

PROPOSED

State of California
AIR RESOURCES BOARD

LOW CARBON FUEL STANDARD LITIGATION ORDER COMPLIANCE ACTION

Resolution 17-48

November 16, 2017

Agenda Item No. 17-11-7

WHEREAS, sections 39600 and 39601 of the Health and Safety Code authorize the California Air Resources Board (CARB or Board) to adopt standards, rules and regulations and to do such acts as may be necessary for the proper execution of the powers and duties granted to and imposed upon the Board by law;

WHEREAS, section 38510 of the Health and Safety Code designates CARB as the State agency charged with monitoring and regulating sources of greenhouse gas (GHG) emissions that cause global warming in order to reduce such emissions;

WHEREAS, section 38560 of the Health and Safety Code directs the Board to adopt rules and regulations in an open public process to achieve the maximum technologically feasible and cost-effective GHG emissions reductions from sources or categories of sources, subject to the criteria and schedules specified in Part 4 of Division 25.5 of the Health and Safety Code;

WHEREAS, section 38580 of the Health and Safety Code requires the Board to monitor compliance with and enforce any rule, regulation, order, emission limitation, emissions reduction measure, or market-based compliance mechanism adopted by CARB pursuant to Division 25.5;

WHEREAS, the Board approved a list of early GHG actions at its June 21, 2007 hearing, and approved additions to the list at its October 25, 2007 hearing, and a subset of nine of these early actions were designated as Discrete Early Action Measures, including a "Low Carbon Fuel Standard" (LCFS) measure to reduce GHG emissions from transportation fuels used in California;

WHEREAS, on July 15, 2013, the State of California Court of Appeal issued an opinion in *POET, LLC v. California Air Resources Board* (2013), 218 Cal.App.4th 681, requiring that CARB take specified actions to correct errors related to the adoption of the first LCFS in 2009, and concluding that the public interests at stake, including the protection of the environment, weighed in favor of preserving the operation of the LCFS while those actions were taken;

WHEREAS the 2013 *POET* opinion ordered CARB to, among other things, further consider whether the LCFS might result in increased nitrogen oxide (NOx) emissions due to increases in the use of biodiesel;

WHEREAS, in February 2014, the Fresno County Superior Court issued a writ of mandate ordering the Board to take the actions directed by the Court of Appeal;

WHEREAS, on September 25, 2015, the Board approved Resolution 15-36, thereby setting aside its approval of, and repealing, the then-current LCFS regulation, and adopting a new LCFS regulation, effective January 1, 2016, published at sections 95480, 95481, 95482, 95483, 95483.1, 95483.2, 95484, 95485, 95486, 95487, 95488, 95489, 95491, 95492, 95493, 95494, 95495, 95496, and 95497 of Title 17, California Code of Regulations;

WHEREAS, on September 25, 2015, the Board approved Resolution 15-41 adopting the Alternative Diesel Fuels (ADF) regulations, designed to, among other things, reduce NOx emissions from the use of biodiesel, published at sections 2293, 2293.1, 2293.2, 2293.3, 2293.4, 2293.5, 2293.6, 2293.7, 2293.8, 2293.9, and Appendix 1 of Title 13, chapter 5, article 3, California Code of Regulations;

WHEREAS, on September 25, 2015, the Board approved Resolution 15-51, thereby certifying the *Final Environmental Analysis for the Low Carbon Fuel Standard and Alternative Diesel Fuel Regulations* and approving the responses to comments;

WHEREAS, on January 5, 2016, the Fresno County Superior Court discharged its February 2014 writ of mandate;

WHEREAS, on May 30, 2017, the State of California Court of Appeal issued an opinion in *POET, LLC v. California Air Resources Board* (2017) 12 Cal.App.5th 52, reversing the Superior Court's discharge of the February 2014 writ, and directing CARB to take specified actions relating to the issue of potential NOx emissions from biodiesel to complete its compliance with a modified writ of mandate;

WHEREAS, an October 18, 2017, writ of mandate from the Fresno County Superior Court, Attachment A to this Resolution, ordered the Board to, among other actions, "[s]et aside its 2015 approval of the parts of the final [LCFS/ADF regulations] Environmental Analysis addressing NOx emissions from biodiesel," and to "[a]ddress whether the project as a whole 'is likely to have' caused an increase in NOx emissions in the past and is likely to cause an increase in NOx emissions in the future";

WHEREAS, pursuant to the writ of mandate, the LCFS compliance standards for conventional diesel fuel and its substitutes are preserved, by court order, at the 2017 standard until the corrective action is complete and approved by the trial court in an order discharging the writ; and

WHEREAS, Board staff is developing further action to complete compliance with the court's order and this further action is anticipated to be presented to the Board for consideration in 2018.

NOW, THEREFORE, BE IT RESOLVED that the Board hereby sets aside its 2015 approval of the parts of the LCFS/ADF final Environmental Analysis addressing NOx emissions from biodiesel.

BE IT FURTHER RESOLVED that the Board directs Board staff to expeditiously present further corrective action for Board consideration in order to complete compliance with the writ of mandate as soon as is feasible.

Resolution 17-48

November 16, 2017

Identification of Attachments to the Board Resolution

Attachment A: Fresno County Superior Court Order Modifying and Reissuing Writ,
October 18, 2017

FILED

OCT 18 2017

FRESNO COUNTY SUPERIOR COURT
By _____ DEPT. 402

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SUPERIOR COURT OF CALIFORNIA, COUNTY OF FRESNO
CIVIL DIVISION – B.F. SISK COURTHOUSE

POET, LLC et al,
Plaintiffs and Appellants,

vs.

CALIFORNIA AIR RESOURCES BOARD
(CARB) et al.,
Defendants and Respondents.

NATURAL RESOURCES DEFENSE
COUNCIL, INC.,
Defendants and Respondents

No. 09 CECG 04659 JYH

ORDER VACATING DISCHARGE OF
WRIT; ORDER MODIFYING AND
REISSUING WRIT

This matter was remitted to the Superior Court from the 5th District Court of Appeal issued and August 23, 2017. At the direction of that court, the order earlier issued by this court discharging the February 2014 writ is vacated.

THIS COURT NOW FINDS that the CARB's return to the February 2014 writ did not demonstrate compliance with paragraph 3 and as such, the request for an order discharging same is denied.

CARB is NOW ORDERED to take the action described below and in the Peremptory Writ issued concurrently with this ORDER:

1. Set aside its 2015 approval of the parts of the final Environmental Analysis addressing NOx emissions from biodiesel.

1 2. Address whether the project as a whole "is likely to have"ⁱ caused an increase in NOx
2 emissions in the past and is likely to cause an increase in NOx emissions in the future. The
3 baseline used for analyzing each period's NOx emissions shall reflect the conditions existing at the
4 time the environmental analysis of the original LCFS regulations was commenced, unless Air
5 Resources Board provides sufficient justification, supported by substantial evidence, for use of a
6 later baseline. In no event shall the baseline conditions describe a year later than 2010. The
7 discussion in the environmental disclosure document shall comply with CEQA, including without
8 limitation an analysis and findings addressing whether the project as a whole is likely to have
9 caused an increase in NOx emissions in the past and whether the project as a whole is likely to
10 cause increases in NOx emissions in the future. After identifying the increased NOx emissions
11 attributable to the project as a whole on a year-by-year basis, the disclosure document shall address
12 whether the increased emissions had, or are likely to have, a significant adverse effect on the
13 environment or are cumulatively considerable. Findings on the foregoing matters shall be
14 supported by substantial evidence. Findings as to the causes for future biodiesel use shall take into
15 account that the incentives provided by federal regulations have or will change over time (e.g., the
16 expiration of the excise tax credits). If required by CEQA, the disclosure document shall address
17 mitigation measures and alternatives to the provisions in the regulations addressing diesel fuel and
18 its substitutes.

19 3. Preserve the status quo relating to conventional diesel fuel and its substitutes by continuing
20 to adhere to the standards in effect during 2017 for those fuels until the corrective action is
21 complete and approved by the trial court in an order discharging the writ.ⁱⁱ

22 4. Proceed in the manner required by CEQA when resolving procedural issues, such as
23 whether the revised environmental disclosure documents are released for public review and
24 comments.

25 The statements that follow are intended to aid in the interpretation and application of the
26 foregoing modifications. First, the modifications to the writ shall not affect the validity and
27 continuing operation of the ADF regulations. Second, there shall be no striking of text from the
28 LCFS regulations; rather, the freeze of the standards for conventional diesel and its substitutes

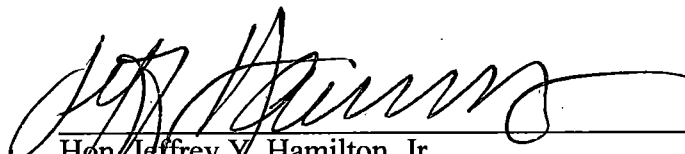
1 shall operate in the manner of an injunction rather than voiding or invalidating provisions that
2 would have come into effect in 2018 and later. Third, Air Resources Board need not suspend its
3 consideration or approval of additional fuel pathways for diesel fuel and its substitutes.

4 This court shall continue to retain jurisdiction over the proceedings by way of a return to
5 the writ. The court may, in an exercise of its discretion, require the Air Resources Board to file an
6 initial return after issuing the order modifying the February 2014 writ. The superior court's
7 jurisdiction shall include the authority to hear a motion for clarification of the terms of the
8 modified writ if the parties dispute its proper interpretation or application. Interpretation of this
9 disposition and the writ shall be in accordance with CEQA's requirements, principles and polices.

10 CARB is ORDERED to proceed diligently, reasonably and in subjective good faith while
11 implementing corrective action pursuant to the modified writ and filing a final return. If the CARB
12 fails to proceed in this manner, this court will immediately vacate the portion of the writ that
13 preserves the status quo with respect to the standards applicable to diesel fuel and its substitutes
14 and shall direct the CARB to set aside the provisions of the LCFS regulations applicable to diesel
15 fuel and its substitutes (i.e., suspend the operation and enforcement of those provisions) and, in its
16 discretion, may impose other sanctions. If the CARB's corrective action requires a notice of
17 approval of regulatory action from the Office of Administrative Law, the CARB may file its final
18 return before obtaining that notice; if it chooses to wait for the approval, it shall demonstrate the
19 necessity for that delay in its final return.

20 Nothing in this disposition or the writ shall prevent the CARB from taking action
21 addressing issues currently raised in other litigation when it takes the corrective action required by
22 this writ.ⁱⁱⁱ

23 DATED this 18th day of October, 2017.

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26 
27 Hon. Jeffrey Y. Hamilton, Jr.
28 Judge of the Superior Court

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i The phrase "is likely to have" appears in section 21061.

ii This provision replaces paragraph 6 of the February 2014 writ.

iii For instance, Air Resources Board might chose to exercise its discretion and provide an additional analysis of "reasonably foreseeable indirect physical changes to the environment" (Guidelines, § 15378, subd. (a)) that may have been caused by the project, such as the impacts of fuel shuffling alleged by plaintiffs. The reasonably foreseeable changes resulting from alterations in the behavior of third parties subject to a new law was discussed in detail by this court in *County Sanitation Dist. No. 2 v. County of Kern* (2005) 127 Cal.App.4th 1544, at pages 1582 through 1598. That case discussed the reasonably foreseeable indirect physical changes, both inside and outside the county, resulting from the reaction of third parties to the requirements of a new ordinance addressing sewage sludge disposal.