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WSPA Comments on SB X1-2 Implementation Process

Additional submitted attachment is included below.

Sophie Ellinghouse
Vice President, General Counsel & Corporate Secretary

May 31, 2024

California Energy Commission
Docket Unit, MS-4
715 P Street
Sacramento, California 95814

Uploaded to Dockets

RE: General Comments Concerning CEC Implementation of SB X1-2 [Docket #23-OIR-03, Docket #23-SB-02, Docket #23-OIIP-01]

The Western States Petroleum Association (WSPA) provides these supplemental comments concerning the processes by which the California Energy Commission (CEC) has undertaken implementation efforts under Senate Bill (SB) 1322 (2022) and SB X1-2 (2023) since late 2022. 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 are concerned that systemic procedural issues – including accelerated timetables, untimely access to materials, piecemeal approaches, and a lack of meaningful engagement with stakeholders – will ultimately undermine implementation of these new statutes. They also expose the CEC to legal challenges.

While we understand the CEC is likely under a tremendous amount of political pressure to expedite implementation of these first-in-the-nation regulations, the agency cannot make it extraordinarily challenging for the public to provide input. The public must be afforded the time necessary to review and understand any proposed regulations. This includes the right to regular notice and comment and a fair opportunity to engage in a dialogue with the regulatory agency on whether the regulation is necessary and, if so, how the regulatory language should be drafted. It remains troublesome that the CEC has instead repeatedly decided to use a truncated emergency rulemaking process that provides extremely short periods of public review for a set of very complex and – in some cases – unprecedented regulations. California's Administrative Procedure Act has, for decades, provided that the emergency rulemaking process may only be used when "necessary to address an emergency," defined as "a situation that calls for immediate action to avoid serious harm to the public peace, health, safety, or general welfare."[1] The Act provides no legal exception for cases when the Legislature attempts to "decree" an emergency by fiat. In any case, the circumstances bely the CEC's claim of emergency: the agency has had months to study the market and consider its options, both before and after SB X1-2 was enacted; the additional 45-day minimum for notice and comment under California law could not possibly justify recourse to an emergency process.[2] These concerns are compounded when:

- **The CEC has often provided negligible (if any) time to review materials.** We urge the CEC to reevaluate the pace of implementation if staff cannot provide stakeholders with an

[1] Cal. Gov. Code §§ 11342.545 (emphasis added), 11346.1(b)(1)
[2] Cal. Gov't Code § 11346.4.

appropriate and meaningful amount of time to review materials prior to workshops. This includes agendas, questions, forms, regulatory language, guidance documents, presentations, etc. We have found ourselves in a position of repeatedly asking for key information in the weeks, days, and even hours leading up to workshops – sometimes without a response, despite multiple requests. In some cases, the CEC provides a series of questions late in the afternoon that stakeholders are expected to answer at a workshop the following morning, or does not post the workshop agenda until after the meeting has concluded.

- **The CEC has provided stakeholders with minimal time to meet deadlines.** Deadlines that fall on holidays, include or immediately follow a holiday, or include a weekend within the 5-day deadline present foreseeable challenges when the public seeks to provide meaningful feedback. That this has now happened multiple times creates the impression that the CEC does not value or fairly consider public feedback. We urge the CEC to be more mindful of its scheduling process and in setting comment deadlines.
- **The CEC has not sought meaningful feedback.** Without soliciting or fairly considering feedback from stakeholders and other members of the public, 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 intended to be used, we could work cooperatively and collaboratively on implementable solutions. Otherwise, it is simply not possible to provide meaningful and iterative feedback the CEC requires to best understand the vast amount of information now being provided, much less expect staff to analyze and draw reasoned conclusions from it. Such feedback is critical in order for the CEC to meaningfully address the challenges California's fuel market faces and adopt regulations that will help California's consumers rather than hurt them.
- **The pace of the CEC's implementation presents ongoing and future challenges.** We understand that the CEC has historically had very few staff members with expertise in the transportation fuels market – and that bringing new staff up to speed about a complex, global commodities market would be a challenge for any regulatory agency. It would therefore seem incumbent upon the agency to leverage expertise from industry to help ensure that proposed actions can readily be implemented in the real world. This has not happened. Instead, to date, the CEC has prioritized a hurried process – based upon a minimal understanding of the transportation fuels market – to meet arbitrary deadlines, accommodate press events, or to rush to conclusions for presentations.
- **These misuses of process are repeated and systemic.** The CEC has repeatedly relied on its supposed emergency authority under SB X1-2, either explicitly or implicitly, to abbreviate the regulatory process. Each time it makes use of these powers without a bona fide exigency, its claim to emergency authority becomes less and less viable. *See Schenley Affiliated Brands Corp. v. Kirby*, 21 Cal. App. 3d 177, 194 (1971) (warning of "a possible abuse of the emergency power when the enacting agency repeatedly and habitually resorted to it without a credible statement of genuine emergency"). The CEC risks becoming the boy who cried "wolf" – no longer considered a credible source for when an actual emergency exists. It should carefully consider when – if ever – it is actually necessary to resort to SB X1-2's emergency provision at the cost of providing a meaningful process for stakeholders.
- **The CEC's piecemeal rulemaking approach will complicate implementation.** WSPA previously recommended that the CEC conduct a public survey to ensure that *all* regulated entities could be made aware of their compliance obligations and could therefore participate in any rulemaking process that would directly or indirectly affect them. This also has not happened. Instead, the CEC has proffered ambiguous, redundant, irrelevant, and/or contradictory reporting forms and guidance documents that only a subset of industry has

been able to comment on. Even then, when presented with a catalog of questions and requests for further clarification, the CEC has often shared clarifying information in a one-off manner through private meetings. This only creates further confusion, duplicative or contradictory reporting, and regulatory uncertainty.

- **The CEC's prior assurances to minimize reporting burdens are unsupportable.** Rather, the CEC has created a complex regime of reporting that duplicates work, demands information that is not available, revises forms months after finalizing them, sets unreasonable deadlines for reporting and commenting, and risks a mismatch between what the CEC is asking for and what refiners reasonably understand the statute and regulations to require – potentially exposing refiners to unfair financial penalties. If the CEC were indeed committed to minimizing the burden upon industry, we urge the CEC leadership to meet with industry participants to better understand exactly how to do so.

These problems directly concern the mission that SB X1-2 assigned to the CEC – analyzing the relevant markets, understanding the forces that drive them, and crafting policy on how to keep California's transportation fuels market reliable and affordable. Without a collaborative, iterative, and transparent process, the CEC cannot achieve this goal. As a result, any regulations that the CEC promulgates are likely to be legally and substantively flawed. Notably, the statute provides that the agency "*shall not* set a maximum gross gasoline refining margin . . . *unless it finds that the likely benefits to consumers outweigh the potential costs*."[3] A penalty is ill-advised and has no support in economics or the evidence before the CEC – but at any rate, without a reasonable opportunity for public input, the CEC cannot make *any* findings that comply with the statute's mandate.

SUMMARY

We again urge the CEC to engage in an iterative and meaningful exchange of suggestions and ideas with the industry – based on a full and fair assessment of the facts – to avoid the issues presented above. WSPA appreciates that these issues are complex and extremely challenging, and that the CEC staff's efforts to devise workable solutions take time. In WSPA's view, these issues cannot be effectively understood or resolved in a rushed process 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

[3] Pub. Res. Code § 25355.5(e) (emphasis added)