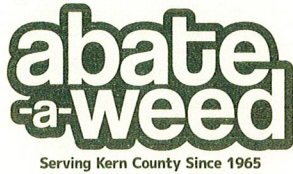


| DOCKETED | |
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| Docket Number: | 23-OIR-03 |
| Project Title: | General Rulemaking Proceeding for Developing Regulations, Guidelines, and Policies for Implementing SB X1-2 and SB 1322 |
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AAW

Abate-A-Weed
INCORPORATED
9411 ROSEDALE HIGHWAY
BAKERSFIELD, CA 93312

2/19/24

Greetings,

My name is Darrell Feil. I am the Owner of Abate-A-Weed in Bakersfield, California and the former Chair of the National Federation of Independent Business. We are a small 22-person company that provides weed and insect control for industrial, commercial, and residential properties in Kern County. As a small business owner, the price of fuel is always a concern, and I fear that this rule will do more harm than good. I am not involved in the fuel trading market, but I know that more regulation, more paperwork, and more administrative burdens disproportionately impact the smaller players. As things get more expensive for these smaller players, I know they will not be able to compete with the more established refiners and, as a result, will not be able to deliver gas to the rural and independent stations I rely on. This will only raise my costs.

At the very least, I do not understand why this rule is being pushed through so quickly. There is no emergency today, and you have not provided enough time for the public to understand what you are doing and provide additional perspectives. I fear that the rule is not well thought-out and ask that you press pause until the market participants are able to weigh in.

Sincerely,

Darrell Feil
Owner
Abate-A-Weed



To Whom It May Concern,

The American Petroleum and Convenience Store Association (“APCA”) represents the owners of over 2,000 independent gasoline and convenience stores in California. Among other things, APCA’s goal is to represent the interests of these owners when important issues touching on their business arise. Our members work every day to deliver the best experience possible to customers.

[Obviously, gasoline is at the heart of the business of our members. Accordingly, APCA took special interest in the emergency regulation the California Energy Commission (“CEC”) delivered to the Office of Administrative Law (“OAL”) last Thursday, February 15 (“Proposed Regulation”). APCA writes this comment letter to respectfully request that CEC and OAL pull down the Proposed Regulation. APCA believes this will allow stakeholders like APCA’s members and others to work with CEC to develop a regulation that will work instead of one that is likely to further tighten the gasoline market in California.

APCA’s members rely heavily on resellers and traders to provide gasoline. The reason for this is simple. While branded gas stations have contracts with big refineries that are obligated to provide gasoline even when production is down, independent gas station owners typically do not. Instead, independent gas station owners must turn to spot-market participants who purchase imported gasoline and sell to a wide group of buyers. Without this group, independent gas stations are at risk of running low on gasoline or even out of gasoline when production contracts. That has been more and more of a reality lately. The Martinez and Rodeo refineries both ceased producing gasoline in the past years and many spot-market sellers have left the California market.

The Proposed Regulation includes requirements that would make it harder for the spot-market participants on which APCA’s members rely to do business in California. The Proposed Regulation heaps these burdens on all spot-market participants and does so for transactions that do not involve California gasoline. If they leave, independent gas stations may find themselves entirely at the whims of big refineries who will put the needs of independent gas stations behind those of their branded stations.] 1

[This is not only a major problem for APCA’s members, but also a major problem for their customers. Independent gas stations are often the majority of gas stations available in underserved and rural areas. Thus, the people who are likely to be most hurt by the Proposed Regulation are people in these areas.] 2

[APCA and its members have not had enough time to review the proposed regulation. CEC’s sweeping plan is likely to have a big impact on the entire state, including APCA and its

American Petroleum & Convenience Store Association
1017 L Street #419
Sacramento, CA 95814
Apc.us

members. More time should be provided for review and more opportunities should be provided for stakeholder discussion. We ask that CEC and OAL pull down the regulation to allow that to happen.] 3

If you have any questions, please do not hesitate to contact me at 916-826-2075 or via email at bobbie@apca.us.

Sincerely,

A handwritten signature in black ink, appearing to read "Bobbie Singh-Allen", written over a horizontal line.

Bobbie Singh-Allen

President

AT

From: [Denise](#)
To: [Oliver, Chad@Energy](#)
Cc: [OAL Reference Attorney@OAL](#)
Subject: Comments on OAL File Number 2024-0215-02E
Date: Monday, February 19, 2024 12:36:40 PM
Attachments: [image001.png](#)
[image002.png](#)
[image003.png](#)
[image004.png](#)

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Dear Mr. Oliver,

As a small business owner already struggling to keep our doors open this is yet another government action that will burden us even more than we already are. Doing business in California is extremely difficult. California is not competitive with most other states and this is just another example of more of the same of California government overreach.

My Company, A T Industrial Products Corporation has been in the business of work place safety since 1997. My operating expenses increase every year while sales, revenues and profits stay nearly the same. Your claim that this rule will keep gas prices down when in all reality (because we work in the private sector and understand how business works) the rule will, without a doubt increase red tape and bureaucracy to free-market gas transactions. Honestly, how in the world can a business be expected to file reports with a 9am deadline for the prior days transactions without incurring additional costs? The increased costs will be passed on at some point to the customers who are already nearly tapped out. Additionally, no one has provided any analysis regarding the cost of this emergency rule. As the customer, I hope you will do your due diligence and fully assess how these requirements will impact costs before pushing them through. There doesn't appear be anything that clearly states the benefit of increased regulations (the very thing California is infamous for) and market monitoring by the Commission that will outweigh the increased operational costs for fuel.

] 1

Respectfully Submitted,
Denise H. Duncan

DENISE H. DUNCAN
909.587.8716/C
909.593.8340/O
909.629.3236/F



3633 POMONA BLVD

POMONA, CA 91768



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6540 Alder Park Circle
Roseville, CA 95678
(916) 704-2392

February 20, 2024

RE: California Energy Commission & Office of Administrative Law reconsideration of proposed regulation in Docket 23-OIR-03

To Whom it May Concern:

On behalf of the California Delivery Association (“CDA”), which represents businesses engaged in the time-sensitive transportation of goods and services, I write to request that the California Energy Commission and Office of Administrative Law reconsider the proposed regulation in Docket 23-OIR-03.

Since 1987, the CDA has served as a non-profit association that advocates for and advances the common interests of messenger and courier companies across California. The CDA is the only California-based organization that monitors state legislative and regulatory actions to assess the impact on couriers and delivery companies. When the association identifies an issue that would affect the messenger and courier industry, it advocates on behalf of its members. I write to raise the association’s concerns about how the proposed regulation would affect our members and the messenger and courier industry.

The messenger and courier industry is heavily impacted by fuel prices. Higher fuel prices increase the cost of transportation and ultimately result in higher costs for our members and the businesses and consumers who rely on messenger and courier services. Reflecting this sensitivity, the CDA website provides a link to a third-party website that monitors gas prices in different areas in the State, so that our members can find the most affordable places to fill up.

[From our perspective, we are concerned about the proposed regulation and the process with which it has been adopted. Our members know that the cheapest gas is usually found outside the refinery-brand chains, at independent stations and membership-based retailers (like Costco). In our understanding, those stations in particular rely on flexibility in the ability to source their gas through different sellers or resellers in the spot market.

We are concerned that the burdens and costs created by the reporting requirements in the new regulation will drive participants out of the spot market and discourage fuel imports. That, in turn, will restrict supply and increase prices, which would greatly affect our members’ businesses. We are also concerned that the reporting regulations are being pushed through on an “emergency” basis with no meaningful time for comment and with what appears to be little engagement with the industry about the most sensible way to proceed.] 1] 2

[We join the California Energy Commission in wanting to avoid price spikes and price gouging. But we ask the agency to defer and reconsider its regulation while it considers the potential unintended consequences and their impact throughout California economy.] 3

Sincerely,

Michael Williams
Executive Director
California Delivery Association

HFL



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To Whom It May Concern:

[I applaud the California Energy Commission's efforts to stop market manipulation and price gouging, but I respectfully provide these comments to ask that you do not rush to impose requirements that I fear will significantly impact gas prices. Many businesses, especially those in rural northern California, depend on the cost of fuel to remain stable. My company, Hills Flat Lumber in Grass Valley, works closely with trucking and delivery fleets to get products to market. My bottom line is closely tied to the costs I pay for shipping, which rise and fall with the cost of fuel. So, I am skeptical of any regulation that will make it more expensive to sell fuel in the state. My skepticism rises in situations like here where the regulation is quickly put together without industry collaboration and without being fully vetted with economic experts. Otherwise, we may end up with rules that sound good on paper but end up driving up costs without any real benefit. Therefore, it would be prudent for the California Energy Commission to conduct a full and formal rulemaking process before it changes how the daily spot market is controlled.] 1

Jeff Pardini
Owner
Hills Flat Lumber
Grass Valley, CA

A handwritten signature in blue ink, appearing to read "Jeff Pardini", is written over the typed name and title.

February 20, 2024

By EmailOffice of Administrative Law
300 Capitol Mall, Suite 1250
Sacramento, CA 95814
staff@oal.ca.govChad Oliver, Esq.
chad.oliver@energy.ca.govCalifornia Energy Commission
Docket Unit
Docket No. 23-OIR-03
715 P Street, MS-4
Sacramento, CA 95814
docket@energy.ca.gov

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.**] 1

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.] 2
- [• 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.] 3
- [• 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.] 4

- [• 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.] 5

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] 6

[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).] 7

[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

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.

] 8

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.

] 9

[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.] 10

[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] 11 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/Exhibit-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.

] 12

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

] 13

- [• 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

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.] 14

- 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] 15

[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.] 16

[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.] 17

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.

The Emergency Rule Is Procedurally Flawed.

[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.] 18

[***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

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.

] 19

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.

] 20

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.

] 21

* * *

[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.] 22

[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.] 23

[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.] 24

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.] 25

SIDLEY

Page 13

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.



1121 L St. Suite 100
Sacramento, CA 95814
916-448-9904
www.nfib.com/california

February 20, 2024

To Whom it May Concern,

RE: Request for Reconsideration of proposed regulation in Docket Number 23-OIR-03

On behalf of the National Federation of Independent Business (“NFIB”), which represents and serves more than 13,000 small and independent business owners in California, I write to respectfully request that the California Energy Commission and Office of Administrative Law reconsider the proposed regulation in Docket Number 23-OIR-03. CEC should carefully study how it will affect small businesses and should slow down the regulatory process to allow adequate time for interested parties to participate in that process.] 1

Since 1943, NFIB has served as the voice of small business, advocating on behalf of America’s small and independent business owners nationwide and in all 50 states. NFIB is nonprofit, nonpartisan, and member-driven. When NFIB identifies an issue that affects small businesses, it advocates on behalf of its members. The proposed regulation came to NFIB’s attention, and I write to raise NFIB’s concerns about how the proposed regulation might impact small businesses.

[As an initial matter, I note that the timing of the proposed regulation has substantially limited the opportunity for interested parties to comment. CEC made its proposed rule available online on February 6 (but subsequently uploaded different iterations of the proposed rule). CEC then submitted its rule to OAL as an “emergency regulation” on at the end of the day on February 15, kicking off a five (5) calendar day comment period. That comment period extends over a holiday weekend, leaving interested parties only two (2) business days to comment. This timing has substantially reduced interested parties’ time to engage in meaningful discussion with CEC regarding the regulation.] 2

[The proposed regulation appears highly likely to increase the costs of fuel in California. First, the regulation appears to impose massive reporting requirements on a broad swath of the fuel market. What is more, the regulation sets a deadline of 9:00 AM the day following a trade for companies to report on the trade. That raises the prospect of employees having to work off hours to complete reports before the start of the business

day. This seems like it can only increase costs for industry participants, and NFIB is concerned that these increased costs will end up in the cost of the product (fuel) those participants sell.] 3

] Second, the regulation appears likely to limit fuel supply in California. While much of the fuel sold in California may come from refineries in the state, imported fuel makes up a substantial portion of the market. Indeed, imported fuel plays an important role when the supply of California-refined fuel dips. The proposed regulation appears likely to drive industry participants who deal in imported fuel out of the California market. This will decrease competition among industry participants and decrease the volume of available fuel. Both of these outcomes will increase the cost of fuel in California.] 4

Increased fuel costs mean increased costs to do business. Compounding the many variables that are already increasing costs for small businesses by piling on regulations that will drive up fuel costs is a bad idea, and CEC should reconsider.

Very truly yours,

Tim Taylor
Legislative Director
NFIB California

Sincerely,

A handwritten signature in black ink, appearing to read 'Tim Taylor', is written over a light blue horizontal line.

Tim Taylor
NFIB California Legislative Director
National Federation of Independent Business (NFIB)

SMC
Star Milling Co.®

Member of California Grain & Feed Dealers Assn.

23901 Water Street, P.O. Box 1987, Perris, CA 92570
Phone (951) 657-3143
Fax (951) 943-2400
www.starmilling.com

To Whom It May Concern:

I am Paul Cramer, Vice President of our family business, Star Milling Company in Perris, California. Star Milling is a small company of 90 employees. The business specializes in manufacturing and distributing farm, pet, and domestic animal food. We distribute across the state, nation, and world. Affordable fuel is critical to our business. We need fuel for the machinery and equipment we use to produce feed. But our business also relies on the fleet of trucks and delivery vehicles that ensure our products are delivered on time. I am also actively involved in the California Farm Bureau and the National Federation of Independent Business, as well as other local small business and community causes. I know this regulation will have an impact on many, if not most, of the members of those organizations.

[I only learned about the CEC's emergency rule regarding spot-market fuel reporting this weekend. I do not think I or other market participants have had enough time to learn what is in the regulation, consider what impact it might have, and provide our input to the CEC. Does this regulation really need to be on the books right now? Can't we slow things down a bit?] 1

[The regulation looks like it is going to raise fuel prices, not lower them. Given the importance of fuel to my business, I appreciate that CEC is trying to keep prices down. But it seems to me that the regulation is going to decrease the supply of fuel, which will only raise prices. I can tell you that when the supply goes down, the price goes up. We only have a handful of refineries here in California. If we drive out other suppliers (like importers), I have to think supply is going to go down. The regulation looks like it will drive out suppliers because it is going to make selling fuel in California more expensive and more complicated. There are other markets for fuel and I am worried that lots of companies are going to take their business elsewhere. We need it here. Please reconsider.] 2

Respectfully,



Paul Cramer
Vice President

| DOCKETED | |
|-------------------------|---|
| Docket Number: | 23-OIR-03 |
| Project Title: | General Rulemaking Proceeding for Developing Regulations, Guidelines, and Policies for Implementing SB X1-2 and SB 1322 |
| TN #: | 254570 |
| Document Title: | OIR-2023-03 Comments on 2024-0215-02E AKA 23-OIR-03 emergency rulemaking |
| Description: | N/A |
| Filer: | Chester Hong |
| Organization: | California Energy Commission |
| Submitter Role: | Commission Staff |
| Submission Date: | 2/20/2024 1:05:28 PM |
| Docketed Date: | 2/20/2024 |

OIR-2023-03 Comments on OAL 2024-0215-02E AKA CEC docket 23-OIR-03 emergency rulemaking

Attached to this Acrobat file (PDF) are my comments on OAL 2024-0215-02E AKA CEC docket 23-OIR-03 emergency rulemaking.

The files are:

OIR-2023-03 Rebuttal to necessity for emergency rulemaking.pdf
OIR-2023-03 Understanding Just In Time production.pdf
OIR-2023-03 Request Form 400 be filed in docket 23-OIR-03.pdf
OIR-2023-03-TN-0252468_Memo to Open New Docket.pdf

My comments are available in docket 23-OIR-03 when the Energy Commission completes my filing in the docket listed below.

See docket log <https://efiling.energy.ca.gov/Lists/DocketLog.aspx?docketnumber=23-OIR-03> this docket was opened October 2, 2023 offering ample time for a regular rulemaking.

[Perhaps the Energy Commission has overlooked notifying the public who have requested rulemaking notices, I did not receive such a notice for this emergency rulemaking.] 1

thanks,

Steve Uhler
sau@wwmpd.com

OIR-2023-03 Rebuttal to necessity for emergency rulemaking

[The Energy Commission opened docket 23-OIR-03 for the subject matter of this rulemaking on October 2, 2023, offering ample time for a regular rulemaking.

The need to urgently understand price spikes in the cost for gasoline appears to be driven by a need to recover from a lack of knowledge of the effect over appearances.]2

[Why is more important to investigate spikes in prices for gasoline than spikes in prices for electricity?

Consider that a gallon of gasoline has the energy equivalent of 32 kilowatt-hours of electricity.

Gasoline at \$4.00 a gallon costs 12.5 cents a kilowatt-hour.

Gasoline at \$6.50 a gallon costs 20.3 cents a kilowatt-hour.

This is a increase of 7.8 cents a kilowatt-hour.

It is not uncommon for the electric utility industry, and California State policies to use such a spike and more, as a means to control production costs.]3

[Perhaps appearances are the only reason the State Legislature and the Energy Commission are wanting to act through a emergency regulation.]2

[Care should be taken to not cause permanent price increases that will in the long run cause consumers to pay more to cover the costs of implementing the proposed regulations, and the resulting additional cost to the industries that work to provide the gasoline many Californians need to live in this state.]4

[When the public sees a \$25.00 increase to fill their automobile with 10 gallons of gasoline, they feel unprotected, and the legislature feels the heat, this does not justify skipping rulemaking steps intended to ensure better regulations.]2

Notwithstanding the legislature's call for a emergency rulemaking, the OAL should deny the use of emergency rulemaking for this matter.

Steve Uhler
sau@wwmpd.com

U

OIR-2023-03 Request Form 400 be filed in docket 23-OIR-03

[Please file Form 400 in docket 23-OIR-03.

Please include any delegations pursuant to 1 CCR 101.] 5

§ 101. Digital Signature Acceptance.

§ 50. Special Requirements for Submission of Emergency Regulatory Actions.

§ 6. Hard-Copy Submission of Regulatory Actions.

§ 6.5. Electronic Submission of Regulatory Actions.

PRC 25217.5. See attached file identifying the chair of the commission as director of the agency known as the Energy Commission.

California Energy Commission Organizational Chart See attached file identifying the current chair of the commission.

Steve Uhler
sau@wwmpd.com

U

OIR-2023-03 Understanding Just In Time production

It appears the Energy Commission wishes to have greater visibility of the petroleum industry.

The Notice Of Propose Action contains this statement:

"The new spot market reporting requirements give the CEC and DPMO greater visibility into the pricing, contracting, and marketing practices of participants at multiple levels of the petroleum supply chain. This in turn provides greater transparency into and enables more effective oversight of the petroleum industry."

[We live in a world driven by the wonders of Just In Time production.

We enjoy lower costs of living that Just In Time production provides.

In a multi-product industry such as the petroleum industry, the costs of production and value streams of each product change the costs of each other.

Perhaps the world came to know through the pandemic, that supply chains can easily collapse over lack of inventory and means of production. We saw increases in prices and some products became unavailable.

Care should be taken so to not replace Just In Time with Just In Case production to ensure no penalties for the petroleum industry. This will cause permanent higher costs to the consumer and unavailable petroleum industry products.] 6

[The Energy Commission appears to have no problem with spiking energy prices in the electric utility industry as a means to control loads on the electric grid in a attempt to control the costs of production.] 3

[Perhaps the Energy Commission should educate themselves in Just In Time production in the petroleum industry before proceeding.] 6

Steve Uhler
sau@wwmpd.com

WSPA

| | | |
|-------------------------|---|----|
| DOCKETED | | 12 |
| Docket Number: | 23-OIR-03 | |
| Project Title: | General Rulemaking Proceeding for Developing Regulations, Guidelines, and Policies for Implementing SB X1-2 and SB 1322 | |
| TN #: | 254547 | |
| Document Title: | WSPA Comments on the Proposed Emergency Rulemaking Revising SB X1-2 Spot Market Reporting Requirements | |
| Description: | N/A | |
| Filer: | System | |
| Organization: | Western States Petroleum Association | |
| Submitter Role: | Public | |
| Submission Date: | 2/16/2024 4:23:28 PM | 1 |
| Docketed Date: | 2/16/2024 | |

*Comment Received From: Western States Petroleum Association
Submitted On: 2/16/2024
Docket Number: 23-OIR-03*

**WSPA Comments on the Proposed Emergency Rulemaking
Revising SB X1-2 Spot Market Reporting Requirements [Docket
#23-OIR-03]**

Additional submitted attachment is included below.



Sophie Ellinghouse

Vice President, General Counsel & Corporate Secretary

February 16, 2024

California Energy Commission
Docket Unit, MS-4
Docket No. 23-SB-02
715 P Street
Sacramento, California 95814

Uploaded to CEC Docket / Emailed to staff@oal.ca.gov

Office of Administrative Law
300 Capitol Mall, Suite 1250
Sacramento, California 95814

RE: WSPA Comments on the Proposed Emergency Rulemaking Revising SB X1-2 Spot Market Reporting Requirements [Docket #23-OIR-03]

Thank you for the opportunity to comment on the California Energy Commission's (CEC) proposed emergency rulemaking action to revise certain industry reporting regulations authorized by the Petroleum Industry Information Reporting Act of 1980 (PIIRA), Chapter 4.5 of Division 15 of the Public Resources Code. WSPA is a non-profit trade association representing companies that import and export, explore, produce, refine, transport and market petroleum, petroleum products, natural gas, and other energy supplies in California. We reserve the right to amend these comments or add to the docket as necessary to reflect additional materials or changes in the CEC's decisions.

This letter serves as WSPA's comments both to CEC and the Office of Administrative Law (OAL) on the emergency regulations. If and when the regulations are submitted to OAL, WSPA requests that OAL disapprove the regulations for the reasons described below.

I. CEC's Proposed Regulations Fail to Meet the Statutory Requirements for "Emergency" Rulemaking

As we have explained in our prior comments, WSPA is deeply troubled that the CEC has chosen to implement major revisions to the long-standing PIIRA reporting regulations on a purportedly "emergency" basis. Improperly characterizing this rulemaking as an "emergency" bypasses important procedural safeguards enacted by the Legislature to ensure all Californians have a fair opportunity to review and comment on significant new regulatory proposals.

Under the California Administrative Procedure Act (APA), adopting proposed regulations on an emergency basis requires – first and foremost – a finding that a genuine "emergency" exists. Cal. Gov. Code (GC) § 11346.1(b)(1). APA defines an "emergency" as "a situation that calls for *immediate* action to avoid serious harm to the public peace, health, safety, or general welfare." GC § 11342.545 (emphasis added). To avoid abuse of the emergency rulemaking provisions, the Legislature provided specific instructions on the factual findings required to constitute an "emergency" under the APA:

A finding of emergency based only upon expediency, convenience, best interest, general public need, or speculation, shall not be adequate to demonstrate the existence of an emergency. If the situation identified in the finding of emergency existed and was known by the agency adopting the emergency regulation in sufficient time to have been addressed through nonemergency regulations . . . , the finding of emergency **shall include facts explaining the failure to address the situation through nonemergency regulations.**

GC § 11346.1(b)(2) (emphasis added). The finding of emergency must be in writing and “include . . . a description of the specific facts demonstrating the existence of an emergency and the need for immediate action, and demonstrating, by substantial evidence, the need for the proposed regulation to effectuate the statute being implemented, interpreted, or made specific and to address only the demonstrated emergency.” *Id.*

] 1

[Though California agencies generally have some discretion in making a finding of an “emergency,” courts are not bound by the agency’s decision, but are the ultimate arbiter of whether the agency’s statement of facts properly supports the agency’s finding of an “emergency.” *Poschman v. Dumke* (1973) 31 Cal.App.3d 932, 941. This finding is not merely a formality for the agency. “The finding of and statement of facts constituting an emergency must be more than mere ‘statements of the motivation’ for the enactment and provide an adequate basis for judicial review.” *Id.* Agency statements that the proposed action is supported by sound policy are also insufficient if they “do not reflect a crisis situation, emergent or actual.” *Id.* at 942.

] 2

[The CEC’s Notice fails to meet the basic requirements of the APA emergency rulemaking statutes. The Notice offers no explanation for why the CEC did not address the last two years of gasoline price spikes it cites through regularly noticed, nonemergency regulations. The CEC Notice does not discuss what imminent harm will purportedly befall the State if these regulations are considered on regular notice, and nothing in the CEC Notice “compels or justifies the view that [consideration on regular notice] would seriously affect public peace, health and safety or general welfare.” *See id.* at 942. Rather, the Notice concedes in the very first two sentences of its “Finding of Emergency” that the most recent gasoline price spikes have been happening over “the past two years” and “can occur at any time.” CEC Notice, p. 2. It also describes multiple efforts taken by the Legislature and Governor for several years to address the perceived problem, including the adoption of Senate Bill (SB) X1-2 nearly a year ago. *Id.*, pp. 2-3. Moreover, most of the documents the CEC cites in the Notice were created and released years ago (*i.e.*, 2017, 2019, 2022), and have been the subject of substantial discussion and debate by the Legislature, the Governor and CEC since those times. The CEC claims throughout the Notice that the proposed regulations are generally necessary to improve agency oversight and market transparency, but these claims are irrelevant to the finding of whether a true “emergency” exists sufficient to dispense with regular public notice and comment.

[Rather than provide supporting facts for its finding of “emergency,” as required by the APA, the CEC simply cites to Public Resources Code section 25367, which reflects the Legislature’s opinion that an “emergency” exists and its direction to the CEC to adopt (and its order to the Office of Administrative Law (OAL) to consider) implementing regulations on an emergency basis. Cal. Pub. Res. Code § 25367 (“[T]he adoption of, or amendment to, regulations or orders implementing this chapter shall be considered by the [OAL] as an emergency, and necessary for the immediate preservation of the public peace, health, safety, and general welfare.”) But only the reviewing courts, not the Legislature or the implementing agency, retain final authority

] 1

to determine whether an “emergency” has been proven on the facts as required by the APA. Indeed, the APA *itself* suggests that legislative determinations are not enough under the law to manufacture an “emergency” where none exists on the facts. For example, even though the Legislature can give a statute immediate effect by deeming it an “urgency statute” – “necessary for immediate preservation of the public peace, health, or safety,” Cal. Const. art. IV, § 8(d) – that is *still* not enough to establish an “emergency” under the Government Code. See GC 11346.1(b)(2) (“The enactment of an urgency statute shall not, in and of itself, constitute a need for immediate action.”) If the Legislature wanted to forego the APA process entirely, it could have been much more explicit about saying so.] 3

[Lastly, WSPA urges that, going forward, the emergency regulation procedure be used sparingly. California courts have noted that it can be “a possible abuse of the emergency power when the enacting agency repeatedly and habitually resort[s] to it without a credible statement of genuine emergency.” *Schenley Affiliated Brands Corp. v. Kirby*, 21 Cal. App. 3d 177, 194 (1971). The CEC should reserve its use of this extraordinary procedure for situations that truly merit it.] 4

[WSPA agrees that these issues are critically important to ensuring that California’s citizens “have adequate and economic supplies of fuel” and are protected from price spikes resulting from structural market influences. But effectively addressing these issues will require proper consideration of years of relevant market data and of the functioning of the industry as a whole. *This proposed rulemaking would bypass that.* Given the importance and complexity of the issues involved, the CEC should not short-change a thorough assessment in order to arrive at workable and effective regulations, and Californians deserve adequate time to review and comment on whatever system emerges from that assessment.] 5

II. The Proposed Emergency Regulations Contain Ambiguous or Misleading Terms and Definitions That Must Be Corrected

The submittal of these regulations on an emergency basis, without providing time for adequate public review and comment, has also resulted in the inclusion of regulatory terms that are ambiguous or do not reflect real-world practice, and contain misunderstandings of how market transactions work.

[For example, the CEC should be aware of standardized industry practice associated with reversals and rebooks. A “reversal” (or “credit memo”) refers to a cancelled invoice, while a “rebook” refers to a reissuance of a previously cancelled invoice. Reversals and rebooks are a standard, unavoidable business practice. Typically, a reverse/rebook occurs within a few days of the initial invoice – but can sometimes happen months afterward. Therefore, when an invoice is issued it cannot be known with certainty that it is a final invoice. If the CEC seeks more frequent reporting cycles, more reversals/rebooks will appear. With a multi-part daily report, the CEC should expect to spend a significant amount of time reconciling these commonplace occurrences, which would likely lead to some confusion with the data being reported. Again, a better approach would be to have a monthly report (e.g., report the January invoice data at the end of February).] 6

Other terms are also not clearly defined or defined at all, including the following:

- [• “Spot Market Trading Location” (see Proposed Appendix D, I.G) – the CEC offers no definition for this term, and WSPA is unsure how this is different than the delivery location, and how to define the geographic boundaries of any such “trading location.”] 7

- “Type of Settlement” (see Proposed Appendix D, II.G) – Aside from providing two definitional examples of settlement types in proposed Section 1363.2 (“Book Transfer” and “Net-Out”), the CEC does not define the term or outline other acceptable “settlement types” that could be reported in the form.] 8

- “Invoice” (see Proposed Appendix D, II.U & II.V) – It is unclear whether the CEC intends for industry to report received invoices or approved invoices in this data category. Sellers and buyers often report different dates for the settlement, which could lead to inconsistent reporting from company to company.] 9

III. The CEC’s Proposed Regulations Will Not Address the Inherent Structural Influences Driving Price Volatility, and Will Only Reduce the Quality of Information Available to the Market

WSPA also has serious concerns that the emergency regulations as currently drafted will not address the two critical factors the Division of Petroleum Market Oversight (DPMO) recently identified as driving gasoline price volatility in California; *i.e.*, long-term market supply imbalances and the outsized influence of independent price reporting agencies in a market characterized by diminishing numbers of transactions. Rather, the proposed regulations would require a flood of additional transaction data with little or no connection to real-time gasoline pricing, which, once published by CEC, would only increase the amount of outdated or inaccurate data available to buyers and sellers, and ultimately impede market transparency.] 10

For example, the CEC is proposing to mandate additional daily reporting of both the trading and settlement phases of gasoline spot transactions. As we previously explained,¹ there is often a time lag between contract execution and settlement dates for daily spot market transactions. Final settlement prices are often only determined weeks or months later, and do not have an appreciable influence on the real-time gasoline spot market. This means that settlement data reported at the time of contract execution may not accurately reflect updated information about the fuel ultimately purchased. Indeed, depending on the contract, pricing may be subject to multiple revisions after the settlement date. Reporting of this settlement information on a daily basis will only create confusion, will not be representative of real-time gasoline prices, and will muddy the waters as buyers and sellers try to assess the real-time direction of the daily spot market. Therefore, we recommend monthly reporting for settlements, which would not only allow the collection of more complete and accurate data but also would put these lagging indicators in their proper time perspective for the market.] 11

Our concerns about the mandated reporting of inaccurate and/or ambiguous data extend to the novel reporting form (Form M1322) adopted by the CEC to obtain information about operational costs and gross and net refining margins. The Form’s separation of operational costs from refining margins does not adequately capture the relationship between the two categories, and could present a misleading or inaccurate picture of how margins are impacted by certain types

¹ WSPA has provided an explanation of these issues in several prior submittals to the CEC, including its Petition for Formal Rulemaking Regarding SB 1322 Implementation (Jan. 6, 2023); Request for Reconsideration of WSPA Petition for SB 1322 Rulemaking and Stay of Penalties (Feb. 15, 2023); Petition for Formal Rulemaking (May 11, 2023); Comments on SB 2 Implementation (May 30, 2023); Request for SB X1-2 Data Reporting Clarifications (June 9, 2023); Comments on Transportation Fuels Assessment Report workshop (Sept. 11, 2023); and Comments on General Rulemaking Proceeding for Developing Regulations, Guidelines, and Policies for Implementing SB X1-2 and SB 1322 [Docket #23-OIR-03]; Comments on the January 17, 2024, Staff Webinar on SB X1-2 Implementation – Revised CEC Spot Contract Forms [Docket #23-SB-02] (Jan. 31, 2024). These submittals are incorporated herein by reference.

Sophie Ellinghouse
Vice President, General Counsel & Corporate Secretary



Sincerely,

Please do not hesitate to contact me at with any questions.

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WSPA appreciates the time and effort the CEC staff have invested to date in its conversations with industry. These issues are complex and devising workable solutions can be extremely challenging. But we continue to ask the CEC to involve industry in the process closely, and to hear and incorporate input from industry and others reflecting how the real-world gasoline market works and how to best gather real-time, accurate information about it. In WSPA's view, these issues cannot be effectively understood or resolved in a rushed "emergency" rulemaking that deprives Californians of proper public notice, review and comment. We urge the CEC to withdraw the current "emergency" process and continue the consideration of these proposed regulations with regular public notice and comment. Aside from California law requiring those steps, we believe a regularly noticed process is much more likely to yield a complete picture of the market, the real-world obstacles involved in collecting accurate real-time data, and what a efficient and workable reporting system might look like.

SUMMARY

We recommend that the CEC withdraw the emergency rulemaking documentation and set these issues for regular public notice and comment, in order to allow a meaningful discussion with industry stakeholders, better understanding of how data is being used and can be most efficiently reported, and cooperation on implementable solutions.

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Equally important to WSPA, the CEC's proposed emergency regulations do not address fundamental structural market supply imbalances or the outsized market impacts of price reporting based on incomplete or selective transaction information disclosed by a very few price reporting agencies. DPMO identified these as two of the central factors contributing to gasoline market price volatility. Californians deserve a transparent discussion about the declining number of refineries in California and the State's active efforts to further reduce in-state refining – both resulting in a shrinking California gasoline supply-side market and increased susceptibility to market impacts from a small number of spot gasoline transactions. As DPMO recognized, these factors have a substantial impact on gasoline price volatility. In our view, addressing price volatility at the pump requires the CEC and the state to have a serious and direct conversation with stakeholders and California consumers about the long-standing structural obstacles to gasoline supply in this State, and what measures can be taken to address these challenges.

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of operational costs. This is critical information in the context of CEC's consideration of potentially imposing a margin cap.