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America's Ethanol Producers

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January 14, 2010

Clerk of the Board
California Air Resources Board
1001 I Street, 23rd Floor
Sacramento, California 95812

Re: Third Notice of Public Availability of Modified Text and Availability of Additional Documents and Information -- Low-Carbon Fuel Standard (December 15, 2009)

Dear Madam:

I write on behalf of Growth Energy, an association of the nation's leading ethanol manufacturers and other companies who serve the nation's need for alternative fuels, in response to the Executive Officer's third post-hearing notice of his intent to modify the low-carbon fuel standard ("LCFS") regulation adopted by the Board in April 2009. Growth Energy testified at the Board's public hearing last April and has commented on each prior post-hearing notice released by the Executive Officer.

The Executive Officer's third notice of his intent to modify the LCFS regulation indicates that he plans to add a so-called "severability clause" to the regulation. The entire discussion of the basis and purpose for this addition to the regulatory text is as follows:

> A new subsection (f) has been added to incorporate a severability clause. From the beginning of the LCFS development, it was the ARB's intent to make each section and provision of the LCFS regulation severable to the extent allowed by law. However, the severability clause was inadvertently omitted from earlier versions of the regulation. The addition of this clause effectuates this intent, and is necessary to help assure that invalidation of one provision of the LCFS regulation does not have the unintended effect of invalidating the entire regulation.

Third Notice of Public Availability of Modified Text and Availability of Additional Documents and Information at 2-3. The short statement of the basis and purpose for the proposed modification warrants and requires only a brief response.

I.

First, with respect to the merits of the proposed amendments, the statement of the purpose of the amendment (in the last sentence quoted above from the Executive Officer's notice) is entirely circular. It is the purpose of any severability clause as broad as that contemplated by the Executive Officer to avoid invalidation of an entire regulation. The Executive Officer assumes, but offers no evidence that, ***the Board*** intended any and all parts of the LCFS regulation that might be not be invalidated if other parts of the regulation were invalidated. The

Executive Officer's assertion that such was the intent of the Board -- *i.e.*, the basis for the proposed addition to the LCFS regulation -- has no basis. The Executive Officer cites no statement by any member of the Board indicating that one-ended and unlimited severance was the intent of a single member of the Board, much less the intent of the entire Board or a majority of a quorum of the Board following full discussion. To the contrary, there was no discussion of severability at the April hearing. Board Resolution 09-31 makes no mention of the issue of severability, nor does Attachment B to that Resolution (a document that presumably the Board was allowed to review before voting to approve it) do so.

Likewise, the circumstances for the "inadvertent[]" omission of a severability term are not explained, and this is not the type of inadvertent clerical error that might conceivably be corrected on a post-hoc basis. Any change in the LCFS regulation is likely to impact its costs, environmental and economic impacts, and the rights and interests of regulated parties and residents of California. For all that appears, the addition of a severability term is simply a defensive measure that the CARB Executive Officer has chosen, perhaps on the advice of counsel, for strategic purposes in defending judicial challenges with respect to the LCFS regulation. The Executive Officer and counsel for ARB can make any argument they choose in litigation concerning their own understanding of the intent of the Board. But neither the Executive Officer nor counsel for the Board can properly use the rulemaking process prescribed by the California Administrative Procedure Act (the "APA") as a means of buttressing any argument they may decide to make about what the Board intended.

If the Executive Officer proceeds with adoption of this amendment to the LCFS regulation, the full basis for doing so must be made to any reviewing court. If the Executive Officer is intent on making this further change in the regulation, Growth Energy urges him to specify each and every statement by a member of the Board, and each portion of the record and evidence provided to the Board, that supports his inference or assumption that the Board intended that the LCFS regulation be subject to reformation by judicial decree -- which is essentially what the severability clause would accomplish, if given effect by a court. That augmented statement of the basis for the proposed amendment should then be made available for public comment. If the Executive Officer proceeds quickly, this can be accomplished and the regulatory package can be completed before the expiration of the one-year period to complete adoption of a regulation under the APA. Unless and until he does so, the Executive Officer cannot lawfully add the proposed severability term to the LCFS regulation, because he has not stated an adequate basis or purpose for the amendment.

II.

Turning to procedures and the requirements of the APA, there are at least threes reasons why the Executive Officer cannot now add the severability clause included with his third post-hearing notice. First, the Board has not delegated to the Executive Officer the power to make such a change in regulatory text, particularly in light of the potentially significant changes, costs and impacts of the LCFS regulation that would result from implementation of some parts of the LCFS regulation without others. Such an amendment does not come within any of the three specific delegations on pages 15 and 16 of Board Resolution 09-31, and it is also not within the scope of the specific types of changes that the Board instructed the Executive Officer to make in the regulation, as indicated on page 14 of the Resolution. The Executive Officer cannot exercise regulatory power that the Board has not delegated to him.

Second, the addition of the severability clause does not come within the scope of the type of post-hearing changes in a regulation sometimes permitted by section 11346.8 of the Government Code. It is not the routine practice of ARB to add severability terms to proposed regulations at the last minute. The "reasonable member of the directly affected public" posited by 1 C.C.R. § 42 would presumably have been as inadvertent to this omission as was the Executive Officer and the CARB staff. While the Executive Officer may believe and claim that he can trace each of his other modifications in the regulatory text that are not merely clerical or insubstantial in nature to

something in the record before the Board heard this regulatory item last April, he has not and cannot identify anything that should supposedly have alerted the public to this important change. Had Growth Energy been aware of this significant feature in the LCFS regulation, it would have offered testimony explaining to the Board the need for appropriate studies of contingent impacts on the costs and benefits of the regulation if judicial reformation were to occur. Estimates of costs and environmental impacts are required by the APA as well as by the Global Warming Solutions Act of 2006. (The relevant statutory provisions are cited in earlier comments by Growth Energy.) As Growth Energy would have testified, the potential for significant changes in costs and benefits if severance were allowed in a regulation as complex as the LCFS regulation would be a decisive reason not to add such a provision.

Third, it is important to recall that the LCFS regulation is subject to CEQA review and analysis, pursuant to the Board's certified environmental review program established in 1978. The invalidation of any one of several parts of the LCFS regulation will affect its environmental impacts, as estimated by the CARB staff and as reviewed by the Executive Officer. Putting to one side the issue whether the Executive Officer can act as the CEQA "decisionmaker" -- an issue on which Growth Energy and the Executive Officer do not agree -- there can be no question that a judicial order that prevents implementation of some parts of the LCFS regulation could affect the environmental impacts of the regulation. But the purpose of CEQA is to ensure that the decisionmaker (however defined) considers and addresses environmental impacts before a regulation might have significant adverse impacts. The inclusion of a severability term as broad as that proposed by the Executive Officer is inconsistent with the requirements of CEQA.

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In sum, Growth Energy urges the Executive Officer not to adopt the proposed severability clause. Growth Energy also renews its earlier requests that the Executive Officer refrain from implementation of the LCFS requirements until the full Board can consider all the evidence that Growth Energy and other parties have sought to place before the Board.

Sincerely,

David Bearden

David Bearden
General Counsel

cc: Ellen Peter, Esquire