

Memorandum

To: Chair, Vice Chair, and Commissioners
California Energy Commission

From: Aleecia Gutierrez, Director
Energy Assessments Division
California Energy Commission

Date: January 23, 2023

Subject: CEC Staff Recommendation on Petition for Formal Rulemaking Regarding SB 1322 Implementation

I. Summary

On January 6, 2023, Western States Petroleum Association (WSPA or Petitioner) filed a petition requesting that the California Energy Commission (CEC) initiate a formal rulemaking to clarify terms in Public Resources Code section 25355, to ensure consistency and accuracy in its interpretation and implementation. Petitioner's assertions that terms in SB 1322 require clarification through a formal rulemaking are premature. A Special Session of the Legislature has been convened that is considering legislative changes on the same subject and terms the Petitioner identifies in its petition. (See SB 2, (2023-2024 1st Ext. Sess.)) CEC staff recommends denying the petition and waiting to determine whether to initiate a rulemaking until the pending legislation has been resolved because a rulemaking at this time may conflict with changes to pending legislation on gasoline supply and pricing that may address the issues raised in the petition.

II. Procedural and Factual Background

On September 16, 2022, Governor Newsom signed SB 1322 (Allen, ch. 374, stats. 2022), known as the California Oil Refinery Cost Disclosure Act, which included findings regarding retail gasoline prices in California compared to other states and added Section 25355 to the Public Resources Code. The findings state that retail gasoline price margins were higher in California than in other states, and that California branded retail margins were higher than those of their competitors in California. Public Resources Code Section 25355(a) defines the term "gross gasoline refiner margin" as "the difference, expressed in dollars per barrel, between the volume-weighted average price of wholesale gasoline sold by a refiner in the state and the average price of crude oil received by the refinery." Public Resources Code Section 25355(b) requires California refineries to provide, within 30 days of the end of each month, five data items related to volume of specified gasoline-related products, information on various costs paid, prices, and sales received for products bought and sold by the operator of the refinery, and information related to other costs such as taxes and fees.

Public Resources Code Section 25355(c) requires the CEC to publicly post various reports derived from this data. Since the bill became effective January 1, 2023, operators of refineries must provide the identified information regarding January activity to the CEC no later than March 2, 2023.

On January 6, 2023, Petitioner filed with the CEC's Executive Director a petition to initiate a formal rulemaking (Petition) pursuant to California Code of Regulations (CCR), title 20, section

1221, seeking clarity on the terms in Public Resources Code section 25355, to ensure consistency and accuracy in its interpretation and implementation. On January 13, 2023, the Executive Director determined that the Petition was complete because it met the requirements of CCR, title 20, section 1221(a). Pursuant to CCR, title 20, section 1221(c), the CEC shall, within 30 days of the filing of the petition, deny the petition, stating the reason for the denial in writing, or grant the petition, directing staff to prepare an order instituting a rulemaking.

III. Petitioner's Requests and Assertions

In its Petition, Petitioner states “a formal rulemaking would best ensure clarity, consistency, and accuracy for both CEC staff and regulated entities in interpreting and implementing the new law.” The Petition specifically states that “the new “gross” refining margin data now required... lacks clarity.” The Petitioner states that a formal rulemaking is necessary to avoid “misunderstanding or misuse of publicly available data” and also asserts that “inconsistent interpretation of SB 1322 may impact other actions relying on and using this data, including the potential imposition of financial ‘penalties’ or taxes.”

The Petition identifies three terms in Section 25355 that Petitioner asserts would benefit from clarification in a rulemaking. First, Petitioner asserts “gross gasoline refining margin”, located in subdivision (a) is unclear if it is intended to be the summation of four of the data items listed in subdivision (b)(1)-(4). Also related to this term, Petitioner asserts that “gross gasoline refining margin”, if intended to be defined *not* by reliance on the items in subdivision (b), requires further refinement of how to quantify associated costs for Low Carbon Fuel Standard and Cap-and-trade program costs. Second, the Petitioner assert the phrase “quantity of wholesale gasoline sales” in subdivision (b)(3) could be inconsistently applied if operators of refineries resell wholesale products. Third, the Petitioner asserts the word “received” used in subdivision (b)(1) and (b)(2) can have different interpretations.

IV. CEC Staff Recommendation

On December 5, 2022, Governor Newsom called a special session of the legislature to address California gas prices. On the same day, Senator Nancy Skinner introduced legislation proposing gas price gouging penalties on operators of refineries. That proposal, Senate. Bill 2, (2023-2024 1st Ext. Sess.) is currently pending in the legislative process, and can be reviewed at www.leginfo.gov. The first sentence of the Legislative Counsel's Digest states: “SB X2, as introduced, Skinner. Energy: transportation fuels: supply and pricing: maximum gross gasoline refining margin.” SB X2 contains a proposal to adopt an additional section to the Public Resources Code that relies on and refines the term “gross gasoline refining margin”. The bill also adds substantial content related to costs and prices, informational reporting related to the petroleum industry and markets, and proposes penalties on operators of refineries for a “gross gasoline refining margin” in excess of an unspecified level. Based on the pending legislation addressing the very terms identified in the Petition, CEC staff recommends that the CEC wait until the pending legislation has been resolved because a rulemaking at this time may conflict with changes to pending legislation on gasoline supply and pricing. Because a rulemaking would consume resources, and may conflict with legislative changes, and legislative activity in this area may address the issues raised in the Petition, rendering them moot, CEC staff recommends the Petition be denied.

STATE OF CALIFORNIA
STATE ENERGY RESOURCES
CONSERVATION AND DEVELOPMENT COMMISSION

IN THE MATTER OF:

Western States Petroleum Association
Petition for Rulemaking

**ORDER DENYING PETITION FOR
RULEMAKING**

I. INTRODUCTION AND PROCEDURAL HISTORY

On September 16, 2022, the Governor signed Senate Bill (SB) 1322 (Allen, ch. 374, stats. 2022), which added Section 25355 to Chapter 4.5, Division 15 of the Public Resources Code, also known as the California Oil Refinery Cost Disclosure Act.

On January 1, 2023, SB 1322 took effect and requires that operators of refineries in the state, within 30 days of the end of each calendar month, submit a report to the California Energy Commission (CEC) containing, among other things, volume, costs, prices, and sales data related to the production of gasoline in that month. SB 1322 requires the CEC to publish the gross gasoline refining margin data reported for that month in the aggregate as specified.

On January 6, 2023, Western States Petroleum Association (WSPA) filed with the Executive Director of the CEC a petition to initiate a formal rulemaking (Petition) pursuant to California Code of Regulations (CCR), title 20, section 1221, seeking to clarify terms in Public Resources Code section 25355, to ensure consistency and accuracy in its interpretation and implementation. WSPA asserts that terms contained in SB 1322, including the term “gross gasoline refining margin”, require clarification, and believes the components of SB 1322 used to calculate a “gross gasoline refining margin” do not accurately represent refining costs. WSPA also states that a formal rulemaking is necessary to avoid misunderstanding or misuse of publicly available data.

On January 13, 2023, the CEC’s Executive Director determined that the Petition is complete and contains the information requirements of CCR, title 20, section 1221.

On January 23, 2023, the CEC staff filed a recommendation on the Petition. In its filing, CEC staff recommends that the CEC deny the Petition because the terms that WSPA seeks to clarify are currently the subject of legislation being considered in a Special Session called by Governor Newsom in December 2023. Specifically, the Legislature is

considering Senate Bill (SB) 2 (2023-2024 1st Ext Sess.) introduced by Senator Skinner that would adopt Public Resources Code section 25355.5, which includes and further defines the term “gross gasoline refiner margin.” The first sentence of the Legislative Counsel’s Digest states: “SB 2, as introduced, Skinner. Energy: transportation fuels: supply and pricing: maximum gross gasoline refining margin.” SB 2 contains a proposal to adopt an additional section in the Public Resources Code that revises the term “gross gasoline refining margin.” This term is specifically identified in the Petition as requiring interpretation through a formal rulemaking.

The bill could also potentially address other terms that WSPA asserts require clarification such as a determination of how to quantify Low Carbon Fuel Standard and Cap-and-Trade costs, as these terms are used in the pending legislation. Since the terms in SB 1322 are being considered and revised through the legislative process, CEC staff recommends denying the Petition and waiting to determine whether to initiate a rulemaking until the pending legislation has been resolved because a rulemaking at this time may conflict with changes to pending legislation on gasoline supply and pricing that may address the issues raised in the Petition.

On January 25, 2023, the CEC held a hearing to consider the Petition.

II. CEC FINDINGS

Based on the entirety of the record, the CEC finds that:

- 1) Public Resources Code sections 25213 and 25218(e) mandate and authorize the CEC to adopt rules and regulations, as necessary, to carry out its statutory duty. The CEC is required by Chapter 4.5, Division 15 of the Public Resources Code to obtain and analyze information and data concerning all aspects of the petroleum industry, including, but not limited to, production and supplies of gasoline, and costs, prices, and investment choices for the state to develop and administer energy policies that are in the interest of the state’s economy and the public’s well-being. Thus, the CEC has the authority to initiate a rulemaking to adopt regulations, as requested in the Petition.
- 2) On September 16, 2022, the Governor signed SB 1322, which added Section 25355 to the Public Resources Code (the California Oil Refinery Cost Disclosure Act), to require operators of refineries in the state, within 30 days of the end of each calendar month, to submit a report to the CEC containing, among other things, volume, costs, prices, and sales data related to the production of gasoline in that month. SB 1322 requires the CEC to publish the gross gasoline refining margin data reported for that month in the aggregate as specified.
- 3) The Petition meets the requirements of CCR, title 20, section 1221.
- 4) Because the issues raised in the Petition are pending before the California State Legislature, CEC staff recommends allowing the legislative process to conclude before initiating a rulemaking for the purpose of considering whether to clarify

terms in SB 1322 and ensure consistency and accuracy in its interpretation and implementation.

- 5) SB 1322 requires operators of refineries to provide information contained in Public Resources Code section 25355(b)(1)-(5) within 30 days of the conclusion of the month for which data is being reported. Operators of refineries are required to provide the listed data by March 2, 2023, which is 30 days after the conclusion of January, the first month in which this rule is effective.
- 6) CCR, title 20, section 1221(c), requires that the CEC, within 30 days of the filing of the petition, deny the petition, stating the reason for the denial in writing, or grant the petition, directing staff to prepare an order instituting a rulemaking.

III. CONCLUSION AND ORDER

- 1) For the reasons stated above, the CEC hereby DENIES WSPA's Petition for Rulemaking.
- 2) CEC staff is directed to file this Order and supporting documentation with the Office of Administrative Law in accordance with Government Code section 11340.7(d)

IT IS SO ORDERED.

CERTIFICATION

The undersigned Secretariat to the CEC does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the CEC held on January 25, 2023.

AYE:

NAY:

ABSENT:

ABSTAIN:

Dated:

Liza Lopez
Secretariat



Catherine H. Reheis-Boyd
President and CEO

January 6, 2023

Mr. Drew Bohan
Executive Director
California Energy Commission
1516 9th Street
Sacramento, CA 95814

RE: PETITION FOR FORMAL RULEMAKING REGARDING SB 1322 IMPLEMENTATION

Dear Executive Director Bohan,

On behalf of the Western States Petroleum Association (WSPA), including California's in-state refiners, I am hereby petitioning the California Energy Commission (CEC) to initiate a formal rulemaking pursuant to California Code of Regulations Section 1221 regarding implementation of the "California Oil Refinery Cost Disclosure Act," Senate Bill (SB) 1322 (2022). WSPA believes that a formal rulemaking would best ensure clarity, consistency, and accuracy for both CEC staff and regulated entities in interpreting and implementing the new law, as well as in ensuring that highly confidential data subject to antitrust laws is properly safeguarded.

Under California Public Resources Code, Division 15 – Energy Conservation and Development, the State Energy Resources Conservation and Development Commission (the CEC) is tasked with implementing SB 1322, which added Section 25355 and amended Section 25364 – both of which are under CEC's purview.

WSPA has consistently endorsed CEC's collection of anonymous, aggregated market data from refiners and other market participants for use by the CEC to carry out its responsibilities regarding energy policy and planning. Historically, one of the CEC's primary data gathering tools for this purpose has been the Petroleum Industry Information Reporting Act of 1980 (PIIRA). A key aspect of PIIRA is its robust protection of confidential, competitive, and market sensitive information for antitrust reasons.

Ensuring that the CEC establishes clear guidance for new data requirements through a formal rulemaking to ensure uniform compliance from reporting entities and maximum protection against potential anticompetitive conduct is critically important, whether this compliance and protection is through the aggregation or withholding of confidential data.

Data previously collected from refiners was clearly defined and provided by refiners for the purpose of assisting the CEC with its energy policy and planning responsibilities. However, the new “gross” refining margin data now required under SB 1322 lacks clarity. It can also be misleading because this calculation fails to consider operating and other costs of running a business in California – which has amongst the highest costs of any state. Furthermore, inconsistent interpretation of SB 1322 may impact other actions relying on and using this data, including the potential imposition of financial “penalties” or taxes. The bulleted sections below describe some sections of the bill that will require additional clarity and would benefit from the rulemaking process:

- First, the term “gross gasoline refining margin” is itself unclear. If the term is meant to be the summation of Section 25355 (b)(1)-(4), then certain compliance issues must be considered.
- Alternatively, if “gross gasoline refining margin” is intended to mean something different than the summation of Section 25355 (b)(1)-(4), refiners will need additional clarity before attempting to quantify associated costs for Low Carbon Fuel Standard and Cap-and-Trade programs compliance in dollars per barrel as initially requested. An agreed-upon benchmark derived during the rulemaking could be a better approach.
- Section 25355 (b)(3) references the “quantity of wholesale gasoline sales.” If this term is not adequately defined or is inconsistently applied, such as by some refiners including spot pipeline sales, the result could be the improper “double counting” of these volumes because such volumes could be resold.
- Section 25355 (b)(1) and (2) reference both “received” crude oil volumes and “received and intended to be refined during that month” crude oil volumes which can have different interpretations. First, these two characterizations of crude oil volumes are not the same due to timing differences between purchasing and processing. Second, it is unclear whether “received” volumes include or exclude purchased crude oil that has not yet arrived at a refinery.
- Section 25355 (b)(4) is unclear as to whether stationary refinery Cap-and-Trade obligation costs should be included.

Additionally, it is important to note that the components included in SB 1322 that appear to be used to calculate a “gross gasoline refining margin” fail to accurately represent refining profits, because they exclude significant costs incurred by refiners including, but not limited to: federal renewable identification numbers (RIN) obligation costs, other refinery costs (e.g., electricity, natural gas, chemicals, maintenance, hydrogen, other intermediate oil products), capital investments, logistics costs, additive costs, and gasoline purchases. In other words, the use of gross margin, particularly on one product line in a complex operation, artificially inflates profits, rather than reflecting actual profit margins. This runs counter to providing the public with facts.

The lists above excludes other concerns (such as regulatory compliance costs) – but is a sampling of the multitude of SB 1322 issues that needs clarification, which should be addressed through a formal rulemaking. That would be the best mechanism through which all stakeholders will have an opportunity to provide input on SB 1322 implementation. It will allow for discussion on what new data is needed to comply with the law and which can be provided by the parties under antitrust laws with the proper protections, and how the required data will be used and to

who it will be made available. Other considerations include avoiding any future misunderstandings or misuse of publicly available data. We want to ensure a consistent interpretation of SB 1322 by privately held, competing companies subject to SB 1322 that each have different assets and market positions and by CEC staff.

In summary, SB 1322 lacks the necessary specificity to be implemented without a formal rulemaking, especially because the data required from refiners is to be made publicly available and used for the purpose of imposing undefined and unprecedented financial penalties. Without additional guidance obtained through a formal rulemaking process, SB 1322 could result in inconsistent and unfair interpretation and application.

For the foregoing reasons, we request that the CEC initiate a formal rulemaking pursuant to California Code of Regulations Section 1221 regarding implementation of SB 1322 by issuing an order instituting rulemaking to initiate such a proceeding. Thank you for the consideration of this important matter and we look forward to working with the CEC to provide input through a rulemaking to ensure our members have the instructions and materials needed to comply with the requirements in SB 1322. My address and phone number are included in the footer of this document should you have any additional questions for me or for Tanya DeRivi on my staff, who can be reached at (916) 325-3088 or by email at tderivi@wspa.org.

Sincerely,

A handwritten signature in blue ink, reading "Cathy A. Boyd". The signature is written in a cursive style and is positioned above a thin horizontal line.

Cc: The Honorable David Hochschild, California Energy Commission, Chairman
Shant Apekian, WSPA
Tanya DeRivi, WSPA



January 13, 2023

Via Email

Catherine H Reheis-Boyd
Western States Petroleum Association
1415 L Street, Suite 900
Sacramento, California 95814
cathy@wspa.org

Dear Catherine Reheis-Boyd:

Thank you for your letter of January 6, 2023, which requests, on behalf of Western States Petroleum Association (WSPA), that the California Energy Commission (CEC) initiate a formal rulemaking to ensure consistent compliance with Senate Bill 1322 (chapter 374, statutes of 2022) reporting requirements.

Under California Code of Regulations, title 20, section 1221(b), I hereby certify that your petition contains the information required by California Code of Regulations, title 20, section 1221(a)(1)-(4). This certification does not constitute approval of your request for the CEC to initiate a rulemaking hearing. The CEC will consider your petition at its regularly scheduled business meeting on January 25, 2023.

The agenda and backup materials for the business meeting will post to our website at <https://www.energy.ca.gov/proceedings/business-meetings> on January 13, 2023. The agenda also contains information on how to participate in the meeting. For more information, please email Kari Anderson, senior staff counsel, at Kari.Anderson@energy.ca.gov.

Sincerely,

A handwritten signature in black ink, appearing to read "Drew Bohan".

Drew Bohan
Executive Director