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Thomas A. Umenhofer, CCM, REPA
Vice President

June 22, 2016

Mr. Sam Wade
Branch Chief
California Air Resources Board
1001 I Street
Sacramento, California 95814

sent via email: samuel.wade@arb.ca.gov

Re: WSPA Comments on ARB Pre-regulatory LCFS Regulation Amendments

Dear Sam,

The Western States Petroleum Association (WSPA) is a non-profit trade association representing companies that explore for, produce, refine, transport and market petroleum, petroleum products, natural gas and other energy supplies in California and four other western states. WSPA appreciates the opportunity to provide feedback on the California Air Resources Board (ARB) proposed Low Carbon Fuel Standard (LCFS) pre-regulatory draft proposal that was presented at the June 2, 2016 Workshop in Sacramento, CA.

WSPA is providing the enclosed comments in an effort to offer feedback on the LCFS-related items presented by ARB. WSPA reserves the right to provide formal comments during the notice and comment period once ARB initiates formal rulemaking process. Key areas addressed in our comments include:

- Regulatory Process;
- Point of Obligation;
- Innovative Crude; and
- Verification.

WSPA appreciates this opportunity to provide our input to this important regulation development. If you have any questions, please contact me at (805) 701-9142 or via e-mail at tom@wspa.org.

Sincerely,

enclosure

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WSPA COMMENTS ON ARB LCFS REGULATION AMENDMENTS
June 22, 2016

The Western States Petroleum Association (WSPA) appreciates the opportunity that the California Air Resources Board (ARB) has provided over the past few months to hold preliminary discussions with ARB staff on the various aspects of the California Low Carbon Fuel Standard (LCFS) draft regulation proposal that was presented on the June 2, 2016 workshop. WSPA believes that this interactive process has led to a better draft proposal and enhanced ARB staff understanding of stakeholder concerns. We believe however, that continued discussion is necessary to resolve issues in the following key areas:

- Regulatory Process
- Point of Obligation
- Innovative Crude
- Verification
- Others

REGULATORY PROCESS

WSPA is not comfortable with the process that ARB staff appears to be employing to develop new regulatory proposals (specifically, on moving the Point of Obligation to the rack and in modifying the Innovative Crude provisions in the proposed regulation). We view new proposals such as these as very significant changes to the overall regulation; and it appears that many stakeholders were unaware of ARB staff's intention to propose the changes until the June 2, 2016 Workshop. Despite comments by ARB staff that "introducing the concept" and "soliciting input" during the Workshop is consistent with past practices, WSPA does not view what ARB staff presented on June 2, 2016 as the beginning of a discussion. New regulatory language (previously unseen, featuring "strike-underline" level of detail) sends a mixed signal to the regulated community as to ARB staff's willingness to take the appropriate amount of time to hear and understand concerns before settling on proposed regulatory language.

The recent stakeholder consultation process on the LCFS Credit Validation proposal serves as a benchmark of WSPA's preferred ARB staff approach in developing its proposals, particularly in the areas of Point of Obligation and Innovative Crude. Given the stated intent to progress these two additional topics in the same time frame (i.e., for Board adoption in November 2016), it leaves us very concerned that there will not be sufficient time to have meaningful exchanges on the potential pluses and minuses of ARB staff's proposals. Further, only 2-3 weeks to develop and submit comments on concepts first viewed by stakeholders on June 2, 2016 is insufficient time to disseminate the information to the appropriate specialists within affected companies for review and feedback. For example, it would take perhaps 2-3 weeks to have a company's accounting and IT staffs complete an initial assessment of the implications of moving the Point of Obligation to the rack, or to have upstream production staff reflect on the implications of ARB's Innovative Crude concept revisions. Clearly, additional discussion of just these two topics demands a more deliberate pace/schedule.

With regard to Innovative Crude specifically, WSPA was under the clear understanding that ARB staff understood the complexity and significance of taking on the task of fleshing out the details of the Innovative Crude provision in the regulation because staff had previously indicated that we would not be undertaking that task until the 2018 rulemaking. By ARB staff's own admission, there is no pressing current need in the form of a pending application for credits under this provision. WSPA is, therefore, perplexed by the need for an accelerated regulatory development process and we urge ARB to reconsider including this revision in the package to be presented to the ARB Governing Board in November 2016.

Similarly, there is no immediate "problem" that moving the Point of Obligation needs to correct in short order. While no discussion has taken place between ARB staff and WSPA on a timetable to move this topic (unlike the Innovative Crude provision), we understand ARB staff's recognition of the potential for simplification of the overlap with the ARB Mandatory Reporting Regulation (MRR) regulation and applaud the intention to take action to address unnecessarily burdensome duplicative requirements. However, other potential impacts of moving the Point of Obligation could likely be more important than aligning with the MRR. Certainly, more time for a deliberate review is needed to assess.

We emphasize that WSPA is committed to work with ARB staff on both of these areas but we would prefer to do so in a deliberate manner that ensures the best possible outcome in terms of developing a workable regulation.

POINT OF OBLIGATION

WSPA is not yet prepared to take a position on this change given that we have had inadequate time to consider the implications.

Positive Aspects

WSPA understands the advantages seen by having the Point of Obligation for the LCFS mirror the Point of Obligation for the AB 32 Cap & Trade and MRR regulations. More specifically, WSPA sees the positive reasons for making this change:

- The position holder at the rack is a logical point of obligation for the LCFS as it is the party that controls the majority of low Carbon Intensity (CI) biofuel blending.

- This change could simplify the verification requirements as the proposed third party audit of volumes for the MRR rule could also serve as the third party audit for the LCFS regulations. However regulated companies need more time to fully assess this.

- This change could also simplify the reporting and proposed third party auditing of volumes as the import, production and purchase and sales of CARBOB and ARB Diesel may no longer be required (WSPA assumes that staff will make these reporting changes as they will no longer be needed or serve any purpose). Again, regulated companies need more time to fully assess this.

- This change could simplify reporting (and verification) as there may not be any CARBOB and CARB Diesel obligation transfers to track and report. Regulated companies need more time to fully assess this.

Negative Aspects

The primary concern with moving the point of obligation at this time is that this is a very significant change on the compliance systems and protocols that stakeholders currently employ. First, as stated earlier, there has been insufficient time for vetting and industry/Agency consultation on an important change such as this. Moreover, WSPA believes that any large-scale system change generally involves lengthy conversion requirements and expensive system modifications industry must be provided time to carefully consider the implications of such changes. This is even more important given that the oil & gas sector has just finished implementing and “shaking down” the current system to the point where it is believed that all “bugs” have been identified and corrected and the current system works very well. The position holder at the rack is currently one option and is used by many regulated parties under the LCFS. The industry has liked having this flexibility and is not eager to lose it.

If, after considering the above, ARB staff chooses to proceed with implementing this change, WSPA recommends that staff also make the following changes in the regulation:

- Update the reporting requirements to reflect this change in Point of Obligation. This can be accomplished by adding the following transaction types to § 95481:

    - "Delivered across the Rack" means deliveries of CARBOB and Diesel reported under MRR, section 95121(d)(1)-(2)
    - “Supplied Via Bulk Transfer System" means deliveries of CARBOB and Diesel reported under MRR, section 95121(d)(3)

Any fuel deliveries meeting the requirements of § 95121(d)(4) could be reported using the existing "Import" transaction type.

- We are concerned with the potential complications associated with the short-term transition period and believe that it would be naïve to assume that such a significant system change will be accomplished without a certain amount of unforeseen problems. WSPA recommends the implementation date be designated as at least 12 months from adoption of the regulations.

INNOVATIVE CRUDE

At the June 2, 2016 Workshop, ARB proposed limiting credits awarded for innovative crudes with a CI above the 2010 baseline crude average CI to the volume supplied during the 2010 baseline year. The supporting reasoning provided by ARB staff was that the Innovative Crude provision, which was only made effective on January 1st of this year, may ultimately incentivize higher volumes of high CI crude to come into California and increase the California crude average CI, thereby penalizing all refiners via an assessment of incremental deficits.

It bears mention that this proposal seeks to address a problem that does not presently exist, namely, high CI crudes coming into California as a result of this provision. In fact, ARB confirmed at the Workshop that there are currently ***zero*** pending applications for Innovative Crude credits. Simply put, the point is moot and ARB should defer any rulemaking on this issue at least until 2018. Furthermore, it creates regulatory uncertainty and thereby potentially hampers investment in the technology and infrastructure build-out that can enable dramatic reductions in the carbon intensity of crude.

ARB and WSPA engaged in extensive dialogue throughout the re-adoption process in order to implement a mutually agreeable provision. While WSPA continues to point out the infeasibility of the program, provisions like Innovative Crude are essential to ensure all options are available to ensure compliance as long as possible. Proposals such as this might serve to limit the regulated community's compliance options. It is important that such provisions be afforded adequate stakeholder input and dialogue which is why WSPA requests that ARB defer any rulemaking on this until 2018.

ARB significantly overestimates the potential impact of the current innovative crude provision in the LCFS regulation and ignores the order-of-magnitude larger geopolitical considerations governing the economics of global crude movements. In reality, the volumes of crude comprising California's crude diet are unlikely to be affected by the innovative crude provisions. Rather, it is the CIs of individual crudes in California's "basket" that have the potential to be improved assuming the regulatory structure imposed by staff do not foreclose on such a possibility before we even start. We note that both crudes with a CI below and above the 2010 average should be equally incentivized to improve their respective CI values and believe that, with enough time to deliberate and exchange views, staff's concerns can be addressed without hampering the potential attractiveness of this provision for industry. WSPA recommends staff postpone action on this item until the 2018 rulemaking, as indicated earlier.

VERIFICATION

Overall Scope of Verification

In general, the proposed LCFS verification program presented at the June 2, 2016 Workshop displayed elements that will help assure the validity of the LCFS credits. However, WSPA believes that some provisions go beyond what is needed for an effective program and create burdensome requirements. As a result, WSPA provides several comments to clarify, streamline, reduce the regulatory burden, of the proposed verification regulations and to ensure that the LCFS credit market continues to function as intended and is not frozen waiting for credits to be verified by end of year verification by the third party auditors.

Affirmative Defense

By providing a mechanism for purchasers of renewable fuel to receive an extra level of protection via the affirmative defense against civil liability, USEPA has added a degree of regulatory stability to the RFS program and thereby promoted market transparency and liquidity. WSPA urges ARB to provide an affirmative defense for any civil/administrative penalties associated with LCFS credit invalidation to provide the same regulatory stability, market transparency, and liquidity for California LCFS program.

Retroactivity

WSPA continues to be concerned that the LCFS amendments come with a risk that the liability related to existing LCFS Credits may be determined by ARB as invalid at some future time ("retroactive review"). In general, WSPA's position is that LCFS Credit verifications should be prospective and not retroactive, meaning that a credit that has been deemed valid by ARB would release the buyer from liability if, at some future date, the ARB deems the verified credit invalid. If ARB does choose to retroactively invalidate LCFS credits, WSPA suggests that: (1) retroactive action would not apply to LCFS credits issued prior to the re-adoption date of the LCFS regulation (January 1, 2016) and (2) LCFS credits can be only retroactively invalidated for the prior reporting year (i.e., discovery of an issue in 2017 with the validity of 2016 LCFS credits). In any case, open-ended retroactive buyer liability of any significant length of time after the initial validation and verification is unreasonable and inappropriate.

Verification of CI Values

Because the calculated CA crude average CI value is based on annual crude supplies, a refiner's crude receipts should only require annual verification, not quarterly as proposed in the Workshop.

WSPA also believes that for both refiners and position holders and renewable fuel producers that quarterly third party verification of volumes is not necessary. If an annual verification revealed a significant discrepancy in volume or a significant variation in volume by fuel pathway code and CI then the reporting party should be able to reopen and correct/amend quarterly reports to account for any findings, and resubmit their annual report with the verified values. If credits had been generated and sold based on incorrect values in quarterly reports, this should be corrected by reducing or increasing the number of credits generated by that party or, if necessary creation of a deficit which the reporting party would need to cover, thus keeping the overall annual number of credits generated correct without affecting the liquidity of the LCFS credit market.

Annual verification of reported volumes should be limited to the introduction of fuels to California. Auditors need only verify production and import of renewable fuels, delivery of CARBOB and CARB Diesel, and delivery of other alternative fuels (e.g. electricity). Transfers of obligation in the state for renewable fuel sales and purchases need not be verified, given the existing requirement that regulated parties reconcile their reported volumes on a quarterly basis. Verification of these volumes should be limited to any material unresolved discrepancies. Materiality should be spelled out in the regulations.

WSPA believes that the regulations should spell out the sampling protocol for third party verifiers when checking back-up documentation of reported volumes for all parties including fuel pathway holders. WSPA proposes that the third party auditors randomly select a statistically based sample of the documents covering the audit period. Specifically WSPA proposes that staff use the sample size that the U.S. EPA has established for its Attestation Requirements for RFG at 40 CFR 80.127(1) which calls for the following:

Sample Size Based Upon Population Size	
No. in Population (N)	**Sample Size**
66 and larger	29
41-65	25
26-40	20
0-25	N or 19, whichever is smaller

WSPA also recommends that the regulations specify that any LCFS credit shortfall arising from a fuel producer's pathway CI verification failure, be made up by the fuel producer and the credits previously generated and used by downstream parties remain valid. Please note, that unlike traditional fuel regulations, where downstream parties can confirm through independent testing that the fuel meets specific properties as represented by the seller (i.e., RVP, benzene, olefins, etc.), there is no way for the downstream parties to independently confirm a fuels CI as represented. This will go a long way toward stabilizing the LCFS credit market and improving its liquidity. In addition, it puts the onus on the party that generated the low CI fuel and obtained its low CI benefit in the market.

Calculated CI values depend on a number of inputs and these inputs have operational variations. At any point in time, calculated CI using current inputs could vary from the pathway approved CI value. The differences in CI should not be large; however, normal process variations will occur and can result in some differences in calculated CI.

WSPA also believes that the regulations should spell out an allowable CI variance that the third parties auditors should apply. Many factors can impact the day to day or month to month actual CI value of an alternative fuel or the volumes involved in a credit generation protocol/project that staff has approved. To account for this, WSPA strongly suggests that the audit be based on the last 12 months when the plant or project was in operation at 80% of capacity or greater. In addition, WSPA suggests that staff use the substantiality requirements in section 95488(c)(4)(G)2.a.i and ii to determine if a plant/project passed or failed the audit. For example, if the plants approved CI is >20 then no action should be taken if the actual CI from the audit is no more than 5.5% above the approved pathway CI. Or if the plants approved CI is ≤20 then no action should be taken if the actual CI from the audit is no more than 1 CI above the approved pathway CI.

Verification Body Requirements

The Conflict of Interest restrictions are very lengthy with 19 separate provisions listed under Section 95504(b)(2). The number of qualified verification service providers may be limited, given both the required expertise and accreditation. Layering the conflict of interest restrictions on top may further limit the number of qualified verifiers. ARB should re-examine the long list of restricted activities to see if they are necessary. By contrast, the U.S. Environmental Protection Agency (USEPA) set 7 criteria to establish independence under their Quality Assurance Program. The list can be found in 40 CRF 80.1471(b) and includes the following:

(1) The independent third-party auditor and its contractors and subcontractors shall not be owned or operated by the renewable fuel producer or foreign ethanol producer, or any subsidiary or employee of the renewable fuel producer or foreign ethanol producer.

(2) The independent third-party auditor and its contractors and subcontractors shall not be owned or operated by an obligated party or any subsidiary or employee of an obligated party

(3) The independent third-party auditor shall not own, buy, sell, or otherwise trade RINs unless required to maintain a financial assurance mechanism for a QAP implemented under QAP Option A pursuant to §80.1469(a) during the interim period or to replace an invalid RIN pursuant to §80.1474.

(4) The independent third-party auditor and its contractors and subcontractors shall be free from any interest or the appearance of any interest in the renewable fuel producer or foreign renewable fuel producer's business.

(5) The renewable fuel producer or foreign renewable fuel producer shall be free from any interest or the appearance of any interest in the third-party auditor's business and the businesses of third-party auditor's contractors and subcontractors.

(6) The independent third-party auditor and its contractors and subcontractors shall not have performed an attest engagement under §80.1464 for the renewable fuel producer or foreign renewable fuel producer in the same calendar year as a QAP audit conducted pursuant to §80.1472.

(7) The independent third-party auditor and its contractors and subcontractors must not be debarred, suspended, or proposed for debarment pursuant to the Government-wide Debarment and Suspension regulations, 40 CFR part 32, or the Debarment, Suspension and Ineligibility provisions of the Federal Acquisition Regulations, 48 CFR part 9, subpart 9.4.

"Check the Checker" Provision

ARB is proposing to require an independent review of the verification team's work (95499(c)(1)). This is an unnecessary additional step and burden and should be removed. Entities should be able to rely on the verification team to complete required reviews and submit conclusions directly to the agency without another check step in the process.

Frequency of Verification

WSPA opposes staff's proposal to require quarterly verification of CI pathways and compliance reporting. WSPA is concerned that the current proposed requirement is excessively burdensome and will add substantially to compliance and transaction costs. We understand the thinking behind withholding credits until reporting is verified, but strongly believe that such an approach is unnecessary to ensure compliance. ARB would have full authority to revise the compliance position of any party found to have reported inaccurately following an annual verification audit and does not need an expensive quarterly verification process. Annual audits are more than sufficient to verify reporting accuracy. Further, reasonable assurance is currently undefined in the regulations and should be linked to ISO 14064 which provides a definition of both reasonable and annual assurance.

WSPA believes that annual third party audits of fuel pathway CI values are not necessary. ARB has just gone through the process of re-certifying pathways. Going forward, new pathway applications will need to have verification services prior to ARB review and approval. ARB also requires 2 full years of operation and data collection before final approval of a new pathway (can obtain provisional approval after one quarter of operation). Following the March 8, 2016 workshop, WSPA commented on the presentations and discussion relative to ARB's Proposed Framework for the LCFS Monitoring and Verification Program. The recommendation from WSPA was that third party verification of pathways be required every 3 years. WSPA also recommended that the verification focus only on elements that have any significant impact on the fuel's CI value. We re-iterate these recommendations and ask ARB to not implement annual CI verifications especially given ARB's recent re-certification of pathways and the robustness of the new pathway application process.

WSPA also questions the "fairness" of requiring quarterly verification of CI pathways and compliance reporting for biofuels while the electricity sector is allowed to generate credits based upon estimates and extrapolation. The burden to verify credits from biofuels versus credits derived from electricity is not equitable.

Unique Identifiers

WSPA concurs with ARB's desire for a mechanism for tracing credits back to the original producers of alternative fuels. In a "buyer beware" environment, such traceability is critical to enable regulated parties to perform any necessary due diligence on potential credit purchases. Further, any and all information necessary to identify those original producers must be available to regulated parties in order to make informed decisions. WSPA recommends that this information include the producer's USEPA company ID, USEPA facility ID, fuel pathway, and the date range during which the fuel was produced. This information should provide full traceability in order to enable monitoring, verification, and enforcement.

Given ARB's proposal to move the Point of Obligation for CARBOB and diesel fuel and eliminate obligation transfers, there is no need for unique identifiers for deficits. Even if the change in the point of obligation is not implemented, unique identifiers would still be unnecessary given that there is no carbon intensity differentiation between producers for CARBOB and diesel.

ARB identified USEPA RFS RINs and California Cap & Trade credits as potential models for the design of unique identifiers for the California LCFS. Given that Cap & Trade credits primarily come from government issues and discrete GHG reduction projects rather than transactional activity, they do not provide an effective structure for tracing activity under the LCFS.

RINs represent a closer example. RINs are assigned to every batch of fuel produced and are "attached" to that fuel until separated by regulated parties. The physical fuel can then be sold without RINs or with the same or different RINs associated with it. This flexibility is useful but necessitates maintaining a fully separate inventory, transaction system, and market for RINs. Separate transactions have to be recorded not only for RIN sales and purchases, but also associated with every fuel transaction. While LCFS credits can be sold separately from the physical fuel, this is likely to occur after the fuel has reached its final point of distribution, so tracking the credits separately as the fuel makes its way through the supply chain is unnecessary.

In addition, a critical difference between LCFS credits and RINs is that RINs can easily be tied to the underlying fuel as the quantity of RINs for a batch of fuel represents a simple multiple of the gallons produced (1/1 for ethanol, 1.5/1 for biodiesel, etc.). Given that LCFS credits are transacted in metric tons of CO2e, constructing a simple alphanumeric code to follow the gallons of fuel would be far more complicated.

A positive aspect of the LCFS has been the avoidance of this separate set of transactions where physical product is bought or sold. Product can be sold with or without obligation and the two parties surrender and generate credits accordingly. WSPA proposes to maintain this simplicity. LCFS reporting already requires the inclusion of production company ID, facility ID, and fuel pathway. This allows ARB to trace any fuel transactions back to the original point of production. In addition, the company ID and facility ID information would be required for all LCFS credit sales. This would make the credits themselves traceable back to the original point of production. Any credits from non-fuel applications (e.g., innovative crudes) would need to be assigned company and facility IDs where USEPA versions do not exist.

This added information would enable ARB to trace any transactions as needed, without requiring substantial changes to the LRT or business practices. The LRT would require additional reporting fields and the ability to maintain regulated party credit inventories at the facility, fuel pathway level.

All information related to in-state fuel transfers and credit sales should be available to both business partners. Quarterly reconciliation should be conducted at the aggregate CI, company ID, and facility ID. Buyers of LCFS credits should be explicitly empowered to reject credit transfers based on any of these fields, including during participation in a Credit Clearance Market. The absence of this ability would negate any due diligence the regulated party may be able to perform beyond ARB’s verification requirements.

In addition to the above, the LRT-CBTS requires new functionality for the retirement of credits for compliance. The current regulations make several references to credit retirement; however there is currently no credit retirement functionality in the LRT-CBTS. Compliance is demonstrated by generating and/or acquiring sufficient credits to meet or exceed the number of deficits generated. If ARB intends to add traceability to the program and practice "buyer beware" enforcement, regulated parties must have the ability to review credit inventories according to the data elements discussed above and select specific credits to be retired for compliance.

OTHERS

Credit Transfer Timing

In regards to the number of days to report credit transfer, it is critical that the regulations clearly state whether it is 3 calendar days or 3 business days for Seller to initiate. If the intention is to make it 3 calendar days, it may not be enough time. Administrative issues could arise resulting in a party not transferring or accepting within 3 days, which would not accomplish the goal of improving accuracy of weekly credit transfer reports from ARB.

Even 3 business days could occasionally, if not frequently, provide insufficient time to execute transactions. WSPA strongly urges staff to consider setting the requirement at 5 business days and continue monitoring transaction performance.

In addition, ARB should clarify how parties should report trades where the delivery date falls outside of the reporting period specified in the regulations. For example, Party A and Party B enter into a transaction on June 1st for delivery of credits in July 1st. July 1st is clearly more than 3 calendar or business days after June 1st. It would be helpful if the system provided for the ability to enter the trade date and the delivery date, and if the regulations stated that the transfer had to occur within 3 calendar or business days of the delivery date.

Know Your Customer

ARB is proposing in Section 95483.2(e) "Know Your Customer (KYC)" requirements. WSPA is opposed to this proposal. The regulated parties under the LCFS are not individuals, but companies. An assertion by an officer of the participating company that the company's LRT-CBTS administrators are empowered to act on behalf of the company and establish additional user accounts as needed is sufficient. Determining the qualification of individual employees to act on behalf of the company is the job of the employer.

WSPA believes that much of the information proposed to be required under KYC (e.g., personal bank account information, primary residence information) is personally invasive and we question the need for this degree of personal information. Further, WSPA is also curious whether or not the same information will be required of all ARB staff and contractors who work with the LRT-CBTS. Should ARB proceed with KYC requirements, WSPA has the following recommendations:

- Limit the KYC requirements to System Administrators and Brokers as opposed to the current proposal which includes "All individuals…" with access to the LRT-CBTS. In certain cases, registered parties may have many individuals with varying degrees of "access" in the LRT ("read only"). Only KYC requirements for individuals with signatory authority should be proposed.

- Allow a second KYC option. Under the existing Cap & Trade regulations, ARB already allows a second KYC option for employees registering in the CITSS system. Under this option (Option 2), employees are required to provide the same information but it is provided to their employer (and not ARB). Employers are then required to make the information available for review by ARB if and when they are requested to do so. A link further describing this option can be found on the CARB website at:
  http://www.arb.ca.gov/cc/capandtrade/markettrackingsystem/cap_trade_kyc.pdf