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**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.



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February 16, 2024

California Energy Commission
Docket Unit, MS-4
Docket No. 23-SB-02
715 P Street
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Uploaded to CEC Docket / Emailed to staff@oal.ca.gov

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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.*

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.

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

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.

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.

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.

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).

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.”

- “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.
- “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.

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.

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.

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.

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

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.

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.

SUMMARY

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 spot 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.

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

Sincerely,



Sophie Ellinghouse
Vice President, General Counsel & Corporate Secretary