

**COURT OF APPEAL**  
FIFTH APPELLATE DISTRICT  
STATE OF CALIFORNIA

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March 20, 2017

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RE: Poet, LLC et al. v. California Air Resources Board et al; F073340

Dear Counsel,

The court has directed me to send counsel the following tentative ruling to guide counsel in their preparation for oral argument on March 23, 2017.

***Tentative Rulings***

Writ Compliance: ARB's attempt at corrective action did not comply with paragraph 3 of the February 2014 writ of mandate because ARB wrongly construed the term "project" and adopted an inappropriate baseline for NOx emissions. The court intended the term "project" to mean the whole of the action, including the enactment and implementation of the original LCFS regulations, the 2015 LCFS regulations and the ADF regulations. The purpose of the writ was to provide the public and decision makers with the information they would have received if the original environmental disclosure documents had complied with CEQA. Thus, ARB's revised environmental disclosure documents would have complied with paragraph 3 and remedied the CEQA violations relating to NOx emissions if they had (1) provided information for the period from 2010 through 2015 that should have been in the original documents and (2) provided information for the years after 2015 using the existing conditions baseline that would have been used in the original documents. ARB's revised documents did not provide this information.

Good Faith: Most of ARB’s corrective action in response to the February 2014 writ satisfied the writ and a subjective standard of good faith. However, ARB’s noncompliant corrective action addressing NOx emissions from biodiesel did not satisfy a subjective standard of good faith. ARB’s misinterpretation of the term “project” was not objectively reasonable for someone familiar with (1) how that term is used in CEQA, the Guidelines and CEQA case law, and (2) the CEQA violations to be remedied in this case. ARB’s actions do not appear to be a sincere attempt to provide the public and decision makers with the information required by CEQA and omitted from the earlier documents.

Causation: The parties’ analysis of the appropriate appellate relief under Code of Civil Procedure section 906 and CEQA section 21168.9 is affected by their different approaches to the causal impacts of the original and current LCFS regulations. Whether the regulations caused, are causing, or will cause an increase in biodiesel usage are factual questions that have not been resolved by ARB in its role as the finder of facts. Simply put, the statements in the environmental disclosure documents are too indecisive to be considered findings that actually resolve these factual questions. (AA 297-300 [Impact 3.c]; AA 318 [Table B-1]; AA 844-845.) It follows that the amount of increased biodiesel use, if any, attributable to the project is an unresolved factual question. In contrast, the factual question of whether increased biodiesel usage causes an increase in NOx emissions has been resolved by ARB in the affirmative.

In sum, the parties have drawn conflicting conclusions about causation—conclusions the court tentatively determines are not appropriate because questions about causation remain open and, therefore, will need to be resolved in the first instance in the further proceedings conducted on remand.

### ***Arguments about Relief***

The parties’ arguments about appropriate appellate relief (1) should be premised on the foregoing tentative conclusions and (2) should assume the disposition will include (a) a reversal of the order discharging the writ, (b) modifications of the writ to reflect the current situation and appropriate relief, and (c) a generic directive for ARB to comply with the modified writ and CEQA. Therefore, questions relating to what modifications to the writ are appropriate will be the primary concern of oral argument. (See *Sanders v. City of Los Angeles* (1970) 3 Cal.3d 252, 262 [“further appropriate order”].)

Severance & Suspension: The potential modifications include severing and either suspending or freezing particular provisions of the 2015 LCFS regulations. Generally stated, if regulatory provisions are both separable and untainted by the uncorrected CEQA violation, the court will allow those provisions to remain in effect. Thus, the arguments about modifications should address whether a provision is separable and whether the CEQA violation relating to the evaluation of NOx emissions from biodiesel taints that provision.

The supplemental briefing request did not specifically ask about severing the ADF regulations from the LCFS regulations and allowing the ADF regulations to remain in effect. Among other things, the court is interested in (1) evidence that tends to prove whether the ADF

regulations promote or restrict biodiesel use and (2) specific provisions in the regulations showing the ADF regulations are (or are not) grammatically-mechanically or functionally separable from the LCFS regulations. (*California Redevelopment Assn. v. Matosantos* (2011) 53 Cal.4th 231, 271; see e.g., Cal. Code of Regs., tit. 13, § 2293.8, subd. (b)(3) [Stage 3B, use of the “Low Carbon Fuel Standards Reporting Tool”] & subd. (c)(3)(A)-(E) [record keeping of volume and “CI pathway”].)

As both sides’ supplemental briefs assert the biodiesel provisions can be severed from the remainder of the LCFS regulations, counsel should be prepared to address, among other things, the functional separability of those provisions and the impacts of the remainder of the regulatory scheme on reporting entities that could no longer rely on biodiesel to reduce the average carbon intensity of conventional diesel.

Status Quo: The modifications to the writ will include the status quo provision in paragraph 6 of the writ.<sup>1</sup> Thus, the questions about the status quo at the top of page 2 of our January 25, 2017, oral argument notice letter remain of interest. The parties’ arguments about which standards, if any, should be frozen in place until the writ is discharged should take into account (1) the continuing failure to comply with CEQA is limited to the evaluation of NOx emissions from biodiesel and (2) the remainder of the writ has been satisfied.

Very truly yours,

CHARLENE YNISON  
Court Administrator/Clerk

By: Judy Evans  
Deputy Clerk 

DEPUTY CLERK
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<sup>1</sup> Paragraph 6 of the writ attempted to preserve the status quo by stating ARB shall continue “to adhere to the LCFS regulations standards in effect for 2013 until the corrective action is completed.” (*Poet LLC v. State Air Resources Bd.* (2013) 218 Cal.App.4th at p. 767.) The parties’ appellate briefing disagrees on the interpretation of paragraph 6 and its continuing role, if any, after remand. The court concludes the phrase “until the corrective action is completed” was an ambiguous expression of the court’s intent to have 2013 standards remain in effect until ARB’s corrective action was approved by the trial court’s discharge of the writ. This ambiguity will be dealt with by a modification to the writ stating that any status quo provisions remain in effect until the writ is discharged.