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## **Court Allows Low Carbon Fuel Standards to Remain Effective While Environmental Review Is Corrected**

The California Global Warming Solutions Act of 2006 (AB32) established the first comprehensive greenhouse gas regulatory program in the United States. AB32's goal was to progressively reduce greenhouse gas emissions to 1990 levels by 2020. One of the actions taken by the Air Resources Board (ARB) to achieve this goal was promulgating the low carbon fuel standards (LCFS) regulations, designed to reduce the carbon content of transportation fuels. However, when ARB adopted the original LCFS regulations in 2009, it violated the California Environmental Quality Act (CEQA).

In 2013, the California Court of Appeal identified ARB's violations of CEQA and issued an order compelling ARB to take corrective action. (*POET, LLC v. ARB*, 218 Cal.App.4th 681 (2013)) ("*Poet I*"). The environmental disclosure document generated by ARB in connection with proposing and adopting the original LCFS regulations violated CEQA by impermissibly deferring (1) the analysis of potential increases in the emission of oxides of nitrogen (NOx) resulting from increased biodiesel use and (2) the analysis and formulation of mitigation measures for any significant increases in emissions.

Notwithstanding the direction to ARB to take corrective action, the court concluded that, on balance, leaving the LCFS regulations in place would provide more protection for the environment than suspending their operation pending ARB's compliance with CEQA.

In 2015, ARB adopted replacement LCFS regulations based on a revised environmental impact analysis. Thereafter, POET, LLC again challenged ARB's compliance with CEQA and the previously issued writ of mandate. In *POET, LLC v. Air Resources Board* (Case No. F073340; April 10, 2017) the Court of Appeal for the Fifth Appellate District ruled that ARB had again failed to comply with CEQA when it promulgated the 2015 LCFS regulations.

Early in its lengthy opinion the court announced certain foundations on which the opinion rested. First, the appeal concerned only the deficiencies in ARB's analysis of NOx emissions and mitigation measures for any significant adverse environmental impact resulting from potentially increased NOx emissions. Second, the project at issue included the whole of ARB's activity in promulgating and enforcing (1) the regulations originally adopted in 2009 and (2) the replacement regulations adopted in 2015 in response to the writ of mandate issued pursuant to *Poet I*. Third, the abuse of discretion standard of review applied to ARB's actions because ARB's attempt to comply with the writ of mandate was, for all practical purposes, an attempt to comply with CEQA.

On appeal, plaintiff contended that ARB's approach violated the writ and CEQA by breaking the project into pieces and pretending the effect of the first piece (i.e., the original LCFS regulations) was not an environmental impact attributable to the project as a whole. The court agreed with this position by noting that in *Poet I* there was no dispute that the adoption of the original LCFS regulations was a "project" for purposes of CEQA, and, more precisely, the "activity" constituting the project was ARB's action in enacting the regulation plus its actions in implementing the regulations (which included enforcement activity). Therefore, the court concluded that for purposes of CEQA the activities associated with the original LCFS regulations and the 2015 LCFS regulations constituted a single project. For that reason, from an informational prospective, the ARB's remedial actions following *Poet I* should have placed the public and decision makers in the same position they would have occupied if the first set of environmental disclosure documents had satisfied CEQA.

ARB's incorrect definition of the "project" similarly infected its determination of impacts. ARB used a 2014 baseline and claimed such a baseline described existing conditions because it misconstrued and misapplied the term "project". The adoption of the original LCFS regulations predated 2014 by several years and therefore the 2014 baseline did not describe the conditions existing when the environmental analysis of the project commenced. A proper baseline would have identified the conditions that existed before any impacts of the original LCFS regulations began to accrue and, thus, would have provided a solid foundation for identifying those impacts. ARB could have justified its use of a 2014 baseline by demonstrating that an existing conditions analysis would have been uninformative or misleading to decision makers or the public. Restated from the opposite perspective, ARB could have shown the 2014 baseline promoted public participation and more informed decision making by providing a more accurate picture of the project's likely impacts. It did not. The court concluded, "ARB has not demonstrated its CEQA analysis employed a realistic baseline that gave the public and decision makers the most accurate picture practically possible of the project's likely impacts".

Following its determination that ARB had failed to comply with CEQA regarding the potential impacts from increased NOx emissions from biodiesel, the court spent considerable effort crafting the appropriate remedy. "[W]e concluded that the portion of the LCFS regulations that address fuels other than diesel fuel and its substitutes involve project activities that do not need to be suspended for ARB to achieve compliance with CEQA on remand." After much discussion of the diesel components of the LCFS the court held:

The impact of the diesel provisions in the LCFS regulations is difficult to quantify, but suspending all of those provisions *might* reduce the NOx emissions from biodiesel while increasing the emissions of greenhouse gases. In other words, leaving the category of diesel fuel and its substitutes unregulated by the LCFS regulations would mean reporting entities would not need to lower the average carbon content of those fuels. As a result, we conclude that suspending the diesel provisions of LCFS would result in adverse environmental impacts due to the increased emissions of greenhouse gases. Weighing this

actual increase against a potential reduction in NOx emissions favors not suspending the diesel provisions of the LCFS regulations. (Emphasis original)

Finally, in a conclusion strikingly similar to that reached in *Poet I*, the court stated:

“Based on our consideration of all the factors relevant to suspending project activity—including the limited scope of ARB’s lack of good faith in taking corrective action—we conclude that the provisions in the LCFS regulations addressing diesel fuel and its substitutes, though severable, should not be suspended while ARB makes another attempt at analyzing NOx emissions from biodiesel in a manner that complies with CEQA and the writ.”