

TO: Mary D. Nichols, Chair

Honorable Board Members

FROM: Richard W. Corey  
Executive Officer

Ellen M. Peter  
Chief Counsel

DATE: April 19, 2020

SUBJECT: Background on April 23, 2020 Alternative Diesel Fuel Amendments  
Board Item

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At the April 23, 2020 Board meeting next week, California Air Resources Board (CARB) staff will present targeted amendments to the Alternative Diesel Fuel Regulation (ADF Regulation). This memorandum is to provide you with context for potential stakeholder comments during the ADF Regulation item's public comment period. These comments may come from either, or both, of two interested competitor-stakeholders who currently have certified products under the existing ADF Regulation and who are currently in litigation with each other. There are also allegations of bias by CARB staff; we disagree with the allegations and characterizations but wanted, for full transparency, to let you know about the claims.

The [rulemaking materials](#) are what you should consider when the matter is presented on April 23. But, in short, the ADF amendments are designed to ensure that NO<sub>x</sub> reducing additives certified by CARB for use in specified biodiesel blends perform to the regulatory standard (i.e., reduce NO<sub>x</sub> emissions to levels that are at least equivalent with CARB diesel emission standards). Applicants seeking certification for biodiesel additives under the ADF Regulation are required to submit a detailed application to CARB for review, including emission test results.

There are two primary ADF additive manufacturers, California Fueling, LLC (CA Fueling) and Best Corp. (Best). The proposed amendments arise from CARB's 2019 emissions testing, performed under contract at the University of California, Riverside (UCR), to assess whether previously certified additives were effective at mitigating NO<sub>x</sub> emissions. The testing was conducted in response to claims from CA Fueling, with supporting documentation, that Best's certified additives were not effective.

Although the testing was developed following up on the concerns raised by CA Fueling, CARB tested CA Fueling's certified additives as well. The 2019 UCR testing demonstrated that all additives tested failed to mitigate NO<sub>x</sub> to the regulatory standard (i.e., emissions of NO<sub>x</sub> from the biodiesel/additive blend were actually higher than emissions of NO<sub>x</sub> from petroleum diesel). CARB staff then published a [public notice](#) to advise the public of our findings. CARB then developed the pending rulemaking proposal to modify the certification process.

Separate from the ADF amendments, which are designed to provide near- and long-term ADF NO<sub>x</sub> mitigation assurance, CARB has separately followed up with additive manufacturers to further investigate the discrepancy between the emissions testing supporting existing certifications and CARB's 2019 UCR emissions testing. CARB continues this investigation pursuant to its enforcement authority; CARB will take action based on any evidence of violations of law that may be discovered. Since the 2019 confirmatory testing data demonstrate that CA Fueling and Best's certified additives do not appear to be performing as intended, the testing provisions of the ADF Regulation need to be strengthened to ensure the certification standards reflect actual additive performance.

CA Fueling and Best have been in litigation in the Los Angeles County Superior Court since late 2018; CA Fueling alleges Best's additive was certified by CARB based on fraudulent emissions data. The litigation between the companies is acrimonious. Both companies have threatened to sue CARB alleging improper actions and alleging unfair treatment by CARB staff, including the Executive Officer. Both companies think CARB shows favoritism toward the other company.

In a letter dated March 9, 2020 addressed to CARB Chief Counsel Ellen M. Peter, attached to this memorandum, CA Fueling's CEO Patrick McDuff requested that Ms. Peter notify the Board before the Board considers the proposed ADF amendments. In Mr. McDuff's view, CARB acted improperly by certifying his competitor's additive and by maintaining an inadequate rulemaking record. CARB staff carefully evaluated Mr. McDuff's assertions; as explained in the CARB response letter, also attached, neither of his complaints are accurate. No bias was demonstrated. The rulemaking file for these proposed amendments is consistent with legal requirements. Specifically, CARB did not post Mr. McDuff's last comment to the rulemaking docket because the comment was not submitted timely during the public comment period on the amendments.<sup>1</sup>

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<sup>1</sup> Mr. McDuff did submit three of the six timely comments received on the proposal during the 45-day comment period. He is welcome to submit additional written comments at the April 23 Board meeting.

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In our view, next week's proposed amendments to the ADF Regulation are straightforward. But, given the related litigation as well as our ongoing enforcement investigations, we wanted you to have the context, in the event public testimony relates more to these issues than to the proposed amendments.

Attachments

March 9, 2020 P. McDuff letter to E. Peter  
April 2, 2020 G. Monroe letter to P. McDuff

March 9, 2020

Ms. Ellen Peters  
California Air Resources Board  
1001 I ST  
Sacramento, CA 95814

**Subject: Proposed Alternate Diesel Fuel (ADF) Regulation Proposed  
Data Accuracy & Staff Conduct**

Dear Ms. Peter:

At a November 2009 Board Meeting, in response to questions related to CARB staff misconduct associated with false credentials ("Tran"), you committed to notifying the Board in the future when cases of data accuracy or staff conduct are called into question. You appropriately noted at that meeting that when "any information that undercuts the accuracy of data or questions the credibility of the staff preparing the report" then Board notification is warranted. We strongly believe that the circumstances associated with the advancement of the Alternate Diesel Fuel (ADF) regulation leading to staff's proposed ADF changes call into question staff's conduct and the accuracy of the data relied upon in making the proposed ADF changes. As a result, the Board should be notified of these circumstances as outlined following in advance of the March 25, 2020 meeting.

**Data Accuracy**

From August to September 2019 CARB conducted an ADF test program at CE-CERT. Thereafter, CARB issued a Product Alert which, among other things, called into question the NOx mitigation performance of all VESTA® products. In a January 10, 2020 California Fueling ("CF") public submission document, we outlined (see Summary section of said document) that "[t]here is a clear disconnect between literature reproducibility (~2%) and CE-CERT's repeatability (as high as 4%). The disconnect is that CE-CERT's repeatability is two times the reproducibility documented in the literature." Put simply, the CE-CERT engine has such high repeatability that any results gleaned from such use are highly suspect. It is worthy of note that, CE-CERT has a documented problem with repeatability beyond this most recent testing program, as can be seen, for example, in CARB's June 2014 report entitled "CARB Comprehensive B5/B10 Biodiesel Blends Heavy-Duty Engine Dynamometer Testing". To that end, when we first learned that CARB was going to be engaging in an ADF testing protocol we suggested it contract with Southwest Research Institute (SwRI). To our knowledge, all ADF certification testing, successes and failures, were run at SwRI, and as evident by, among other things, the data submitted in support of our three approved certifications, SwRI does not have the same repeatability issues as CE-CERT. CARB staff literally responded to our suggestion with the rhetorical question,



"what does it matter where you test?" We hope staff realize now the importance of the test facility selection process.

Our repeatability concerns with the instant CE-CERT data were initially raised with staff in November 2019 after the results were issued to all stakeholders via the above referenced Product Alert; we have yet to be provided with any explanation as to the accuracy of CARB's CE-CERT test results and how staff plan to address what's been said as a result and correct any such statements publicly. We have been provided fuel changeout procedure documents supposedly used by CE-CERT which, if followed, confirms that repeatability is an issue with the CE-CERT engine. Our concerns were echoed in the Engine Manufacturers Association's (EMA) February 24, 2020 public comment document wherein they highlight, among other things, the CE-CERT results' repeatability problems. Last week, CARB formally issued a full CE-CERT report entitled "Confirmatory and Efficacy Testing of Additive-Based Alternative Diesel Fuel Formulations" which provides no written confirmation of procedures we've questioned and fails to address the repeatability concerns highlighted by CF and the EMA.

CARB's use of data without apparent recognition or consideration of repeatability has damaged all ADF stakeholders, especially California Fueling and our VESTA® brand. In relying upon CE-CERT's highly variable test data as their sole basis to evaluate VESTA®'s performance, while not considering the SwRI data from our three separate certification runs is improper and contrary to its positions taken in the *Poet* litigation in demonstrating compliance with the Court's order. As we've previously pointed out, CARB noted to the *Poet* Court that "... the certification is indisputable [VESTA®]" and later in the same filing that "VESTA® provides a separate, independent and unchallenged way to reduce those very emissions."<sup>1</sup> CARB has made broad sweeping conclusions about the ADF and in particular VESTA® which are contrary to its mandate and exceed its authority given the questionable nature of its data. This matter requires an internal investigation and based upon such further clarification needs to be provided to all stakeholders before any testing changes are made to the ADF.

Based on these facts, data accuracy is clearly an issue, meeting one of your stated requirements to prompt Board notification.

### Staff Conduct

In proposing changes to the ADF, staff is attempting to divert attention from their past bad decisions. In awarding Executive Orders G-714-ADF05 and G-714-ADF05a ("Best's EOs"), staff ignored science, altered protocol and have made every effort to cover up what is clearly a self-admitted mistake as indicated by both the proposed amendments and its admissions to an industry trade association. While we realize that Best Corp.'s conduct in connection with the issuance of these EOs is presently the subject of an open investigation, CARB should be

<sup>1</sup> *Poet, LLC v. California Air Resources Board, "Respondents Reply to Petitioners' Opposition to Respondents Motion for Judgement on the Pleadings", Case No. 15 CE CG 03380, pages 9-10, 16.*



concerned with how something as egregious as the approval of either of Best's EOs could occur. There is clearly something wrong internally with staff's ADF evaluation process, from beginning to end, given what's been allowed to occur.

Further in your November 2009 testimony addressing the Tran issue, you stated "science and health-based science is CARB's guiding light". That same mentality was not employed through the process to approve Best's EOs and many commonsense mistakes were made. We are pleased that at least some of the more obvious staff errors are being addressed in the proposed ADF, such as:

1. "Demonstration that use of the proposed ADF additive or formulation to mitigate NOx emissions is based on sound principles of science and engineering."
2. Test fuels and additives ".... shall be shipped directly from their product source facilities to each emission test facility for analysis, blending, and emission testing."

Staff did not follow your stated mantra, and why the foregoing was not demanded from all applicants under the existing ADF regulations is beyond troubling. If staff are intimating, by including these provisions in the proposed ADF, that the original ADF did not allow them to use items 1-2 in their decision-making process, then this only supports our call for an internal investigation as to the processes that staff followed. Further, as it relates to the interpretation of certain test results, staff have demonstrated a willingness to not only skew data in a light most favorable to excusing their bad decisions, but simply ignore data that highlights their errors.

For the last 20 months, NOx emissions from certain biodiesel blends have inappropriately added approximately 500-600 tons of NOx into the atmosphere and another 300 tons are forecasted to be emitted for the remainder of 2020 as a result of CARB's bad decisions and ongoing decision to honor the EO's. On an annual basis, this environmental damage rivals the VW "dieseldgate" episode (10,000 additional tons of NOx responsible for as many as 19 deaths, 610 asthma attacks and 1,200 lost workdays). Worse yet, by using better judgement staff could have prevented or at some point even stopped what occurred yet chose not to, exhibiting careless judgement and an unwillingness to admit fault. This is the type of "bad faith" that was admonished by the Court in the Poet litigation.

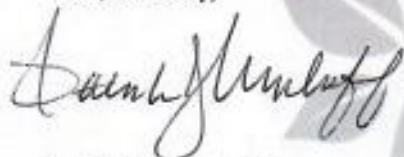
Further in its Product Alert issued as a result of the CE-CERT testing, CARB indicated their "... action to address these concerns will not affect the validity of Low Carbon Fuel Standard (LCFS) credits associated with biodiesel supplied to the California market that is compliant with the ADF and LCFS regulations." The question must be asked, **how can a "biodiesel supplied to the California market that is compliant with the ADF", containing a NOx Mitigant that CARB (based on its internal documents and representations to third parties) never believed worked, and now has testing confirming that it does not work, be compliant?** CARB are not taking ownership of their failure to rely on sound principals of science and engineering in

association with awarding Best's EOs. While stakeholders look to CARB for the proper adoption and approval of NOx Mitigants, CARB must address the market and environmental impact of its failure to properly police the application process. To that end, CARB staff will be making material misrepresentations to the California legislature if it indicates that it has met or exceeded its 2019 LCFS CI reduction goals, despite knowing that any credits generated by use of EO's was fraudulent. Alternatively, CARB should consider funding the bank for all such fraudulently generated credits – estimated to be approximately 500,000 since June 2018 – if they choose to allow the credits to stand.

Based on the aforementioned facts, data accuracy and staff conduct are clearly an issue with the ADF regulation, meeting both of your standards to prompt Board notification.

In closing, the Board should be made aware of the above data accuracy and staff conduct issues prior to the Board meeting later this month. We would ask that this document be placed in the public record as we plan on referencing such during our open testimony. Lastly, we certainly hope there will be ample time made available to stakeholders wishing to discuss the proposed ADF changes. Thank you in advance for your consideration.

Respectfully,



Patrick J. McDuff  
CEO  
California Fueling, LLC

cc: Richard Corey  
Gwynne Hunter – California Department of Justice  
Andrew Jablon - Resch Polster & Berger LLP



April 2, 2020

***Sent via email***

Patrick J. McDuff  
California Fueling, LLC  
[Pat@californiafueling.com](mailto:Pat@californiafueling.com)

RE: Response to Recent California Fueling Communications to CARB

Mr. McDuff,

Executive Officer Richard W. Corey and Chief Counsel Ellen M. Peter have asked me to respond to your recent communications on their behalf.

Thank you for your March 19, 2020 email to Richard W. Corey sharing your views on the SwRI seals and related information. CARB is considering the information you provided and following up. You requested a follow up call. To the extent that the purpose of such a call would be to discuss an ongoing CARB enforcement investigation, such a call would not be appropriate. If you had another purpose in mind, please let us know.

As to your letter to Ellen M. Peter dated March 9, 2020, the letter is certainly part of the public record in relation to the pending ADF regulation (Regulation on the Commercialization of Alternative Diesel Fuels) amendments rulemaking. But because the letter was not received timely during the public comment period that ran from January 10, 2020 through February 24, 2020, CARB will not post the letter to the docket of timely comments. You are welcome to resubmit the letter as a timely comment at the Board hearing at which the ADF amendments will be considered.

As to the substance of the letter, CARB strongly disagrees with you and will respond as appropriate within the context of the rulemaking. The rulemaking is supported by the record.

UC Riverside's CE-CERT staff and test facility are known for their competence, performance, and integrity. CARB staff found no evidence or indication of poor performance of the CE-CERT staff or test facility in conducting the confirmation certification testing. CARB staff has analyzed emissions test repeatability from SwRI and CE-CERT testing, and found that in general, repeatability was similar between the two labs.

CARB continues to develop and implement programs focused on reducing emissions of pollutants including NOx emissions. The ADF regulation is an important part of that work. In



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2018, [CARB initiated](#) a NOx mitigation initiative specifically to drive statewide NOx reductions beyond any potential conservatively estimated NOx emissions increases statewide as a result of increased biodiesel use in California. Because NOx emissions reductions are critical to California achieving its air pollution reduction implementation goals, CARB will continue to explore all possible actions to drive such reductions. If ADF additives were certified in violation of the ADF regulation, CARB retains authority to seek mitigation.

Contrary to your assertions, which have previously been addressed, CARB staff, including ADF staff, continue to act reasonably and thoughtfully based on the information and evidence available to them. CARB is dedicated to achieving its public health mission, and doing so openly and fairly, based on science and evidence. CARB management knows staff working on the ADF regulation to be exemplary public servants and is disappointed in unfounded assertions that suggest otherwise.

As you know, CARB staff and management are concerned by the recent CE-CERT emissions testing results that suggested previously certified additives, including your company's additives, do not reduce NOx emissions to the extent stated in certification documentation materials. As you also know, the proposed ADF amendments are designed to prevent future certification of potentially ineffective ADF NOx mitigation additives. The [initial statement of reasons](#) supporting the proposed amendments to the ADF regulation includes analysis of NOx emissions impacts associated with the use of biodiesel and renewable diesel use in California, including the impact of potentially ineffective biodiesel additives, from 2018 – 2020. The results of this analysis are summarized in Section VI (Environmental Analysis) of that document.

To the extent that CARB discovers evidence that any existing certification was approved inappropriately, CARB can and will take appropriate enforcement action.

Sincerely,

/s/ Gabriel Monroe

Gabriel Monroe, Attorney  
California Air Resources Board  
[Gabriel.Monroe@arb.ca.gov](mailto:Gabriel.Monroe@arb.ca.gov)

cc: (via email only)

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