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WSPA Comments on Proposed Emergency Rulemaking Revising SB X1-2 Gasoline Refining Margin and Marine Import Reporting Rules

Please see attached for Docket #23-OIR-03.

Additional submitted attachment is included below.

Sophie Ellinghouse
Vice President, General Counsel & Corporate Secretary

May 13, 2024

California Energy Commission
Docket Unit, MS-4
Docket No. 23-OIR-03
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
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RE: WSPA Comments on Proposed Emergency Rulemaking Revising SB X1-2 Gasoline Refining Margin and Marine Import Reporting Requirements [Docket #23-OIR-03]

Thank you for the opportunity to comment on the California Energy Commission's (CEC) recently adopted proposed emergency rulemaking action to revise certain industry reporting regulations pertaining to gasoline refining margins and marine imports under Senate Bill (SB) X1-2 (2023) as set forth in Public Resources Code (PRC) sections 25354 and 25355.

This letter serves as WSPA's comments to both CEC and the Office of Administrative Law (OAL) on these emergency regulations. 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.

California's refining industry already reports a prodigious amount of data and information to the CEC in numerous categories every day, week, month, and year – ranging from the content and amount of crude oil and petroleum products imported into the State, to the amount and average prices of all gasoline and diesel bought and sold in California, to the amount of fuel blended and distributed from refineries to end-users. Now, the CEC is proposing to require even more data without fully justifying its request, the intended outcome, or use of each data element. We question whether all the detailed data already being provided to the CEC is being adequately, properly, and thoroughly understood and analyzed in a timely fashion – as evidenced by many of the proposed and revised forms being ambiguous, unclear, and/or seeking duplicative or irrelevant information. It is especially concerning that this data – particularly changes to margin-related data – may simply be intended to try to quickly justify a politically-motivated gasoline refining margin cap and associated penalty, despite the fact that all the evidence before you shows it will not address California's chronic fuel supply problems, and that it will end up harming Californians more than it helps them.[1] WSPA therefore requests that OAL disapprove these regulations for the numerous reasons described below.

[1] See April 11, 2024, CEC Workshop Event Recording, Vice Chair Siva Gunda, at 00:06:59 mark: "…really move forward on making sure the penalty lands this year…" at: https://www.energy.ca.gov/event/workshop/2024-04/workshop-sb-x1-2-maximum-gross-gasoline-refining-margin-and-penalty

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 continues to choose to implement major revisions to the long-standing Petroleum Industry Information Report Act of 1980 reporting regulations on a purportedly "emergency" basis. Improperly characterizing this rulemaking as an "emergency" bypasses important procedural safeguards enacted by the California State Legislature to ensure that all Californians have a fair opportunity to review and comment on significant new regulatory proposals.

Under the California Administrative Procedure Act (APA), the Legislature made clear that adopting proposed regulations on an emergency basis requires – first and foremost – a finding that a actual "emergency" exists, not just reliance on another entity's ***assertion*** of one.[2] The 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."[3] To avoid abuse of the emergency rulemaking provisions, the State Legislature provided specific instructions to agencies 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***.[4]

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."[5] Notably, the APA does ***not*** provide that an agency may simply ignore the need for an emergency finding supported by evidence, and instead simply point to a later assertion by the Legislature that an emergency exists. 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 APA.[6] If the Legislature had wanted legislative declarations to be enough to bypass the APA process entirely, it would have spelled that out explicitly in the APA. It did not.

Though California agencies generally have some discretion in making a finding of an "emergency," courts are not bound by the agency's decision, but ultimately decide whether the agency's statement of facts properly supports the agency's finding of an "emergency."[7] 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."[8] Agency statements that the proposed action is supported by sound policy are also insufficient if they "do not reflect a crisis situation, emergent

[2] Cal. Gov. Code (GC) § 11346.1(b)(1)
[3] GC § 11342.545 (emphasis added)
[4] GC § 11346.1(b)(2) (emphasis added)
[5] *Id.*
[6] *See* GC 11346.1(b)(2) ("The enactment of an urgency statute shall not, in and of itself, constitute a need for immediate action.")
[7] *Poschman v. Dumke* (1973) 31 Cal.App.3d 932, 941
[8] *Id.*

or actual."[9]

The CEC's Notice fails to meet the basic requirements of the APA emergency rulemaking statutes. Indeed, the CEC Notice simply relies on the Legislature's unfounded ***assertion*** that an emergency exists. The CEC does not even attempt to independently assess 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."[10]

Rather than provide supporting facts for its finding of "emergency," as required by the APA, the CEC issued a "Finding of Emergency" that goes into great detail on the asserted policy reasons for the proposed reporting regulations but fails to actually explain why those reasons constitute an "emergency." Nor does the CEC explain – as the law requires – why it failed to address these issues through nonemergency regulations during the past four decades of periodic price spikes in California, a history both CEC and the Division of Petroleum Market Oversight (DPMO) have addressed in detail during this rulemaking. Instead, CEC simply cites to Public Resources Code section 25367, which reflects the ***Legislature's*** opinion that, notwithstanding this long history, fuel price spikes now somehow pose "an immediate threat" constituting an "emergency." But it is the ***CEC's*** job – ***not*** the Legislature's – to make a finding that a situation indeed "calls for immediate action to avoid serious harm to the public peace, health, safety, or general welfare." CEC has not done that analysis here because it knows that these long-standing issues constitute no real "emergency."

WSPA urges that, going forward, the emergency regulation procedure is not abused in this way either by the CEC or by the Legislature, but be applied as it was intended under the APA. 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."[11] The CEC should reserve its use of this extraordinary procedure for situations that truly merit it – or its regulations will increasingly be subject to invalidation in court.

Maybe as important as the regulations' legal deficiencies are the disregard they show for proper and full public input. 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, and the considered input not only of industry but of the California citizens who will be directly affected by any further restrictions on fuel supply or pressure on prices at the pump. *This proposed rulemaking would bypass that*. Given the importance and complexity of the issues involved, the CEC should not short-change a thorough and proper public 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.

II. The Proposed Emergency Regulations for Refining Margins Reporting Requirements Contain Deficiencies That Must Be Corrected

Because the CEC has submitted these regulations on an emergency basis without addressing deficiencies identified during the artificially limited public comment period, the proposed emergency regulation includes regulatory terms that are ambiguous or do not reflect real-world

[9] *Id.* at 942
[10] *See id.* at 942
[11] *Schenley Affiliated Brands Corp. v. Kirby*, 21 Cal. App. 3d 177, 194 (1971)

practices. This presents numerous additional challenges that would make it very difficult to implement the regulations. In many cases, these forms request information that has questionable relevance to the CEC's efforts to minimize or prevent the fuel price spikes the Legislature claimed motivated SB X1-2 in the first place. In other cases, the forms would overstate industry profit by failing to account for all of the costs associated with producing and distributing gasoline. Neither of these results helps the CEC promulgate effective regulations. Our specific issues and concerns previously identified include, without limitation:

- The concerns remain regarding the revised M1322 report and the complexities faced by industry members in providing detailed data, which may exceed their current data capture capabilities. The statutory definitions for gross and net refining margin, crucial for financial transparency and market analysis, still have flaws and require further education to the public from the CEC to prevent divergent interpretations among SB X1-2 stakeholders on what the data means. Ongoing dialogue, preferably through rulemaking, among industry representatives, the public, and regulatory agencies is essential to help improve fluency of the data in scope and to facilitate a more comprehensive understanding of that data set. Improving CEC's understanding of this data will also aid the CEC and the public in making informed decisions.
- The addition of sales from company owned; company operated (COCO) stores might also be considered a transfer within the same company, which may broaden the meaning of "wholesale," which usually means the selling of goods in bulk to be sold by others.
- Additional time is needed to determine the feasibility of providing consistent and useful data with the amended cost allocation section of the M1322 reporting template. Amendments included added and removed categories for which it may prove difficult to capture data at the level of granularity now proposed by the CEC, or for which granularity must be removed in order to understand the actual cost of managing refinery operations.
    - For example, the definition of gross gasoline refining margin in SB X1-2 (on which any potential penalty would be imposed) accounts for the acquisition costs of finished gasoline in the monthly gross margin calculation. Yet the CEC's newly proposed amendments inexplicably omit such expenses from the monthly margin calculation. The CEC must take the time needed to address these issues, rather than rushing to finalize the emergency regulations.
    - Separating out the Regulatory Compliance Costs – Local AQMD Compliance Projects, Permits & Fees and Effluent Discharge Compliance Projects, Permits & Fees is a significant manual effort.
- TAs reporting will require a significant amount of manual effort or the development of new methodologies to address reporting more systematically, there should be a way to report associated compliance costs in one of the compliance categories. The CEC should also clarify how project costs not already reported in maintenance for certain the compliance categories would avoid double counting errors given how reporting capital projects in the capital related expenses and depreciation would be handled.
- All delivered crude volume and costs are captured ("Crude Oil Rec'd" tab), yet the form is meant to collect only the volumes and cost for "sales of California-specification gasoline that originated from the refinery." This omits the crude that is also used to produce gasoline for Arizona and Nevada.
- The categories of "Regulatory Compliance Costs – Local AQMD Compliance Projects, Permits & Fees" and "Regulatory Compliance Costs – California Static Carbon Emissions Compliance" overlap with "Capital-Related Expenses," which state, "activities that effect modifications or installation of new equipment required for regulatory compliance…"

As discussed above, the CEC already collects a substantial amount of data and information from

California's refineries. It is still unclear to WSPA whether much of what CEC is trying to accomplish now can be done with existing data collection without imposing significant additional burdens. Given that, it is especially concerning that this mountain of additional data – particularly changes to margin-related data – may simply be intended to try and justify a politically-motivated gasoline refining margin cap – motivated not by the facts and conclusions of experts, but by the desires of activists and politicians to rush to a convenient conclusion that California's fuel supply issues are not the result of decades of misguided State policies to tax and constrict in-State fuel supplies, but instead come from some vague and shadowy "manipulation" for which zero evidence has been presented. This agency must be guided by facts, not by politics. The CEC's mission is to analyze the facts and understand whether its regulations would make California's ongoing transportation fuel supply and market volatility issues better or worse for California consumers. In our view, the proposed regulations do not address the fundamental fuel supply issues that have plagued the State for decades, and for that reason, Californians stand to be hurt, not helped.

III. The Proposed Emergency Regulations for Marine Import Reporting Requirements Also Contain Deficiencies That Must Be Corrected

The same issues mentioned above apply to the new and revised marine import forms as well. These forms raise several issues that the CEC has not adequately addressed nor justified, including:

- We are uncertain if the EBR700 Marine Import form is additive or a replacement for M and W700 forms.
- The industry has not been given sufficient time to test the proposed forms, to understand and determine their feasibility, or to provide meaningful, helpful, and iterative feedback to the CEC.
- The CEC has yet to fully explain the rationale behind requiring the proposed new and amended data elements. This may result in forms that are unclear, and, in some instances, would result in responses that are infeasible or impractical.
- The information requested by the CEC may not be reasonably available (if available at all), resulting in the submission of estimates or omissions.
- The data collected by the CEC may be obscure or irrelevant, which likely undermines the State Legislature's transparency goals. For example, the CEC requests the breakdown of the interstate components of gasoline and other refined products, without explaining how this information will benefit the public or the neighboring states that rely upon California for their fuel supplies.
- The CEC may compromise its ability and methodologies in analyzing the data, as the interpretation of poor or incomplete data can provide flawed beliefs about California's market. For example, the CEC may draw inaccurate conclusions about the supply and demand of fuels based on the imports reported, without accounting for the factors that affect the import management practices of different operators.

We continue to be extremely concerned that this data may be meant to support further restrictions on fuel exports and imports that are driven neither by the findings of experts nor the underlying facts. It is important to understand that California's fuel industry serves the needs of Californians *as well as* Arizonans and Nevadans – who also depend upon a reliable supply of affordable and cleaner transportation fuels.

SUMMARY

We recommend that the CEC withdraw the emergency rulemaking documentation and set these issues for regular public notice and comment, both to comply with California law and 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.

Having an iterative and meaningful exchange of suggestions and ideas with the CEC -- based on a full and fair assessment of the facts – would avoid resulting questions and comments about adding or revising the reports or reporting formats. Without that level of exchange, the CEC has created unnecessary ambiguity and virtually ensured that reporting will provide an inaccurate and/or non-representative picture of California's market to the public. If industry stakeholders could better understand how the CEC data is being used, we could work cooperatively on implementable solutions.

WSPA appreciates that these issues are complex and that the CEC staff's efforts to devise workable solutions is extremely challenging. 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. 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 data, and what an efficient and workable reporting system might look like.

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

Sincerely,

Sophie Ellinghouse
Vice President, General Counsel & Corporate Secretary