



**California Energy Commission  
March 14, 2023 Business Meeting  
Backup Materials for Agenda Item No. 3:  
Request For Reconsideration of the CEC's Denial of Petition for Rulemaking**

The following backup materials for the above-referenced agenda item are available as described below:

1. Proposed Order, attached below.
2. Memorandum, attached below.
3. Request for Reconsideration of WSPA Petition for SB 1322 Rulemaking and Stay of Penalties, attached below

**STATE OF CALIFORNIA**  
**STATE ENERGY RESOURCES**  
**CONSERVATION AND DEVELOPMENT COMMISSION**

***IN THE MATTER OF:***

Western States Petroleum Association  
Petition for Rulemaking

**[PROPOSED] ORDER DENYING  
REQUEST FOR RECONSIDERATION  
OF DENIAL OF PETITION FOR  
RULEMAKING**

**I. INTRODUCTION**

On February 15, 2023, WSPA filed with the CEC's Executive Director a letter titled "Request for Reconsideration of WSPA Petition for SB 1322 Rulemaking and Stay of Penalties." In the letter, WSPA requests that the CEC reconsider its denial of WSPA's petition for rulemaking pursuant to Government Code Section 11340.7(c) and also requests the CEC stay enforcement of SB 1322's reporting requirements until the Legislature or CEC clarify or contextualize SB 1322. WSPA asserts the CEC should reconsider its denial of the Petition for two reasons: refinery operators should not have to comply with SB 1322 if the Legislature is currently considering clarifications to terms used in that legislation; and it would be unfair and arbitrary to not postpone enforcement of SB 1322 while the CEC is awaiting further clarification from the Legislature. WSPA continues to repeat earlier assertions that terms in SB 1322 are "vague." Finally, WSPA requests a stay of the obligation to report and a stay of any enforcement or penalty for failure to report.

**II. PROCEDURAL HISTORY**

On January 1, 2023, Senate Bill (SB) 1322 (Allen, ch. 374, stats. 2022), took effect, adding the California Oil Refinery Cost Disclosure Act to the Public Resources Code. The statute, Public Resources Code section 25355, requires refinery operators to report data to the California Energy Commission (CEC) regarding their gross gasoline refining margin. SB 1322 defines "gross gasoline refining margin" and requires refinery operators to submit five categories of information related to the volume of specified gasoline-related products, information on various costs paid, prices, and sales received for products bought and sold by refinery operators, and information related to other costs such as taxes and fees. The first of the required monthly reports was due March 2, 2023.

On January 6, 2023, Western States Petroleum Association (WSPA) filed a petition to initiate a rulemaking (Petition) with the CEC's Executive Director, 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 asserted 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.

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

On January 23, 2023, the CEC staff (Staff) filed a recommendation on the Petition which recognized WSPA is requesting the CEC initiate a rulemaking to interpret terms that are the subject of pending legislation. Specifically, Staff noted that the Legislature is considering SB 2 (2023-2024 1<sup>st</sup> 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" among other terms in SB 1322. Staff recommended 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, and those legislative changes may render moot the issues raised in the Petition.

On January 25, 2023, the CEC held a hearing to consider the Petition. WSPA, Staff, and Steve Uhler provided comments at the hearing. The CEC agreed with Staff's recommendation and adopted an Order Denying WSPA's Petition for Rulemaking, recognizing the prudence of awaiting the outcome of the legislative process under the circumstances. The Order also finds that refinery operators are required to provide the listed data by March 2, 2023.

WSPA filed its request for reconsideration on February 15, 2023, and by March 5, 2023, all major California refinery operators had submitted reports to the CEC regarding the information required in SB 1322, including their gross gasoline refining margin, with only one refinery operator providing only partial information, and objecting to providing the rest of the data.

On March 10, 2023, Staff filed a response to WSPA's request recommending the CEC issue an order denying the request for reconsideration, and denying the request for a stay of SB 1322's reporting requirements. In its recommendation, Staff notes that WSPA does not identify any new information or argument that would support reconsidering the original decision on the petition for rulemaking and that WSPA has not substantiated its claim by showing that it is impossible to comply with the statute as written without further agency interpretation. Staff further supports this point by noting that the majority of refinery operators timely submitted their SB 1322's data reports. Staff also reasserts its position from its recommendation on the original petition that initiating a rulemaking to interpret terms that may conflict with pending legislation is not

a prudent use of state resources nor is a rulemaking necessary for refinery operators to comply with SB 1322.

Staff also concludes that because it is possible to comply with SB 1322 without a rulemaking, the request for a stay should also be denied. Moreover, Staff asserts WSPA fails to show the CEC has authority to order a stay of SB 1322, WSPA lacks standing to request a stay, and the presence of administrative due process for challenging any penalties provides sufficient protection for refinery operators and obviates the need for a stay from the enforcement of penalties. To this last point, Staff notes that refinery operators who timely object to the information reporting requirements would be subject to a civil penalty only if, after being notified of the failure to provide specified information, they refuse to submit the specified information after a hearing was held on the matter. Since adequate procedures exist to protect the due process rights of refiners subject to reporting requirements, Staff concludes that a stay regarding penalties is unnecessary.

On March 14, 2023, the CEC held a hearing to consider the Request for Reconsideration of the WSPA Petition for SB 1322 Rulemaking and Stay of Penalties.

### **III. ENERGY COMMISSION FINDINGS**

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

- 1) Public Resources Code sections 25213 and 25218(e) 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 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 Request for Reconsideration.
- 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) On January 6, 2023, WSPA filed a Petition for Rulemaking requesting CEC open a rulemaking proceeding to interpret various terms used in SB 1322.
- 4) On January 25, 2023, the CEC adopted an Order Denying WSPA's Petition for Rulemaking because the terms used in SB 1322 are also contained in pending legislation. Specifically, Senate Bill (SB) 2 (2023-2024 1<sup>st</sup> Ext Sess.), introduced by Senator Skinner, would adopt Public Resources Code section 25355.5, which

includes several of the same terms used in SB 1322, such as “gross gasoline refiner margin.”

- 5) On February 15, 2023, WSPA submitted a letter to the CEC’s Executive Director that contains a Request for Reconsideration of the Order Denying Petition for Rulemaking dated January 25, 2023, and a request for CEC to stay refinery operators’ reporting obligations under SB 1322.
- 6) The Request for Reconsideration meets the requirements of Government Code section 11340.7(c) because it was filed within 60 days of the Order Denying the WSPA’s Petition for Rulemaking, and provides a reason for requesting reconsideration.
- 7) Government Code section 11340.7(c) requires that the CEC, within 30 days of the filing of the request for reconsideration, grant or deny the petition, indicating why the agency has reached its decision on the merits or schedule the matter for public hearing in accordance with the rulemaking provisions of the Administrative Procedure Act (Govt. Code section 11346 et seq). California Code of Regulations, title 20, section 1221(c) interprets this provision and requires either a written denial of a petition for rulemaking, or the issuance of an order instituting a rulemaking proceeding.
- 8) As of the date of this Order, the Legislature is still considering Senate Bill (SB) 2 (2023-2024 1<sup>st</sup> Ext Sess.). Because the California State Legislature is still considering whether to further define terms used in SB 1322, it is premature to consider initiating a rulemaking process to define these or related terms.
- 9) SB 1322 requires refinery operators 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. Refinery operators are required to provide the listed data by March 2, 2023, and monthly thereafter.
- 10) By March 5, 2023, all major refinery operators submitted to the CEC information in each of the categories specified in SB 1322. Only one major refinery operator provided only partial information and objected to providing data for the remaining statutory categories. SB 1322 directs refinery operators to provide data in specified categories, and compliance with these provisions is feasible.
- 11) Public Resources Code section 25362 directs the CEC to notify refinery operators who fail to timely provide the information specified in Section 25355. If, within five days after being notified of the failure to supply the specified information, the refinery operator fails to supply the specified information, refinery operator shall be subject to a civil penalty as specified in Section 25362. The process further permits a refinery operator to timely object to providing specified information, and for the CEC to hold a hearing on the matter. Adequate due process is provided to refinery operators prior to the imposition of a penalty. A

general stay of the potential for penalties is unnecessary to provide refinery operators with due process.

#### **IV. CONCLUSION AND ORDER**

- 1) The CEC hereby DENIES WSPA's Request for Reconsideration of the Order Denying Petition for Rulemaking.
- 2) The CEC hereby DENIES WSPA's request to stay implementation of SB 1322.
- 3) 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 March 14, 2023.

AYE:

NAY:

ABSENT:

ABSTAIN:

Dated:

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Liza Lopez  
Secretariat

## Memorandum

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

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

**Date:** March 10, 2023

**Subject:** Staff Recommendation on Western States Petroleum Association's Request for Reconsideration of Order Denying Petition for Rulemaking

### I. Summary

On February 15, 2023, the Western States Petroleum Association (WSPA) submitted a "Request for Reconsideration of WSPA Petition for SB 1322 Rulemaking and Stay of Penalties" ("letter") to the California Energy Commission (CEC). In the letter, WSPA requests that the CEC reconsider its denial of WSPA's petition for rulemaking and stay enforcing SB 1322's reporting requirements until the Legislature or CEC clarify or contextualize SB 1322. Initiating a rulemaking that may conflict with pending legislation is not a prudent use of state resources nor is a rulemaking necessary for refinery operators to begin compliance with SB 1322. The first reporting deadline in compliance with SB 1322 passed on March 2, 2023. All major refinery operators submitted the required data except one, who provided only partial information. A rulemaking is not necessary at this time given that there is sufficient direction in SB 1322 to allow refinery operators to comply as shown by the fact that the majority of refinery operators timely submitted their SB 1322 reports.

SB 1322 allows only "those persons who have failed to timely provide the information" to object, not a third party. Accordingly, WSPA is not the proper entity to request a stay or object to the SB 1322 data reporting requirements. In any event, a stay is not warranted because refinery operators who timely object to the information reporting requirements would be subject to a civil penalty only if, after being notified of the failure to provide specified information, they refuse to submit the specified information after a hearing was held on the matter. Since adequate procedures exist to protect the due process rights of refinery operators subject to reporting requirements, CEC staff (Staff) concludes that a stay regarding penalties is unnecessary.

Therefore, Staff recommends the CEC deny WSPA's request for reconsideration for the reasons discussed further below.

### 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 noting the conclusions reached by the CEC regarding retail gasoline prices in California compared to other states and added Section 25355 to the Public Resources Code. The findings state that the CEC analysis concluded that retail gasoline price margins were higher in California than in other states over the last five years, and that the retail margins of the higher-priced brands 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 SB 1322 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, WSPA filed a petition to initiate a rulemaking pursuant to California Code of Regulations (CCR), title 20, section 1221, seeking clarity on the terms in Public Resources Code section 25355. On January 13, 2023, the CEC’s 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), within 30 days of the filing of the petition, the CEC was required to deny the petition, stating the reason for the denial in writing, or grant the petition, directing Staff to prepare an order instituting a rulemaking.

On January 25, 2023, the CEC issued an order denying the petition at a public business meeting, stating that SB 1322 could be implemented as written. At the CEC business meeting, in response to WSPA’s comments, Staff stated that SB 1322 “is clear as written,” the “information that is required under 1322 can be complied with,” and “that the regulated community understands what is being requested.” Further, Staff explained that it would “work in good faith with the regulated community to make sure that the information that is being requested is done so in a consistent format” and “then if there is a need to clarify, [Staff] will work with them to do that at some point.” [Transcript of Business Meeting, February 25, 2023, p. 194.]

On February 6, 2023, the CEC’s Executive Director sent a letter to refinery operators requesting that, when interpreting the meaning of the terms in SB 1322, they refer to California Code of Regulations, Title 20, Division 2, the federal Energy Information Administration (EIA), or usage of the language otherwise commonly understood in the industry. The letter explained that if the refinery operators believe there is more than one definition for any of the terms in the statute, they could provide an explanation with the data on why they chose to apply the definitions or meanings they selected. The CEC also provided the refiners an optional form they could use to submit their data.

On February 15, 2023, WSPA submitted a “Request for Reconsideration of WSPA Petition for SB 1322 Rulemaking and Stay of Penalties” to the CEC. WSPA requests that the CEC



reconsider its denial of WSPA's petition for rulemaking and stay enforcing SB 1322's reporting requirements until the Legislature or CEC clarify or contextualize SB 1322.

By March 5, 2023, all refinery operators have submitted reports to CEC regarding the information required in SB 1322. One refinery operator has only provided partial information, and objected to providing some of the data. Staff will follow available procedures to obtain complete information from the objecting refinery, which may include bringing the matter to a hearing before the CEC. All other refinery operators have provided data in each of the categories required by statute.

Government Code section 11340.7(c) permits any person to request reconsideration of an agency's denial of a petition for rulemaking, and directs that the provisions of Government Code section 11340.6 apply to the contents of such reconsideration request, and that a reason for the request shall also be included. Government Code section 11340.7(a) applies to requests for reconsideration, and that provision requires an agency to, within 30 days of the filing of the petition, either deny the petition or schedule the matter for a hearing in accordance with Article 5 of the Administrative Procedure Act. The CEC established procedures in California Code of Regulations, title 20, section 1221, that interpret and implement Government Code section 11340.7. Section 1221(c) states that the CEC shall, within 30 days of the filing of a certified petition, "deny the petition, stating the reasons for the denial in writing, or grant the petition, directing staff to prepare an appropriate order pursuant to section 1222 of these regulations." Section 1222 contains the procedure for adopting an order instituting a rulemaking proceeding.

### **III. Staff Analysis and Recommendation**

- 1) WSPA does not identify any new information or argument that would support reversing the original decision to deny the petition for rulemaking.

WSPA spends little time in its request explaining why the CEC should reconsider its decision on the original request and provides no new information or argument, but mischaracterizes the record in several respects. First, on page 2 of the letter, WSPA claims that the CEC's order denying WSPA's petition for rulemaking states that pending legislation could potentially address unclear terms in existing law. The CEC did not make that statement. WSPA's edited excerpts from the order are not supported by the record. The CEC's order states that pending legislation "could also potentially address other terms that WSPA asserts require clarification." Second, on page 2 of the letter, WSPA claims that Staff "recognized that SB 2 could provide much-needed clarity to the existing law." That is WSPA's claim. Staff did not make that statement. As noted above, at the January 25 business meeting, Staff explained that SB 1322 is clear as written and can be implemented without further interpretive regulations. Furthermore, the CEC's order is very clear that it decided to allow the legislature to complete its related legislation before considering whether to initiate a rulemaking. Staff reiterates below the reasons why the CEC should reaffirm its denial of the petition for reconsideration.

- a) Compliance with SB 1322 as it is currently written is feasible.

WSPA claims that the terms in SB 1322 "are vague and contradictory, rendering any reporting" "burdensome, inaccurate, and inconsistent." Yet, WSPA does not substantiate its claim by showing that it is impossible to comply with the statute as it is written without further agency

interpretation. And the fact that the majority of refinery operators recently submitted information specified in SB 1322 undercuts any assertion that the statute cannot be implemented as written. SB 1322 consists of terms generally used in the industry and to the extent refinery operators believe that some of the terms are open to interpretation, and are not just using this argument as a pretext for delay, refinery operators can use definitions of these terms contained in Title 20 of the California Code of Regulations and federal law to help guide them in providing the requested data.

- b) It is not a prudent use of resources to begin a rulemaking when the Legislature is currently considering possible changes or additions to the statutory requirements at issue.

Staff's continued recommendation to deny the rulemaking petition (and the request for reconsideration) is based on the fact that the Governor called a Special Session of the Legislature on December 5, 2022, to address California gasoline prices, and Senator Nancy Skinner introduced legislation (Senate Bill 2, (2023-2024 1<sup>st</sup> Ext. Sess.)) that proposes to impose gasoline price gouging penalties on refinery operators. SB 2 would also refine the term "gross gasoline refining margin" and require additional data reporting of costs and prices related to the production of gasoline. The pending legislation includes the same terms contained in SB 1322, including the term "gross gasoline refiner margin." For this reason, Staff continues to believe that the CEC should await the outcome of this very closely related legislation before turning to consider whether any interpretive regulation is helpful regarding the terms and requirements of SB 1322. This does not mean that SB 1322 is unclear, only that it is the subject of potential further changes at the Legislature and beginning a rulemaking now before that process concludes is premature. The existing law is clear and refineries appear able to understand what is required in their reports. WSPA's claim that it needs more direction is not a basis for delaying statutory reporting requirements.

Further, on February 6, 2023, the CEC's Executive Director notified refinery operators that if they are concerned about submitting data that would result in an inaccurate reflection of its gross gasoline refining margin, they can provide an explanation with the data. SB 1322 is clear, requiring reporting by each refinery of the gross refiner margin, the crude oil price, and the revenue the refinery operator receives when it sells to the downstream entity in the petroleum market. WSPA does not provide any evidence supporting a conclusion that, even if, assuming arguendo, some terms are not precisely defined in the legislation and are open to some interpretation as WSPA claims, they are so ambiguous as to make provision of the requested data impossible. As such, the proper course is to require compliance with SB 1322 as written.

- 2) WSPA's request for a stay is not supported.

In its letter, WSPA states that "the CEC should delay action on SB 1322 – and stay refiners' reporting requirements – until after the Legislature has time to act."

- a) Compliance with SB 1322 as it is currently written is feasible.

A stay is not warranted because WSPA fails to support any assertion that it is not feasible for refinery operators to comply with the statute as it is currently written. As noted above, the first reporting deadline in compliance with SB 1322 passed on March 2, 2023. All major refinery operators submitted SB 1322 data except one, who provided only partial information. A

rulemaking is not necessary at this time. Because the statutory language is sufficiently clear to allow for compliance, a majority of refinery operators have in fact adhered to the first filing deadline, and given potential pending legislative action, a rulemaking is premature.

- b) WSPA does not show that the CEC has discretion regarding whether to enforce SB 1322.

SB 1322 contains mandatory reporting requirements and does not vest discretion in the CEC to decide whether or not to require refinery operators submit reports to the CEC. Due to this statutory language, it does not appear that the CEC has authority to stay SB 1322's reporting requirements.

- c) WSPA does not have standing to request a stay.

In its letter, WSPA requests the CEC "stay" its enforcement of SB 1322. As discussed above, SB 1322 allows only "those persons who have failed to timely provide the information" to object, not a third party. SB 1322 does not require WSPA to submit information to the CEC; therefore, it is not the proper entity to request a stay or object to the submission of information specified in AB 1322.

- d) Administrative due process established by statute affords refinery operators a forum for objecting to any penalties.

Further, even if WSPA's request to stay is lodged by or on behalf of a refinery operator, the request for stay is not warranted and is premature because refinery operators who timely object to the information reporting requirements would be subject to a civil penalty only if, after being notified of the failure to provide specified information, they refuse to submit the specified information after a hearing was held on the matter. Since adequate procedures exist to protect the due process rights of refinery operators subject to reporting requirements, a stay regarding penalties is unnecessary.

#### **IV. Staff's Recommendation**

For the reasons discussed above, because WSPA has not provided support for a request to reconsider the CEC's decision to deny the petition for rulemaking, Staff recommends that the CEC deny WSPA's request for reconsideration. Staff also recommends the CEC deny the request for a stay of SB 1322's reporting requirements as premature, unsupported, and not properly before the CEC.



**Sophie Ellinghouse**

Vice President, General Counsel & Corporate Secretary

February 15, 2023

The Honorable David Hochschild  
California Energy Commission, Chair  
715 P Street, MS-14  
Sacramento, CA 95814

**RE: REQUEST FOR RECONSIDERATION OF WSPA PETITION FOR SB 1322 RULEMAKING  
AND STAY OF PENALTIES**

Dear Chair Hochschild,

Thank you for the opportunity to speak at the California Energy Commission's (CEC) Business Meeting on January 25, 2023, about agenda item 17, the Western States Petroleum Association's (WSPA) Petition to Request a Rulemaking Hearing to implement the "California Oil Refinery Cost Disclosure Act," Senate Bill (SB) 1322 (2022).<sup>1</sup> The petition explained that SB 1322 introduces novel reporting terms that will require refiners to change the way they gather and report data. Without clarifying guidance from the CEC, best informed through a rulemaking, these key terms are vague and contradictory, rendering any reporting under the bill burdensome, inaccurate, and inconsistent.

The CEC denied WSPA's petition because it claimed that pending legislation could contextualize, clarify, and refine SB 1322's terms, and elected instead to postpone its decision about whether to clarify the law until *after* the Legislature acts. SB 1322 breaks new ground in imposing novel reporting requirements on refiners. But the decision to deny rulemaking and enforce SB 1322 without further clarification is flawed for at least two reasons. First, if the Legislature is indeed poised to clarify the law, refiners should not have to comply without the benefit of this much-needed clarity. Second, if the CEC wishes to postpone its decision about whether SB 1322 is unclear until after the Legislature acts, it would be unfair and arbitrary to not also postpone enforcement of SB 1322 as to refiners (that is, to enforce the law *before* making that decision).

Instead, the CEC should initiate a rulemaking but delay action—and stay refiners' reporting requirements—until after the Legislature has time to act. Accordingly, under Government Code section 11340.7(c), I am writing on behalf of WSPA and its members to request that the CEC reconsider its denial of WSPA's petition and stay its hand in enforcing SB 1322's reporting requirements until such much-needed clarification is provided by the Legislature and/or CEC. The CEC's brief letter and optional reporting form transmitted to refinery executives on February 6, 2023, is much appreciated, but does not provide the necessary clarifications sought in WSPA's petition on behalf of the refiners.

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<sup>1</sup> CEC Business Meeting Agenda (Jan. 25, 2023), <https://bit.ly/3RuQeFk>.

Indeed, the CEC's letter acknowledges that industry may have "more than one definition for any of the terms in statute" and that multiple "definitions or meanings" would need to be further explained.

## **BACKGROUND ON WSPA'S PETITION FOR RULEMAKING**

WSPA filed its formal petition for rulemaking with the CEC on January 6, 2023. The petition presented to the CEC reflects input from refinery operators, regulatory-compliance specialists, finance officers, and legal counsel from across WSPA's member companies. The petition pointed out that key pieces of SB 1322's reporting mechanism are unclear or misleading. For example, the law asks refiners to provide "estimated valuations of costs" associated with the low-carbon fuel standard and cap-at-the-rack program without providing any guidance on how to arrive at such estimates. And the list of transaction types in Public Resources Code section 25355(a)(3), such as "spot pipeline sales," potentially contains overlapping categories and could result in double-counting of wholesale gasoline sales.

At first, CEC staff appeared to support the petition. Before the petition was filed, CEC staff stated in a letter to WSPA that they would "propose that the Commission adopt an order instituting rulemaking to initiate a proceeding to evaluate how best to interpret and make specific the requirements of SB 1322."<sup>2</sup> And the petition itself benefited from extensive guidance from and collaboration with CEC staff. But after publicly noticing the petition for consent agenda approval, and about a week before the January 25 Business Meeting, the CEC reversed course and requested that WSPA withdraw the petition. WSPA did not do so given the need for clarity.

At the meeting, CEC staff opposed the petition on the basis that proposed legislation could refine and clarify SB 1322.<sup>3</sup> The CEC staff recommendation noted that a bill pending in the Legislature, SB 2, "relies on and refines the term 'gross gasoline refining margin'" and "adds substantial content related to costs and prices."<sup>4</sup> Although CEC staff recognized that SB 2 could provide much-needed clarity to the existing law—for example, because it "adds substantial context" to the costs described by SB 1322—they nonetheless maintained that SB 1322 was "clear as written" and "can be complied with."<sup>5</sup> At the meeting, staff indicated that they "wish to wait and see the outcome of the pending legislation" before engaging with the rulemaking process.<sup>6</sup>

I addressed this proposed wait-and-see approach at the meeting. As I stated then, "If you intend to delay your rulemaking responsibility due to the pending legislation, then [you] should also delay the obligations under SB 1322 to prevent the potential conflicts your staff has identified."<sup>7</sup>

The CEC denied the petition—but not without acknowledging the potential clarifying effect of future legislation on SB 1322's terms. In its order, it states that pending legislation "could also potentially address" unclear terms in existing law, and notes that it would wait for legislation "before initiating a

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<sup>2</sup> Letter from Kari Anderson, CEC Senior Att'y, to WSPA CEO Catherine H. Reheis-Boyd (December 16, 2022).

<sup>3</sup> Sen. Bill. No. 2 (2023-2024 1st Ext Sess.), introduced by Senator Skinner, would adopt Public Resources Code section 25355.5.

<sup>4</sup> Aleecia Gutierrez, Memorandum, CEC Staff Recommendation on Petition for Formal Rulemaking Regarding SB 1322 Implementation 2 (Jan. 23, 2023).

<sup>5</sup> *Id.* at 4:15:57–4:16:03.

<sup>6</sup> Zoom recording, CEC Business Meeting at 4:16:40, <https://bit.ly/3RtHNu9>.

<sup>7</sup> *Id.* at 4:13:19.

rulemaking *for the purpose of considering whether to clarify terms in SB 1322* and ensure consistency and accuracy in its interpretation and implementation.”<sup>8</sup>

## **REQUEST FOR RECONSIDERATION AND STAY OF REPORTING AND ENFORCEMENT**

The CEC should reconsider WSPA’s petition for at least two reasons. First, if the Legislature *does* pass legislation that clarifies and contextualizes SB 1322, refiners should have the benefit of that clarity and context before being forced to comply with the law’s as-yet-unclear-and-unworkable terms. And, second, whatever the Legislature does, the CEC should not impose the law’s novel reporting requirements on refiners *before* deciding whether to clarify those requirements. Instead, the CEC should grant the petition but stay rulemaking on—and enforcement of—SB 1322 until after the Legislature decides whether and how to pass further legislation that would clarify and contextualize SB 1322. Proceeding with enforcement of SB 1322 now, without providing the clarity and context that the CEC itself admits may be necessary, would unfairly put the cart before the horse.

1. Pending legislation could indeed contextualize and clarify SB 1322’s terms, and refiners should not have to guess at what those terms mean before the Legislature (or CEC) provides this much-needed context. SB 1322 writes on a blank slate: Never before have refiners been asked to estimate the costs of California’s environmental regulations or tabulate “crude oil . . . received and intended to be refined” in a given month. Pub. Res. Code, § 25355(b). If, as the CEC acknowledges, the Legislature could help regulators and industry members understand these new requirements, the CEC should hold off on enforcing the law until everyone involved can benefit from this legislative guidance.

2. Regardless of what the Legislature does, it would be unjust to acknowledge the need for a potential rulemaking, but enforce the law before deciding whether such a rulemaking is in fact necessary. The CEC’s order states that it wishes to “allow[] the legislative process to conclude before initiating a rulemaking for the purpose of considering whether to clarify terms in SB 1322.” In essence, the order recognizes that the CEC may have to clarify the terms in SB 1322 while postponing doing so while the Legislature deliberates further. But if SB 1322 is unclear, then the CEC should act now to clarify it, or else delay enforcement of it until after the CEC or Legislature clarifies it. An act-now, decide-later approach would be unfair to refiners, placing them in the impossible position of guessing at what to report, and would also put the CEC in the awkward position of aggregating and publishing potentially misleading and contradictory data to the public.

Forcing industry members to comply with reporting requirements that the CEC itself acknowledges may need clarification would also give rise to unnecessary and avoidable constitutional issues. *See People v. Garcia*, 2 Cal. 5th 792, 804 (2017) (espousing “a preference for avoiding the unnecessary resolution of constitutional question”). States may not enforce laws that are “so vague that [people] of common intelligence must necessarily guess at [their] meaning.” *E.g., In re Sheena K.*, 40 Cal. 4th 875, 890 (Cal. 2007) (citations omitted). And the First Amendment limits States’ ability to compel businesses to make disclosures that are both controversial and misleading. *E.g., CTIA - The Wireless Ass’n v. City of Berkeley*, 928 F.3d 832, 847 (9th Cir. 2019).

Fortunately, SB 1322 vests the CEC with authority to forestall the law’s reporting and enforcement provisions—authority the CEC should exercise here, in the interests of fairness, accuracy, and sound

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<sup>8</sup> California Energy Commission, Order Denying Petition for Rulemaking 2–3 (Order No. 23-0125-17, Jan. 25, 2023) (italics added).

public policy. Public Resources Code section 25362(a) provides that all penalties for failure to report are stayed if the refiner “has timely filed objections with the commission . . . and the commission has not yet held a hearing on the matter.” On behalf of its members, WSPA has and hereby does timely object to the inconsistent, unfair, misleading, and inaccurate reporting called for by SB 1322, and would renew this objection (as may some or all of our members) whenever any refiner is notified of a failure to timely report information called for by SB 1322. We further request that you schedule a hearing to clarify these requirements via the rulemaking process, and that such a hearing on the matter be held *after* the Legislature has passed clarifying legislation currently before it.

\* \* \* \*

WSPA understands why the CEC does not want to act on statutory provisions that could soon be clarified and contextualized by the Legislature. Neither do WSPA’s members. Accordingly, the CEC should reconsider its denial, initiate rulemaking, and postpone any hearing on the matter until the Legislature can provide the requisite clarity and context, thereby suspending for the time being SB 1322’s reporting requirements (or at least its penalties).

We look forward to the opportunity to engage with you in good faith on the foregoing, and to your response to this request.

Sincerely,

A handwritten signature in blue ink, appearing to read "S. Ellh".

Cc: The Honorable Siva Gunda, California Energy Commission, Vice Chair  
The Honorable Andrew McAllister, Commissioner  
The Honorable Patty Monahan, Commissioner  
Mr. Drew Bohan, Executive Director  
Cathy Reheis-Boyd, WSPA  
Shant Apekian, WSPA  
Tanya DeRivi, WSPA