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Catherine H. Reheis-Boyd
President

March 18, 2016

Ms. Rajinder Sahota
California Air Resources Board
1001 I Street
Sacramento, CA 95814

Re: Comments on ARB-Proposed Cap &Trade Regulation Amendments to Align With Clean Power Plan

Dear Ms. Sahota,

The Western States Petroleum Association (WSPA), representing 25 companies that explore for, develop, refine, market and transport petroleum and petroleum products, appreciates this opportunity to comment on ARB's draft concepts for Cap & Trade amendments to implement USEPA's Clean Power Plan (CCP) regulations in California. Given the lack of detail provided during ARB's February 24, 2016 public workshop, these comments are preliminary and will be supplemented as additional information is released for public review and comment.

At the outset, WSPA would like to reiterate our previously stated concern that the timeframe for both the Cap & Trade regulation amendments and the Scoping Plan Update are being artificially compressed by ARB's desire to meet USEPA's CPP implementation timeline, despite the express opportunity for an extension of the submittal deadline and the fact that the rule was recently stayed by the U.S. Supreme Court.[1] As we noted in our February 29, 2016 comments on the economic analysis for the Scoping Plan Update, adhering to ARB's tentative schedule will inevitably forego opportunities for meaningful stakeholder input, compromise the level, quality, and defensibility of supporting analyses and documentation, and lead to poorly informed policy decisions. Such procedural expediency also increases the likelihood of unintended outcomes that will undermine public and extra-jurisdictional confidence in California's climate programs and jeopardize the state's ability to achieve its long term climate goals.

[1] The U.S. Supreme Court on February 9, 2016 issued a ruling in North Dakota vs. EPA et. al. to stay implementation of the Clean Power Plan pending a decision by the U.S. Court of Appeals and final disposition of any appeal to the Supreme Court. The timeframe for final disposition of this case is expected to extend well beyond EPA's September 6, 2016 CPP submittal "deadline".

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WSPA is not suggesting that ARB should walk away from the CPP planning process until the litigation runs its course, only that it should take advantage of the opportunity for a more deliberative rulemaking process. The Cap & Trade rulemaking and the Scoping Plan Update will chart the course for the next few decades of California climate policy. Moreover, ARB and the Brown Administration are positioning the state for unprecedented transformations in technology, infrastructure, economic productivity and societal preferences. An effort of this magnitude requires much more thorough, thoughtful and careful deliberation, and a more rigorous stakeholder engagement effort, than the current schedule will allow. We respectfully request that ARB extend its tentative schedule for both proceedings and announce that decision to the public as quickly as possible.

As the following comments indicate, we are also concerned that ARB's proposed CPP implementation concepts would serve to diminish compliance flexibility and increase compliance costs for all Cap & Trade regulated entities, despite the fact that the vast majority of these entities are not subject to the CPP rule. We maintain that this blunt instrument approach is neither equitable nor necessary to ensure CPP compliance. However, if ARB believes this outcome is unavoidable, then it must at least develop alternative mechanisms in the Cap & Trade regulation that restore the flexibility and cost containment that would be sacrificed under the current conceptual proposals.

CPP Implementation Issues

Cap & Trade May Not be Necessary for CPP Compliance

As WSPA noted in our January 4, 2016 comments to ARB on development of the state's proposed compliance plan for USEPA's CPP rule, it may not be necessary for ARB to submit the Cap & Trade regulation to satisfy CPP requirements for a "state measures" approach. California's recently enacted 50% Renewables Portfolio Standard (RPS) is one of the most stringent in the world. In addition, the state invests over $1 billion per year in energy efficiency upgrades. Taken together, these two measures alone may meet the federal requirements. WSPA reiterates our prior recommendation that ARB model the GHG-reducing impacts of the more stringent RPS and energy efficiency programs to determine if they are adequate to meet the CPP glide path and final targets as a simpler alternative to including the Cap & Trade program in California's CPP submittal.

California's Cap & Trade program broadly covers 85% of the state's economy, including numerous sectors beyond the electricity sector that are not subject to the CPP rule. Flexibility is a key tenet of the Cap & Trade program, making it the most cost-effective option for achieving GHG reductions. However, the requirement for USEPA approval of all CPP state plans, including state measures plans, means that submission of the Cap & Trade regulation or other AB 32 regulations to USEPA as part of California's CPP plan may decrease or eliminate California's future flexibility to change its Cap & Trade program based on market and economic indicators. The final CPP rule did not clarify whether a state's changes to measures in its approved state measures plan could be implemented prior to USEPA approval of those changes. As a result, the state CPP plan could restrict California's options in the future by locking in place the version of the Cap & Trade regulation submitted to USEPA.

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California must preserve all of its current options to develop GHG measures and change course over the coming decades, since it is impossible to predict the optimal path to maximizing GHG reductions in that timeframe. If ARB chooses to include the Cap & Trade program as part of a "state measures" plan for implementing the CPP in California, it is important that the state be clear in its submittal to USEPA that the Cap & Trade program is a state-only program and that the separate, federally enforceable backstop measures are applicable only to CPP-regulated electricity generating units (EGUs).

It is also important that ARB evaluate the cost-effectiveness of utilizing the Cap & Trade program as the CPP compliance mechanism relative to the alternative approach described above, and that this analysis be made available for stakeholder review and comment. Such analyses are essential to inform least-cost policy decisions that defray the rapidly increasing cumulative cost of compliance with state climate programs.

Backstop Design Should Be Limited Only to CPP Regulated Entities

It is not clear why ARB feels compelled to manage compliance risks for CPP-regulated EGUs at the expense of entities not subject to the CPP. In fact, in the preamble to the regulation, USEPA asserts that the federally enforceable emission standards should apply to the affected EGUs.[2]

As currently proposed by ARB, the CPP backstop design would include a taking of allowances from the Cap & Trade program. Regardless of whether the backstop is ultimately triggered, a set aside of allowances from the pool available under the Cap will constrain the volume of allowances available to all Cap & Trade regulated entities. This approach will diminish market liquidity during a period when ARB seeks much more dramatic reductions in statewide GHG emissions and could contribute to escalating compliance costs for all regulated entities.

Similarly, the concept of recharging the backstop pool from the Allowance Price Containment Reserve (APCR) in the event that pool is depleted would be discriminatory toward non-CPP regulated entities and is not appropriate. The APCR is a cost containment mechanism for all Cap & Trade -regulated entities. It is not a slush fund of allowances to be allocated for the benefit of individual entities or sectors at ARB's discretion. These proposals should be eliminated from further consideration.

If, as ARB staff asserted during the February 24 public workshop, there is little likelihood of the backstop being triggered (slide 33), then there is little risk to CPP regulated EGUs in limiting the backstop only to that sector. Moreover, ARB offers no recommendations as to how it would make other sectors whole for allowances sacrificed to the CPP backstop set aside, which would occur under ARB's proposal regardless of whether the backstop is actually triggered.[3]

[2] "…With a state measures approach, the plan must also include a contingent backstop of federally enforceable emission standards for affected EGUs that fully meet the emission guidelines and that would be triggered if the plan failed to achieve the required emission reductions on schedule. (FR page 64668)"
[3] Slide 34 indicates that the set-aside pool of allowances would be "available only to CPP EGU's."

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ARB should investigate backstop designs that do not impact the overall market and sectors other than those regulated by the CPP. As part of this process, we request that ARB convene stakeholder workshops to discuss backstop options, including whether it is even necessary to use Cap & Trade as the foundation for a state measures approach. The workshops should also explore the impact of backstop options on the overall market and non-CPP regulated entities and how best to minimize or mitigate those impacts.

Alignment with CPP Compliance Periods Should be Limited Only to CPP Regulated Entities

ARB is proposing to conform Cap & Trade compliance periods with the compliance periods prescribed in the CPP regulation for ***all*** Cap & Trade-regulated entities in the post-2020 timeframe, despite the fact that the vast majority of state-regulated entities are not subject to the CPP. With one exception (period 3 - January 1, 2025 through December 31, 2027), this change would have the effect of truncating all future Cap & Trade compliance periods by one year. This proposal is at cross purposes with ARB's decision to establish three-year compliance periods in the Cap & Trade regulation to provide increased compliance flexibility and address price volatility that may be caused by annual variations in sector emissions.[4] The reasons for including three-year timeframes in the original regulation become even more relevant in the post-2020 timeframe wherein ARB envisions a much more aggressive rate of GHG emissions reductions.

It is irrational to compel the vast majority of regulated entities to sacrifice compliance flexibility and accept a greater risk of market volatility to level the playing field for a relative handful of CPP-regulated entities. Moreover, while we appreciate that bifurcating compliance schedules between CPP-regulated EGUs and all other sectors would add complexity to the Cap & Trade regulation, ARB should not penalize all other regulated sectors for the primary purpose of reducing its own CPP implementation burden. To the extent the CPP rule does not allow for deviation from the federal compliance schedule, truncating compliance periods in the Cap & Trade regulation to align with CPP requirements should be limited only to CPP-regulated EGUs.

Procedural Issues

ARB Should Minimize Reliance on Regulatory Guidance

WSPA observes a continuing, disturbing trend toward developing policy in guidance documents and then codifying that policy through "clarifying" amendments to existing regulations. While this concern is perhaps more apparent in ARB's proposed amendments to the MRR regulation[5] than in the CPP concepts for Cap & Trade, from our perspective the approach is becoming ingrained across ARB's climate regulatory programs. The guidance document development process is typically

[4] Initial Statement of Reasons for the Proposed Cap and Trade Regulation, Section G6, Timing of Compliance Obligations, page II-22, October 28, 2010.

[5] ARB's MRR slides note multiple areas where "clarification" is needed, including conversion methods, application of default emission factors, reporting hydrogen sales data, reporting fuel deliveries, all of which are addressed to varying degrees in ARB guidance documents.

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abbreviated and less accessible to stakeholders. ARB is under no obligation to respond to public comments and the final guidance is rarely if ever presented to the Board for adoption. In addition, to the extent certain proposed amendments are characterized as "clarification" of guidance, they can be viewed as non-substantive amendments under the Administrative Procedures Act and this interpretation can be used as a rationale for dismissing stakeholder comments. This process has the appearance, if not the effect, of underground regulation.

We appreciate that guidance is sometimes necessary to address implementation issues that may arise in between regulatory updates. However, for the reasons noted above it should be the exception, not the rule. WSPA strongly encourages ARB to work proactively with stakeholders to anticipate potential implementation problems and develop solutions that can be incorporated into the applicable regulation through the formal rulemaking process.

ARB Should Provide More Detail Further in Advance of Public Workshops

ARB does not provide enough advance access to workshop materials, or sufficient detail supporting draft policy concepts, to facilitate substantive stakeholder comments. The slide deck for the February 24 workshop was posted on the ARB website on February 23 and some of the concepts proposed for CPP compliance beg questions that ARB was not prepared to answer. For example, ARB proposes to use the Allowance Price Containment Reserve (APCR) as a second tier backstop for CPP-regulated entities, but it has yet to define the structure and size of the APCR in the post-2020 period. ARB also has yet to indicate whether it intends to carry any unused allowances from the pre-2020 time period forward into a post-2020 APCR. Absent this kind of information, it is impossible to comment on the feasibility of building the APCR into the CPP backstop.

WSPA recognizes the importance of engaging stakeholders in a dialogue on potential amendments before commencing a formal rulemaking process. However, the value of that process will depend upon the quality and clarity of information provided by ARB and the extent to which stakeholders have the opportunity to reflect on it in advance of public workshops and meetings with ARB staff.

Two-Week Comment Periods Should be Extended

In the current round of regulatory updates ARB has relied almost exclusively on two week comment periods. These are much too abbreviated to accommodate meaningful stakeholder input. While we appreciate that ARB identifies deadlines as "informal" and has indicated a willingness to accept comments on conceptual proposals after the deadline, ARB is under no obligation to respond to those comments and this process offers no assurance that stakeholder comments will be given due consideration in development of an actual regulatory proposal.

In light of the fact that ARB is not subject to impending federal deadlines or other mandates that warrant a compressed schedule, it should extend all public comment timeframes to a minimum of 30 days. ARB should also consider 45-day comment periods where warranted by the complexity and potential impact of the proposed changes.

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WSPA appreciates your consideration of our pre-regulatory comments. We look forward to the formal rulemaking process and further information from ARB to better understand the potential impacts of various CPP compliance strategies on Cap & Trade regulated facilities not subject to the CPP. We also look forward to further clarity on how ARB would restore compliance flexibility and cost containment for non-CPP facilities under a Cap & Trade/CPP compliance approach. If you have any questions, please contact me at this office, or Tom Umenhofer of my staff at (805) 701-9142 or tom@wspa.org.

Sincerely,

cc: Edie Chang - ARB
Tom Umenhofer -WSPA

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