rule, Idemitsu is concerned that the CEC will not be able to achieve its stated goals. This is particularly true with respect to the goals of avoiding price spikes and increasing liquidity. Market changes—such as a decrease in refinery production (and corresponding increased reliance on costly fuel imports) and a decrease in the number of spot market participants—have already limited supply in the State. Idemitsu is concerned the Emergency Rule will exacerbate this supply problem. Idemitsu believes that the right course for CEC to achieve its objectives is to engage all affected parties before promulgating these market-shaping rules. Idemitsu stands ready to engage with CEC in such a process.

Against that background, Idemitsu notes that the Emergency Rule raises a number of concerns relevant to OAL’s review and the Rule’s practical effect, including (among other things) the following:

- The Emergency Rule lacks clarity in what transactions are covered and potentially reaches interstate transactions that have no or little connection to the California transportation fuels market.

- The Emergency Rule has expanded the definition of “nonrefiner” in a manner that (a) goes beyond and is inconsistent with the statute, (b) creates inconsistency and incoherence in the regulatory definitions, and (c) would produce unnecessarily duplicative reporting.

- The Emergency Rule imposes onerous reporting fields and conventions that go beyond what the statute requires and do not cleanly align with how transactions are actually processed and structured. Moreover, CEC has set a completely infeasible and unreasonable 9:00 a.m. deadline for the daily reports. Idemitsu notes that the prior version of the Emergency Rule circulated on February 6 of this month had a deadline of 5:00 p.m. on the following day, and the deadline appears to have been dramatically changed (to the tune of eliminating an entire work day to prepare the data) without any further explanation or consultation with affected parties. Idemitsu is concerned that, by

imposing such unreasonable and unnecessary burdens, CEC will drive participants out of the market, thus harming rather than helping the California fuel market.

- The Emergency Rule is procedurally flawed, including because, among others, CEC does not appear to have identified each technical and empirical study, report, or similar document on which CEC has relied and has not adequately considered the fiscal impact or indirect effects of the rulemaking. These failures will undermine the ability to provide meaningful judicial review of the regulation and are symptomatic of the unnecessarily rushed process that occurred without meaningfully consulting with the industry and/or providing the required notice.

Accordingly, Idemitsu requests that OAL disapprove the Emergency Rule and/or that CEC withdraw the Emergency Rule, pending further discussions with all affected market participants.

***Market Background***

To provide context for many of its comments below, Idemitsu notes that the California transportation fuels market has undergone significant changes in recent years. As noted above and as CEC is no doubt aware, the California fuel market has undergone substantial changes that have decreased supply. For example, California's refinery capacity has significantly decreased because of the conversion of two refineries (Marathon Martinez and Phillips 66 Rodeo) to biodiesel production.[1] Idemitsu understands that these conversions may have decreased California's fuel production by 120,000 barrels per day.[2] This, of course, has a significant negative impact on overall production capacity in California. In the CEC's Transportation Fuel Supply Outlook, 2017 (cited as supporting the Emergency Rule),[3] the Commission concluded that California's transportation fuel market was "nearly self-sufficient" because of refinery production.[4] At that time, gasoline production was around 1 million barrels per day.[5] But overall refining production has dropped since then. Even isolated from other changes, the conversions of Martinez and Rodeo represent a more than 10% reduction in gasoline supply from California

[1] *See* Tom Vacar, KTVU Fox, "2 of 5 Bay Area refineries to stop making gasoline," Oct. 11, 2023, *available at* https://www.ktvu.com/news/2-of-5-of-bay-area-refineries-to-stop-making-gasoline.
[2] *See* CEC, "California Oil Refinery History," *available at* https://www.energy.ca.gov/data-reports/energy-almanac/californias-petroleum-market/californias-oil-refineries/california-oil (last accessed February 17, 2024) (noting the closure of Phillips 66 Santa Maria in January 2023).
[3] *See* CEC, "Transportation Fuel Supply Outlook, 2017," *available at* https://www.energy.ca.gov/publications/2017/transportation-fuel-supply-outlook-2017.
[4] Transportation Fuel Supply Outlook, 2017 at 43.
[5] Transportation Fuel Supply Outlook, 2017 at 25.

refineries.[6] As a result, the California market is now more reliant on imports of gasoline and gasoline components from other countries to stay balanced. This market contraction sits atop other idiosyncrasies of the California fuel market, including the state's strict and unique product specifications for gasoline. These factors further combine to isolate the California market.

Importing gasoline is expensive, and that expense has driven many market participants out of the market already. Gasoline imports require infrastructure that is limited in capacity (storage and draft) and expensive to access for independent importers. By contrast, because of their advantages in assets and financial means to handle large-volume imports, large refiners are better positioned to be able to import gasoline. As a result, the number of spot-market participants has decreased significantly in California in recent years. For example, Idemitsu understands that Glencore, Vitol, Cosmo, WestPort, Astra, Trafigura, Mercuria, and Freepoint have all exited the California market.

***The Emergency Rule Lacks Clarity on What Transactions Are Covered and Improperly Threatens to Regulate Transactions Outside of California.***

Idemitsu is concerned about the clarity of what transactions are and are not covered by the Emergency Rule. Idemitsu respectfully submits that this lack of clarity may be addressed by further study and discussion with industry participants prior to the issuance of regulations.

CEC's proposed daily spot transaction and settlement reports, set forth in the addition of Appendix D, Sections I and II to Title 20, Division 2, Chapter 3, Article 3 of the California Code of Regulations ("CCR"), purport to require market participants to report the consummation and settlement of "each spot market transaction for a transportation fuel product that either occurs in California or involves a transportation fuel product that will be delivered on the spot within the California fuels market." The Emergency Rule does not define what it means for a transaction to "*occur*[] in California" (in contrast to, e.g., involving a delivery "on the spot within the California fuels market"). Given the broad and ambiguous use of the phrase "*occurs* in California," it appears that CEC is intending to require reporting on transactions for deliveries *outside* the California fuels market and that have no or only a remote nexus to the California market. This would only confuse CEC's data collection efforts and violate federal law.

For example, CEC's regulation could be read to require reporting on a transaction where one party sells fuel from Korea for delivery in Nevada simply because the fuel was delivered into a pipeline that originates at a California port and runs through California to Nevada. Similarly,

[6] This reduction is not limited to gasoline. For example, California refinery sales of ultra low sulfur diesel have dropped from a production of 1,252.8 thousand gallons per day in August 2019 to 752.4 in March 2022. *See* U.S. Energy Information Administration, "California No 2 Diesel Ultra Low Sulfur Less than 15 ppm Retail Sales by Refiners," *available at* https://www.eia.gov/dnav/pet/hist/LeafHandler.ashx?n=PET&s=A723650061&f=M (last accessed February 17, 2024).

CEC's regulation could be read to mean that a transaction that involves the sale of fuel from Japan to Alaska (and that enters a pipeline in Alaska) as a transaction taking place "in California" simply because a party involved in the transaction was located in California at the time of the transaction. It makes no sense to include either of these transactions in CEC's data collection.[7]

Imposing reporting requirements on transactions that govern the purchase and sale of transportation fuels wholly outside of California raises two principle concerns. First, CEC will be collecting irrelevant data on transactions that have no impact on the price of gasoline in California, which could ultimately skew the market monitoring reports.[8]

Second, such an application of the Emergency Rule would violate the Commerce Clause. The Commerce Clause provides that "Congress shall have Power . . . [t]o regulate Commerce . . . among the several States," U.S. Const., art. I, § 8, cl. 3, and by implication, it permits only *incidental* regulation of interstate commerce by the States; direct regulation is prohibited. *Edgar v. MITE Corp*., 457 U.S. 624, 640 (1982). "The Commerce Clause also precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State." *Id.* at 642–43. And "even when a state statute regulates interstate commerce indirectly, the burden imposed on that commerce must not be excessive in relation to the local interests served by the statute." *Id.* at 643. Here, the Emergency Rule, if interpreted as broadly as CEC apparently intends, would impose reporting obligations directly on transactions in interstate commerce and that involve sales outside of California. Moreover, the only reason for CEC to gather such information is to limit the margins of sales in the California market based on sales in other states—effectively creating the kind of protectionist regime that the Supreme Court has repeatedly rejected. *See, e.g.*, *Healy v. Beer Institute, Inc.*, 491 U.S. 324 (1989).

To be clear, Idemitsu does not expect OAL to resolve a constitutional challenge as part of its review. But OAL is required to ensure the *clarity* of a proposed regulation, so that "the meaning of regulations will be easily understood by those persons directly affected by them." Gov. Code § 11349(c). Here, the regulation lacks clarity on its face, and the serious constitutional concerns further confirm why OAL should disapprove the regulation as submitted. *Cf. People v. Garcia*, 2 Cal. 5th 792 (2017) (discussing how statutes should be interpreted to

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[7] The question of where a transaction "occurs" is all the more confusing given that the Emergency Rule identifies only two options for the "spot market trading location": San Francisco spot market (defined to include Kern County and anything North of it), and the Los Angeles spot market (defined to include everything else). Emergency Rule, App. D, I.D.

[8] Indeed, the breadth of the Emergency Rule's collection efforts belies CEC's explanation that its mandate from SB X1-2 was to "submission of spot market transaction reports to the CEC detailing trades for petroleum products that influence California gasoline prices." Emergency Rule at p. 4.

avoid constitutional concerns). Instead, any regulation would have to be limited to trades taking place on the *California* spot market for ultimate delivery to customers in California.

***The Emergency Rule's Expanded Definition of "Nonrefiners" Is Inconsistent with the Statute, Creates Confusion, and Is Overbroad and Unnecessary.***

Similarly, the Emergency Rule's definition of "nonrefiners" would benefit from further consideration.

The Emergency Rule's definition of "nonrefiners" stretches beyond the boundaries of the statute. SB X1-2 amends Section 25354(l) of the Public Resources Code to require daily report from "refiners and nonrefiners." SB X1-2 does not define "nonrefiners" directly, but the immediately preceding subsection (Section 25354(k)) is a weekly reporting requirement applicable to "nonrefiners, *such as proprietary storage companies*, that commercially trade in gasoline, gasoline blending components, diesel fuel, or renewable diesel fuel inventory not subject to contractual supply obligations." Pub. Res. Code § 25354(k) (emphasis added).

The Emergency Rule, however, adopts a much broader view of "nonrefiner." The Rule defines that term to include "importers, brokers, and traders as defined in Section 1363.2." 20 CCR § 1366(a) (proposed). The term "brokers" and "traders" did not even exist in the prior version of Section 1363.2. The Emergency Rule thus had to add new definitions of "trader" (broadly defined to mean "an individual, company, or other entity that does not have a refining presence in California but either sells or takes possession of refined petroleum products or renewable fuels, or both, via spot market transactions") and "broker" (defined as an "entity that negotiates contracts of purchase and sale of spot market transactions that is not classified as a refiner or a trader").

For several reasons, this new and expanded definition of "nonrefiner" is inconsistent with the statute and existing law. *See* Gov. Code § 11349(d) (requiring OAL to review regulations for "[c]onsistency," meaning "being in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law"). It also creates a lack of clarity and confusion.

First, under traditional rules of statutory construction (including the doctrines *ejusdem generis*, *expressio unius est exclusio alterius*, and *noscitur a sociis*),[9] the illustrative and more limited use of the term "nonrefiner" in Section 25354(k) operates to inform and limit the meaning of "nonrefiner" in Section 25354(l). As interpreted by CEC, essentially any individual, person, or company that is a party to a spot market transaction has an independent daily reporting obligation. If that were what the Legislature really intended, it could have just said, "Any person

[9] *See Dyna-Med, Inc. v. Fair Employment Housing Comm'n*, 43 Cal. 3d 1379, 1391 & nn. 12-14 (1987) (explaining the canons).

that consummates a spot market transaction shall submit a daily report ….” Instead, the Legislature used the phrase “Refiners and nonrefiners,” suggesting a more limited scope. There is no logical reason why the reporting obligations need to be expanded in this way, and doing so would create unnecessary duplication and burdens.

Second, CEC’s regulatory definitions create internal ambiguities and incoherence. For example, CEC defines “nonrefiner” to include an “**importer**,” which in the pre-existing (and proposed) regulation is defined to mean the following:

> [A] firm that is owner of record at the point of discharge for crude oil, petroleum products or oxygenates imported to California and has imported 20,000 barrels or more … during any month of the current or previous year. Importer also includes firms delivering 5,000 gallons or more of non-California fuels to a site in California by tanker trucks.

20 CCR § 1363.2. As defined, “importer” is properly and sensibly limited to “firms” that have a significant volume of business specifically in the California market. The definitions of “broker” and “trader,” in contrast, have no territorial or volume limits whatsoever, and may include individuals. Thus, an importer who consummates spot market transactions is exempt if they import 19,000 barrels per month to the State, but an out-of-state reseller who makes one transaction involving the California market would be covered. That makes no sense. That lack of clarity within CEC’s own regulatory definitions is further reason to disapprove of and reconsider the Emergency Rule.

Third, the rulemaking would benefit from industry input and CEC’s consideration of the economic impact of adopting such a broad definition of “nonrefiner,” as extending the reporting obligations in this manner will likely drive participants out of the market. Resellers, like Idemitsu, play an important role in bringing balance and competitive pressures to lower prices in petroleum markets and expand access to underserved communities. Based on data from the CEC, independent gas stations had a 31.5% share of the gasoline market in 2019.[10] But, independent gas stations made up either the majority or plurality of gas stations available in *every single California county where 20% or more of the population fell below the poverty line*.[11] It is these

[10] *See* California Energy Commission, Petroleum Watch (October 2020), *available at* https://www.energy.ca.gov/sites/default/files/2020-10/2020-10_Petroleum_Watch_ADA.pdf (last accessed February 16, 2024).

[11] *See* California State Council on Developmental Disabilities, California Poverty Levels by County, *available at* https://scdd.ca.gov/wp-content/uploads/sites/33/2019/03/Exhbit-A-SCDD-California-Poverty-Levels-by-County.pdf (last accessed February 16, 2024) (identifying Butte, Del Norte, Fresno, Glenn, Imperial, Kern, Kings, Lake, Madera, Mendocino, Merced, Tehama, Trinity, Tulare, and Yuba counties as having populations where 20% or more of the population fell below the poverty line). For the CEC and OAL’s convenience, Attachment 1

populations who will be most negatively affected by the Emergency Rule. But, there is no evidence in the regulation or in the documents cited therein that any consideration has been given to the impact of the regulation on these independent gas stations. CEC should carefully consider retracting the Emergency Rule to investigate the issue and should amend the regulation to ensure that these communities will not be forced to bear even more hardship.

While only providing a small fraction of total petroleum sales into the state, resellers, unlike refiners, are not partial to making refinery-direct sales and are therefore able to provide a steady supply of product to independent gas stations, which are more prevalent in rural and poor areas. But in regulating resellers like refiners, CEC will make it increasingly difficult for these smaller entities to compete, which will disincentivize them from participating in the California spot market. Without these resellers, an important check on refinery trades that serves to balance the market will cease to exist.

***The Emergency Rule's Reporting Obligations Go Beyond the Statute, Are Unduly Burdensome, and Will Not Produce Meaningful Information.***

The Emergency Rule is also inconsistent with the statute and lacks clarity in the way that it expands the daily reporting obligation. For example:

- The Emergency Rule requires that reports for each day's transactions be electronically submitted by **9:00 a.m.** the following day. This requirement is extremely burdensome. Appendix D.I (daily report for initiated transactions) requires 32 separate fields. Appendix D.II (daily report for settled transactions) requires 24 separate fields. For many individuals and companies, there will be no way to comply with that deadline without hiring staff dedicated just to CEC reporting or requiring existing personnel to work overtime or special graveyard shifts. While CEC contends that the 9:00 a.m. deadline is "to allow CEC staff to analyze spot market activity soon after it occurs," CEC fails to explain what analyses the Commission intends to conduct, why a 9:00 a.m. deadline specifically is necessary, or what interventions they intend to do.[12]

- The Emergency Rule bifurcates reporting on both the initiation of the transaction and its settlement, with different fields required for each. *See* Proposed § 1366(a); App. D, §§ I, II. While CEC contends that this bifurcated reporting is intended to

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consolidates the information CEC provided regarding independent gas stations with the poverty statistics provided by SCDD.

[12] Indeed, as of February 6, CEC proposed a version of the Emergency Rule using a deadline of 5:00 p.m. the following day. CEC never explained the basis for the abrupt change, what exactly CEC intends to do with the information each morning, or why a 9:00 a.m. deadline specifically is necessary. And it appears that CEC failed to consult with anyone in the industry or consider the economic and administrative impact of the deadline change.

"streamline" the reports and save "both industry and the CEC time and effort," the reality is that CEC is merely doubling the work that entities must do to complete the reports. Nothing in the statute supports imposing this duplicative burden.

- The Emergency Rule requires an extremely detailed specification of fields apparently intended to make CEC's analysis easier but is not aligned with how transactions are necessarily processed. And the fields, as detailed as they are, still will not necessarily capture the structure and nuance of a given transaction.[13]

The extremely burdensome nature of CEC's reporting demands (also discussed below) heightens the problems with adopting such a broad definition of "nonrefiner" and requiring duplicative reporting. CEC's field specifications and deadline seem to assume that the demanded information is somehow automatically or routinely captured every time a trade occurs—as if all a person needs to do is click a button saying "Run Report," and everything will automatically get transmitted and sent to CEC. That is not the case. There is no way for an entity to comply with CEC's demands without devoting extensive staffing and technological infrastructure to managing these reports.

The effect—whether intended or not—will thus be to isolate California even further. Refiners and large entities that do substantial business in the State may have the resources and incentives to create the systems and processes necessary to comply with the reporting requirement. Smaller entities may not and thus will be incentivized to leave the market entirely. Likewise, the Emergency Rule may artificially restrict how transactions themselves are conducted so as to align with the required fields, rather than allowing market participants to freely trade amongst each other using the terms and conditions that make sense for the individuals involved.

Ultimately, California will find itself with a dearth of entities willing to sell gas into the state, which will only exacerbate the current supply challenges created from California's limited permissible gasoline blends and the risk of disruptive price spikes affecting commuters. SB X1-2 was intended to prevent "anticompetitive conduct" and "price gouging," Sec. 1(f), (i), yet the Emergency Rule would create a regime that disproportionately burdens small entities and reduces competition, harming the market and consumers. That is not what the Legislature intended.

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[13] For example, by mandating the reporting of the volume of product contracted on a given day (App. D. I(K)), the CEC will be unable to account for variable option trading that may result in a final sale price and volume unknown at the time of the transaction. And if CEC then uses this data to establish margin caps, it will be doing so without properly understanding the transaction in question.

***<u>The Emergency Rule Is Procedurally Flawed.</u>***

We recognize that, as part of SB X1-2, the Legislature authorized OAL to treat any proposed implementing regulations as emergency regulations. *See* Pub. Res. Code § 25367(a). Nonetheless, that does not mean that CEC is free to act arbitrarily or capriciously, to ignore due process, or to act beyond the scope of its authority. In short, procedural safeguards still apply. We respectfully submit that the Emergency Rule at issue here warrants a much fuller procedure than what two business days allow.

***Failure to Identify All Materials Relied On***

Even in the context of an emergency regulation, an agency must "identify each technical, theoretical, and empirical study, report, or similar document, if any, upon which the agency relies." Gov. Code § 11346.1(b)(2). This critical requirement allows the public to understand and comment on the basis for the agency's rule, and it allows a court to meaningfully review the rule upon any challenge. Here, however, Idemitsu believes that CEC has not provided all materials on which it has relied. Providing those materials would be helpful to the regulated community, as it would provide important information to assist in understanding the Emergency Rule.

For example, CEC states that it developed the specific reporting requirements "through internal analyses and engagement with the industry." Notice of Emergency Rule, at 10. But no such internal analyses are identified in the description of materials relied, nor is there any further description of what the engagement with the industry entailed or how or why it supported CEC's rule. The CEC appears to have engaged with only a select segment of the industry that did not include fuel resellers or potentially affected industries such as independent gas stations, jobbers, small businesses, agricultural businesses, manufacturers, and a host of others. But even the select segment CEC did consult has come out *against* the Emergency Rule as unreasonably burdensome and adopted *without* adequate input from that segment of industry.[14]

As another example, CEC cites, as material it relied on, a DPMO Interim Update on California's Gasoline Market September 2023 ("DPMO Update").[15] As pertinent here, that Update reported that, "on Friday September 15, 2023, an unusual transaction took place on the California spot market that caused the price of gasoline to increase by nearly $0.50 per gallon on the spot market." Update at 3. And CEC's Emergency Rule references that "unusual transaction on the gasoline spot market" as a reason for the "enhanced reported requirements implemented through this rulemaking." Notice of Emergency Rule at 5. Yet the cited DPMO Update document contains just two paragraphs generally describing the event, with no further discussion, analysis, or explanation of what the supposed "unusual transaction" was or why

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[14] *See, e.g.*, Comments from Western States Petroleum Association, (February 16, 2024), TN# 254547.
[15] Available at https://www.energy.ca.gov/media/8748.

enhanced reporting requirements would have avoided the issue, nor did CEC's Notice provide any further explanation.

Presumably, there is *some* more detailed report or analysis on what that transactions was, and that information is critical to understanding whether CEC's "enhanced reporting requirements" are actually tailored to the problem CEC is purportedly trying to solve. But without further identification of what that analysis or document is and what happened, the public and courts have no real way to assess the rationality of CEC's approach.

***Failure to Acknowledge Fiscal Impact***

CEC contends that it "does not anticipate any costs to itself or other state agencies as a result of this emergency rulemaking action." Idemitsu questions whether this is correct. CEC's Emergency Rule (a) significantly expands the number of entities required to report, resulting in duplicative reports; (b) imposes additional and highly specified field reporting obligations; and (c) demands that all reports must be submitted by 9:00 a.m. the next day on the premise that CEC will be promptly reviewing each day's transactions by the following morning. It seems highly unlikely that CEC will be able to process all of this additional information without additional cost. **Again, Idemitsu appreciates the goal of improving transparency into the spot market.** The question is how to achieve that goal efficiently and without harming the market. Idemitsu is concerned is that CEC has simply taken a maximalist approach without adequately considering the costs, burdens, and feasibility either for the reporting parties or for itself.

***Failure to Conduct a CEQA Analysis***

CEC contends that the Emergency Rule is not a "project" subject to CEQA, purportedly "because the proposed rulemaking relates to an informational reporting requirement, and so does not result in any direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment." That finding significantly underestimates how the Emergency Rule will impact the California gas market and distort the way transactions are handled, including by squeezing out smaller market participants in favor of bigger companies and refineries. Indeed, CEC's Emergency Rule *does* threaten physical change. For example, a decrease in fuel availability from independent gas stations is likely to cause affected populations to have to travel farther to fill up their tanks (increasing greenhouse gas emissions, street and highway traffic, and noise while reducing air quality, all while costing consuming more in the process). And, as another example, decreased availability from resellers will mean increased refinery production and an increase in truck traffic delivering fuel (increasing greenhouse gas emissions, traffic, and noise while reducing air quality, all while costing consumers more in the process). Both of these (and other outcomes of the Emergency Rule) will increase greenhouse gas emissions, traffic, and noise while reducing air quality, all while costing consumers more in the process. CEC should conduct a full CEQA evaluation to further refine its proposal.

* * *

While SB X1-2 authorizes the CEC to adopt its implementing regulations through emergency rules, CEC is by no means obligated to do so. Given the complexity of regulating the spot market, including establishing set margin caps and defining reporting metrics to monitor individual transactions that can range in duration, structure, and allocation of risk, it would be prudent for CEC to adopt regulations through a formal rulemaking process. Doing so would present all affected market participants with the opportunity to engage with the CEC and provided much-needed insight on how to properly frame reporting requirements in a way that will not hamstring future transactions. It would also allow CEC to consult with industry and market experts and adopt regulations supported by academic studies or industry standards, none of which are cited in the Emergency Rule.

CEC's current rulemaking docket already includes a number of comments, including requests for it to conduct a formal rulemaking; yet it does not appear that CEC has responded to or even considered these comments. Taking action without regard to public comments is, in and of itself, arbitrary and capricious. The CEC has considered public comments in the past when choosing to adopt emergency regulations and should do so here. *See* CEC Resolution 22-1012-7. Even ignoring these prior comments and requests for formal rulemaking, an emergency action with a five-day comment period is hardly sufficient to support reasoned decision-making. Worse, a five-day comment period that starts before a three-day weekend leaves only two (2) business days for any affected party to read and understand how they may be impacted by what is proposed, much less be able to provide valuable comments to assist the CEC to develop a workable regulation that furthers rather than undermines the goals of the statute. And, the last of those days (Tuesday, February 20), falls on the first day of a major industry conference—the Western Petroleum Marketers Association conference—meaning that many market participants will be out of the office almost the entire duration of the comment period. Moreover, it is not clear that a legitimate emergency exists such that CEC needs to bypass formal rulemaking or otherwise accelerate its initial plans to promulgate a rule later this summer. *See* CEC's November 3rd Workshop Presentation, 23-OIR-03 (TN# 252883). The petroleum products industry has been producing and distributing California transportation fuels for many years now. The signature event motivating the Emergency Rule was the 2022 retail gasoline price spikes. Since that time, however, the Legislature passed SB X1-2, which establishes self-executing daily reporting obligations that are currently underway, obviating the need for CEC to act on an emergency basis without a complete deliberative process.

For all of the above reasons, Idemitsu respectfully submits that OAL should disapprove the Emergency Rule, and CEC should re-engage with industry—including representatives from all relevant segments of the market—in considering a new and more balanced rulemaking.

Regards,

Maureen F. Gorsen
Partner

Attachment

**Attachment 1**

| County | Percent Below Poverty Level | Number of Independent Gas Stations[16] | Independent Gas Stations Determination |
|---|---|---|---|
| Butte | 21.3% | 55 out of 95 | Majority |
| Del Norte | 21.7% | 6 out of 14 | Plurality |
| Fresno | 26.9% | 185 out of 358 | Majority |
| Glenn | 20.3% | 12 out of 22 | Majority |
| Imperial | 24.1% | 51 out of 83 | Majority |
| Kern | 23.1% | 194 out of 367 | Majority |
| Kings | 21.6% | 28 out of 61 | Plurality |
| Lake | 24.6% | 21 out of 41 | Majority |
| Madera | 22.1% | 31 out of 75 | Plurality |
| Mendocino | 20.2% | 41 out of 60 | Majority |
| Merced | 24.2% | 53 out of 113 | Plurality |
| Tehama | 21.5% | 21 out of 40 | Majority |
| Trinity | 20.1% | 12 out of 20 | Majority |
| Tulare | 28.3% | 122 out of 228 | Majority |
| Yuba | 20.8% | 27 out of 41 | Majority |

[16] For purposes of this analysis and to provide the most conservative understanding of the prevalence of independent gas stations in the counties listed, we have assumed that all "unknown" gas stations are branded.