

September 2, 2008

Ms. Alice Lippert
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OE-30, Forrestal Building, U.S. DOE
Washington, DC 20585

Attn: Comments on Refinery Disruption and Incident Report (73 FR 37451)

Ms. Lippert:

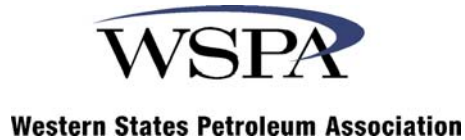
The American Petroleum Institute (API), the National Petrochemical & Refiners Association (NPRA), and the Western States Petroleum Association (WSPA) are trade associations representing the U.S. oil and natural gas industry. The members of API, NPRA, and WSPA are involved in all facets of the oil and gas industry, including exploration, production, transportation, refining, marketing, and petrochemicals production. API, NPRA, and WSPA frequently participate in legislative, administrative, and judicial proceedings that address issues of national concern and are able to offer an industry-wide perspective on the issues raised by DOE's proposal. Every one of the refineries affected by this proposal is represented by one or more of the trade associations.

We appreciate the opportunity to provide our input on the Department of Energy's (DOE's) July 1, 2008 notice and request for comments on the Refinery Disruption and Incident Report proposal (73 FR 37451). We believe that this reporting requirement is unnecessary, of limited practical utility, potentially disruptive to established, high priority emergency response protocols, and, therefore, should not be required as proposed. However, if DOE proceeds with finalizing this proposed requirement, our primary concerns include the one-hour reporting deadline, the protection of sensitive company information, and determining what constitutes a "significant production disruption" such that the incident reporting meets DOE's needs without overwhelming the agency with reports of minor incidents with no supply implications.

I. DOE'S PROPOSED ONE-HOUR REPORTING REQUIREMENT IS INAPPROPRIATE

A. **Three-hour Deadline to Report Is More Appropriate**

DOE's proposed one-hour requirement for submission of the Schedule 1 report conflicts with refiners' emergency response priorities to ensure worker, site, and public safety. To prevent this DOE incident report requirement from potentially interfering with critical initial response activities, API/NPRA/WSPA recommend that the deadline for submission of the Schedule 1 report be not less than three (3) hours after determining that an incident has triggered the reporting requirement. While it may still be difficult to report within three hours, these extra two hours allow refiners to ensure that the primary focus is on incident assessment and response rather than on regulatory reporting.



Additionally, it is important that reporting apply only to those events that potentially will have a significant impact on transportation fuels and home heating oil production. DOE must clearly specify a threshold for an incident's expected impact on total refinery transportation fuels and home heating oil production that triggers the filing of Schedule 1. (See Section II for specific recommendations.)

B. Flexibility Is Required for Extenuating Circumstances

Furthermore, DOE's final rule should recognize that refiners must deal with these important emergency response and safety priorities by including language similar to that used by California's Air Resources Board in a California reformulated gasoline regulation found in 13 CCR Section 2265(a)(5):

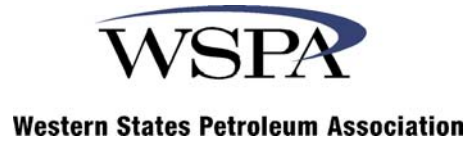
If, through no intentional or negligent conduct, a producer or importer cannot report within the time period specified in section (a)(2)[... in referenced rule], the producer or importer may notify the executive officer of the required data as soon as reasonably possible and may provide a written explanation of the cause of the delay in reporting. If, based on the written explanation and the surrounding circumstances, the executive officer determines that the conditions of in section (a)(5)[... in referenced rule] have been met, timely notification shall be deemed to have occurred.

This language would allow refiners to file Schedule 1 with DOE promptly, but without interfering with emergency response activities.

C. Petroleum Refineries are More Complex than Electric Utilities

Requiring a refinery to file notification of a potential supply disruption within the first hour of becoming aware of an emergency would distract from the primary focus of emergency response which is, first and foremost, to ensure the safety of the employees and the surrounding community. Refiners are well organized and have plans in place to address emergencies, but those plans focus on the first priority of containing an incident. Assessing impacts is a next step.

We are aware that the one-hour reporting deadline currently applies to utilities. It is important that DOE understand the differences between a refinery and a utility pertinent to this type of requirement to see why the one-hour timeframe is unmanageable at a refinery. Utilities are less complex because they produce a single product (power) and their incidents are less ambiguous because they typically have an immediate impact on their communities and because their production impact can be readily quantified (MWhrs). Refinery emergencies are more complex because they require the attention and focus of a more extensive network to account for all personnel, assess the situation, and direct people to manage the incident. These critical activities are complex by nature because refineries consist of multiple process units which are interconnected and typically in close proximity, such that an issue in one unit may impact downstream or adjacent units resulting in multiple issues requiring simultaneous attention. This makes it much more time consuming to determine the cause of an incident and assess impacts. During an emergency, information and situation updates must be consolidated from various



personnel and field locations into an accurate understanding of the situation. This is followed by an assessment of the impacts, a decision on appropriate response and, ultimately, quick action.

Petroleum refineries also differ from electrical power plants in that refineries typically hold several days of production in inventory on-site and more inventory is generally available to supply the product markets at terminals. Therefore, the effects of refinery incidents on supply are not as immediate and do not necessitate immediate reporting to DOE. Product inventory provides a cushion that should allow refiners a reasonable amount of time to assess the refinery's situation and its ability to produce fuels and supply the market. Inventories, in addition to contractual arrangements to bring in some additional supplies to fill any gaps created by an incident should be a factor considered when determining the potential significance of an event.

D. Existing Emergency Notification Requirements Are Extensive

In addition to managing the emergency to ensure the health and safety of refinery employees and the community, the refinery supervision team is already obligated to take the following actions:

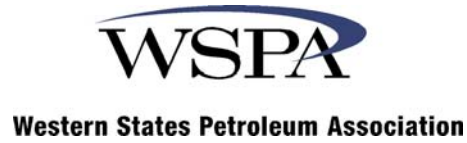
- Immediately notify local emergency responders who can assist in the response;
- Make calls for assistance to off-shift employees for help in responding to the emergency, and; and
- Make multiple notifications to local, state, and/or federal environmental and safety agencies.

A one-hour incident report that is not associated with the emergency response and is solely for the purpose of informing DOE of the event, adds an unnecessary burden and distraction to the first responders on the refinery supervision team who are working to mitigate the impacts of an emergency.

A more realistic timeframe is necessary to prevent this mandatory report from diverting refinery personnel from critical initial response activities. API/NPRA/WSPA recommend that DOE require the submittal of the initial Schedule 1 notification as soon as practicable, but with a regulatory deadline that is not less than three (3) hours after refinery personnel determine that an incident has triggered the reporting requirement.

II. CRITERIA FOR REPORTING INCIDENTS TO DOE

According to DOE, the purpose of the emergency incident report is to provide the Agency “with the information necessary to alert it to the existence and severity of a problem with a refinery and its ability to supply the market with products” and “would be filed during an emergency when certain conditions were met indicating that a serious problem were occurring at a refinery” (73 FR 37452). Since it is DOE's intent to capture only those events that truly have the potential for significant supply impacts, DOE must establish reporting criteria that will distinguish between those incidents that will have a significant effect on transportation or home heating fuels production and those that will not. It is in the interest of both DOE and refiners to have reporting



criteria that screen out inconsequential events so that the reporting process is not overwhelmed with unnecessary reports.

API/NPRA/WSPA propose the following principles for reporting criteria:

1. The definitions of the terms used must be clear and universally understood such that Operations personnel may easily determine whether or not a report must be filed with DOE.
2. The criteria should focus on the refinery's total production of transportation fuels and home heating oil.
3. The criteria should be based on the reduction of the refinery's total production (in barrels per day, BPD) expressed as a percentage of the refinery's average daily production¹ for the preceding calendar year. The criteria should not be based on the production of any one process unit within the refinery.
4. Planned outages for maintenance or repairs should not be reported since planning for these outages will include production planning to compensate for the temporary loss of production.

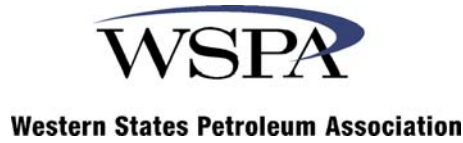
API/NPRA/WSPA concede that the following situations warrant an emergency incident report submission to DOE (as proposed, these criteria apply only to refineries with crude distillation capacity greater than 50,000 barrels per calendar day (BPCD)):

- Emergency shutdown of whole refinery;
- Any physical attack on a refinery.

Refineries can experience emergency and unintended production disruptions that affect only one process unit or a limited area in the refinery. Such events may not necessarily affect the refiner's ability to supply markets with products and therefore may not meet the loss of production criterion. These disruptions may or may not rise to the level of an "emergency" and are typically handled by the Operations personnel already on site. Recovery from these incidents, even the unintended shutdown of a major process unit, can be relatively quick and the production consequences may be minimal or can be offset over a short period of time by the refinery's inventory cushion.

With the exception of entire refinery shutdowns or physical attacks on a refinery, API/NPRA/WSPA recommend that in all other situations, additional criteria regarding the production consequences of the incident should be applied to determine whether or not an incident qualifies as significant (as for the criteria above, these apply only to refineries with crude distillation capacity greater than 50,000 BPCD). For emergencies other than an entire facility shutdown or physical attack, refiners should submit a report only when there is a

¹ Total transportation fuels and home heating oil



reduction of a refinery's total daily production of transportation fuels² and home heating oil by 30% or more due to:

- Loss of containment (LOC) with or without ignition and/or fire; or
- Emergency shutdown of a refinery process unit or refinery system³; or
- A cyber attack on a refinery's computer system(s).

As an example, a vibration sensor on a diesel hydrotreater feed pump could interrupt power to the pump motor and cut off distillate feed to the process unit resulting in a unit shutdown. If the operators have a spare pump available which they are confident can be restarted within a short period of time then the production consequence of the reliability event is unlikely to meet the 30% of total refinery production criterion and a report to DOE should not be required.

The recommended criteria would eliminate the need to define the terms "major interruptions or impacts" and "critical facilities, systems, or operations" included in DOE's proposed rule and eliminates the need to provide examples of such facilities, major process units, and systems.

Finally, the recommended criteria allow refiners to use existing inventories and other supply arrangements to cover production disruptions when determining whether or not the criteria for reporting have been met. Incidents where potential supply impact can be mitigated by purchasing products should not be reported.

III. CONFIDENTIALITY OF INFORMATION REPORTED ON SCHEDULES 1 AND 2

DOE states that its goals are ". . . to perform due diligence on policy recommendations concerning emergency actions" and ". . . to provide the most effective regulatory relief and restoration assistance" (as stated in 73 FR 37452(4)(I)). API/NPRA/WSPA believe that these goals can be best accomplished by treating the information in both Schedules 1 and 2 as confidential. Although the Federal Register Notice and Draft Refinery Disruption and Incident Report's "Provisions Regarding Confidentiality of Information" state that information from Schedule 2 is confidential, the information from Schedule 1 is not similarly protected.⁴ API/NPRA/WSPA ask that Schedule 1 also be treated as confidential information and that neither schedule is published in OE's Emergency Situation Reports in part or in whole.

First, API/NPRA/WSPA appreciate DOE's recognition that "[a]ll information collected related to actions taken, units or processes affected by the disruption or incident, the estimated losses of production, and any additional information . . ." contained in Schedule 2 is confidential. As

² Finished gasoline, gasoline blendstocks, jet fuel, on- and off-road diesel fuel, and home heating oil

³ Utility or refinery infrastructure system; e.g., steam or instrument air or cooling water

⁴ The information at the bottom of the draft form "Schedule 1" states that "[i]tems 5 through 9 of Schedule 1 on Form OE-XXX are considered protected." It appears that this was a simple misstatement in light of the above provisions.

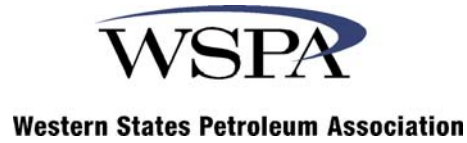


DOE is aware, such information about the production of petroleum products is very different from other energy information, such as electrical generation data, because petroleum product commodity markets react quickly to production announcements. Similarly, the information collected in Schedule 1 could have an immediate impact on the petroleum product commodity markets and could put the reporting refinery at a competitive disadvantage if it must make purchases in the spot market to meet its obligations, which could result in increased costs for the consumer. API/NPRA/WSPA are concerned about the potential for misuse of the information in a fashion detrimental to the stability of the fuel markets and to consumers.

Second, the release of the information in Schedule 1 could thwart DOE's intent to use the information to provide relief in the event of refinery disruption or incident. Instead, making public statements on the specifics of the timing and type of disruption or incident, even without an estimate of the loss of production, could disadvantage the reporting refineries that may need to buy blendstocks and finished products on the market to cover the production disruptions. Market participants could use information about the disruption or incident to increase purchases of futures instruments or liquid volumes of blendstocks and finished products while it is ongoing. In addition, this information could lead to impacts in the refinery services markets. Refiners need to secure labor, equipment, engineering and other services from third-party suppliers for significant disruptions. Again, we consider the information in Schedule 1 to be confidential information which, if generally released, could disadvantage a company seeking to secure alternative product supplies, necessary equipment or contract labor forces at competitive market rates following significant disruptions. Therefore, the information in Schedule 1 should be treated as confidential information like the information in Schedule 2.

Section 796(d), 15 USC 796(d), states that confidential information shall not be deemed confidential for purposes of disclosing it upon request to certain other agencies and Congress, but it does not state how such agencies and Congress will maintain the confidentiality of the information. API/NPRA/WSPA recommend that such disclosures should be made only when the recipients of the information sign a Memorandum of Understanding by which they agree to observe DOE's confidentiality protocols AND, whenever possible, the data should be aggregated rather than sharing individual company or refinery information. If such safeguards are not in place, then requesters like Congress should rely on DOE or EIA to analyze the data absent a compelling reason to share company-level confidential information.

API/NPRA/WSPA recommend that the final rule explicitly state DOE's confidentiality protocols and the procedures in place for responding to requests from other agencies and from Congress.



IV. NECESSITY AND PRACTICAL UTILITY OF REPORTING

API/NPRA/WSPA understand DOE's interest in refinery production and the need to be informed of significant disruptions of supply or production. Petroleum refining is among the most heavily regulated and scrutinized industries in the US and adequate petroleum supplies are essential to the economy. However, additional reporting requirements could interfere with critical response activities that help refiners recover after major incidents. API/NPRA/WSPA submit that there are alternatives available to DOE for gathering the information it needs without adding paperwork and immediate notification requirements in a situation where a refinery is already operating in emergency mode and possibly with limited personnel. In many states, there are already multiple layers of reporting requirements for various local, state and federal regulations and some have "one call" systems to facilitate the timely and efficient reporting of emergency information. DOE should take advantage of the reporting that already occurs rather than requiring a new, duplicative report from refiners.

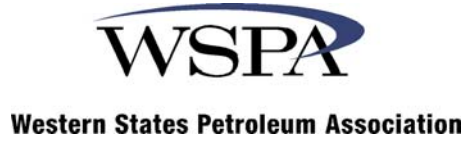
Reporting of emergency incidents is unlikely to have practical utility relative to stated DOE objectives in the early hours of the event since the reporting cannot assist in any way to mitigate the incident and the production consequences are unlikely to be understood immediately. The first few hours after an incident are critical to controlling the incident and securing the personnel and the site safely. Reporting requirements that have unreasonable timeframes, or that are unrelated to emergency response can actually exacerbate the problem by diverting critical resources away from securing the site.

The proposed reporting requirement might possibly have some utility in the aftermath of an incident if DOE can assist in coordinating supply continuity. However, DOE should be aware that it often takes several days to assess the full impact of a refinery disruption. DOE should also be aware that process units at a refinery can come back on line at different intervals, since some are easier to repair and restart while other units may be down for longer periods of time. During these restarts, a refinery can often mitigate any production losses by varying its product slate, securing third party feedstocks, drawing from inventory and diverting to other process units with the ability to vary processing capability.

V. TIME BURDEN ESTIMATE & REPORTING FREQUENCY

API/NPRA/WSPA expect that DOE has significantly underestimated the number of incidents that would be reported unless a threshold for reporting incidents is clearly identified. The criteria for a "significant production disruption" outlined above will ensure that significant events are reported to DOE without the burden of reporting every minor occurrence at a refinery.

The number of reports that may be generated each year is speculative at this time since no threshold has been identified. However, API/NPRA/WSPA believe that DOE's estimate of the amount of time required to file these incident reports is extremely low. Filing a Schedule 1 notification is going to require much more than six minutes and preparing an estimate of



production consequences for Schedule 2 is going to require much more than one man-hour. We also believe that DOE has underestimated the number of incidents that will require a report, even if a 30% production reduction threshold is employed. Therefore, we expect that the burden of preparing and submitting these reports will be significantly greater than DOE’s estimated burden.

VI. OTHER COMMENTS ON THE REPORTING FORMS FOR THE DOE PROPOSAL

There are several miscellaneous comments and recommendations with regard to DOE’s draft forms:

- Add the word “emergency” to the title of the form so that the title would read, “Emergency Refinery Disruption and Incident Report”;
- Delete “explosion” from Line #9 – Type of Disruption. This type of situation is adequately covered by “fire”; and
- Delete “unknown cause” from Line #9 – Type of Disruption. “Unknown cause” is not a useful term when trying to classify an incident by type and it is extremely unlikely that an incident’s cause will be determined in the timeframe for reporting an incident. DOE should recognize that asking refiners to guess at the cause of an incident is inconsistent with the complex nature of incidents and likely to be counterproductive.

We appreciate DOE’s thoughtful consideration of these comments. Although we are not persuaded that the industry’s existing capability to communicate with DOE is inadequate or that the value of reporting is worth the risk of diverting refinery personnel from more pressing duties, we are interested in meeting DOE’s needs as long as they prioritized appropriately. We believe that any reporting requirement must be flexible so that refiners can continue to focus on safety and emergency response in the critical first hour of a potentially significant disruption and we cannot stress enough the importance of allowing at least three hours for filing Schedule 1. DOE must also provide a reasonable threshold to avoid over-reporting and reporting of minor incidents with no impact on supplies. In addition, protection of sensitive company information should be carefully considered as DOE moves forward with the proposal.

Please do not hesitate to contact us if you have any questions or would like further explanation on any of the comments provided. You can reach Cindy Schild at API at 202.682.8482/schild@api.org, Jeff Hazle at NPRA at 202.552.8459/jhazle@npra.org, or Gina Grey at WSPA at 480.595.7121 or gina@wspa.org.

Sincerely,

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