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FRESNO COUNTY SUPERIOR COURT
By V. Cardozo
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SUPERIOR COURT OF CALIFORNIA, COUNTY OF FRESNO

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|--------------------------------|---|---------------------|
| POET, LLC and JAMES M. LYONS, |) | No. 15 CECG 03380 |
| |) | |
| Plaintiffs and |) | |
| Petitioners, |) | |
| |) | |
| vs. |) | |
| |) | ORDER AFTER HEARING |
| CALIFORNIA AIR RESOURCES BOARD |) | |
| (CARB); RICHARD COREY, in his |) | |
| official capacity as Executive |) | |
| Officer of the CARB; LORI |) | |
| ANDREONI, in her official |) | |
| capacity as a Manager of the |) | |
| CARB; and ELLEN PETER in her |) | |
| official capacity as Chief |) | |
| Counsel of the CARB, |) | |
| |) | |
| Defendants and |) | |
| Respondents. |) | |
| |) | |
| |) | |

INTRODUCTION

This matter came regularly before this court on December 21, 2017 for hearing on defendants/respondents California Air Resources Board (CARB) and Richard Corey's motion for judgment on the pleadings in Department 61 of the above court, the Honorable James M. Petrucelli presiding. Timothy Jones and John P. Kinsey appeared for and argued on behalf of petitioners/plaintiffs. Mark W. Poole, Gavin G. McCabe and Elaine Meckenstock, Deputy Attorneys General, appeared for and argued on behalf of respondents/defendants. The

1 matter was also on calendar for a hearing on the merits of the
2 petition for writ of mandamus. After hearing oral argument, the
3 court took the motion for judgment on the pleadings under submission
4 and continued the hearing on the merits to January 29, 2018.

5 Having considered the moving and opposing briefs filed by the
6 parties and the arguments raised at the hearing, the court now
7 removes the case from submission and issues its order granting
8 respondent's motion for judgment on the pleadings as to the entire
9 petition for writ of mandate. The court finds that the petition is
10 moot in light of the Fifth District Court of Appeal's recent
11 decision in the related action of *POET, LLC v. State Air Resources*
12 *Board* (2017) 12 Cal.App.5th 52 as well as the earlier Court of Appeal
13 decision in *POET, LLC* (2013) 218 Cal.App.4th 681 (hereinafter "*POET*
14 *I*").

15 **PROCEDURAL BACKGROUND**

16 **The *POET I* Litigation:** In its original decision in *POET I*, the
17 Court of Appeal reversed the trial court's order denying a petition
18 for writ of mandate filed by petitioner *POET, LLC* that sought to
19 challenge the Low Carbon Fuel Standards regulations adopted by CARB
20 in 2009. Petitioners contended that, instead of reducing harmful
21 emissions, the LCFS regulations would actually result in an increase
22 in harmful nitrogen oxide (NOx) emissions from biodiesel fuel, and
23 that CARB had not adequately considered and addressed the negative
24 effects of these emissions. The Court of Appeal found that
25 respondent CARB had violated the California Environmental Quality
26 Act (Public Resources Code, § 21000 et seq., aka "CEQA") and
27 directed the Superior Court to issue a writ of mandate compelling
28 CARB to take corrective action. The Superior Court issued the writ

1 of mandate, and in 2015 CARB then adopted a new LCFS regulation, as
2 well as an Alternative Diesel Fuel (ADF) regulation, in an effort
3 to comply with the writ. The Superior Court subsequently discharged
4 the writ after finding that the CARB had complied with it.

5 However, petitioners then filed an appeal of the Superior
6 Court's decision to discharge the writ, arguing that the CARB had
7 not complied with the instructions of the Court of Appeal pursuant
8 to the writ and had not acted in good faith in adopting the new
9 2015 LCFS regulation.

10 **The Present Action (POET II):** In the meantime, petitioners
11 also filed a new petition for writ of mandate, the present action,
12 which also sought to challenge the 2015 LCFS regulation, as well as
13 the ADF regulation and certain violations of the Administrative
14 Procedures Act (APA) that allegedly occurred when the new
15 regulations were adopted. This court then stayed the hearing on
16 the merits of the present action until the Court of Appeal issued
17 its decision on the second appeal in *POET I*.

18 **The Court of Appeal's Second Decision in POET I:** The Court of
19 Appeal issued its second decision in *POET I* on May 30, 2017, again
20 finding that CARB had not complied with CEQA in adopting the second
21 set of regulations, and that the Superior Court should not have
22 discharged the writ. In particular, the court found that CARB
23 improperly used the conditions as they existed in 2015 as the
24 baseline for the "project", including NOx emissions from biodiesel
25 fuel that had occurred up to 2014. The Court of Appeal found that
26 the proper baseline for the project should have been the conditions
27 as they existed in 2009, when the "project" commenced, i.e. when
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1 the LCFS regulations were first approved. (*POET I, supra*, 12
2 Cal.App.5th at p. 57.)

3 The court then reversed the Superior Court's order discharging
4 the writ, and remanded for further proceedings under a modified
5 writ, which directed CARB to address NOx emissions from biodiesel
6 in a manner that complies with CEQA, including using the proper
7 baseline. (*Id.* at p. 58.) In addition, the court ordered CARB to
8 set aside its approval of the 2015 environmental analysis (EA)
9 related to the issue of NOx emissions from biodiesel that it had
10 approved at the time it adopted the 2015 regulations. (*Id.* at p.
11 104.) However, the court allowed the remaining portions of the LCFS
12 and ADF regulations to remain in effect. (*Id.* at p. 58.)

13 **CARB Withdraws Its Approval of the Environmental Analysis:** In
14 order to comply with the Court of Appeal's decision, on November
15 16, 2017, the CARB set aside its approval of the parts of the 2015
16 EA related to NOx emissions from biodiesel. (Respondent's Request
17 for Judicial Notice, Exhibit B, p. 3. The court takes judicial
18 notice of the CARB's decision as an "official act" under Evidence
19 Code section 452, subdivision (c).)¹

20 **THE MOTION FOR JUDGMENT ON THE PLEADINGS**

21 **The Parties' Contentions:** On November 29, 2017, respondents
22 filed the present motion for judgment on the pleadings as to the
23 entire petition in the present action, contending that the Court of
24 Appeal's decision in *POET I* renders the petitioners' claims in the
25 current case moot. Respondents also allege that CARB has now set
26 aside its approval of the 2015 EA that it approved when it adopted
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28 ¹ The court overrules all of the petitioners' objections to the respondents'
requests for judicial notice.

1 the 2015 LCFS regulation, and thus respondents' claims with regard
2 to the EA are moot for this reason as well. Petitioners oppose the
3 motion, arguing that the *POET I* case involved a different regulation
4 and that the court specifically found that its decision was not
5 intended to prevent CARB from taking actions as a result of other
6 litigation. Petitioners also object to the motion and move to
7 strike it, arguing that the motion is untimely as it was not filed
8 at least 30 days before the initial trial date, and that it relies
9 on matters extrinsic to the pleadings. Therefore, petitioners claim
10 that the court should not consider the merits of the motion in the
11 first instance.

12 **Timeliness and Motion to Strike:** With regard to petitioners'
13 objection that the motion for judgment on the pleadings is untimely,
14 Code of Civil Procedure section 438, subdivision (e) states, "No
15 motion may be made pursuant to this section ... within 30 days of
16 the date the action is initially set for trial, ... unless the court
17 otherwise permits." (Code Civ. Proc., § 438, subd. (e).)

18 Here, the motion was not filed at least 30 days before "trial".
19 However, in a mandate proceeding there is technically no "trial",
20 but rather a hearing on the merits. Still, the hearing on the
21 merits is the functional equivalent of a trial for purposes of a
22 petition for writ of mandate. The present case was originally set
23 for hearing on the merits on September 9, 2016, and the motion for
24 judgment on the pleadings was not filed until November 29, 2017,
25 well after the original "trial date."

26 However, as respondents point out, it would not have been
27 possible for respondents to bring their motion at least 30 days
28 prior to the original trial date, since the present motion relies

1 on events and circumstances that occurred only recently, including
2 the Court of Appeal's May 30, 2017 decision in *POET I*, and the
3 CARB's decision to rescind its approval of the 2015 EA on November
4 16, 2017. Also, respondent's counsel alleges that he attempted to
5 file the motion more than 30 days before the rescheduled hearing
6 date on December 21, 2017, but due to a calendaring error by the
7 court clerk, the motion was not accepted for filing and set for
8 hearing until November 29, 2017.

9 Therefore, the court finds that, although the motion was not
10 brought at least 30 days before the initial trial date,
11 circumstances did not permit the motion to be brought earlier, and
12 any delay in filing the motion before the present trial date was
13 not attributable to respondents. As a result, the court will
14 consider the merits of the motion despite its untimeliness.
15 Petitioners' motion to strike the motion for judgment on the
16 pleadings is denied.

17 **Petitioners' Claims Are Moot:** This court agrees with
18 respondents that the petitioners' claims in the present case are
19 now moot in light of the Court of Appeal's second decision in *POET*
20 *I*, as well as the CARB's recent decision to set aside its approval
21 of the 2015 EA. One of the primary forms of relief sought in the
22 present petition is an order staying or setting aside the 2015 LCFS
23 regulations, which are essentially the same regulations that were
24 also at issue in *POET I*, and which were the subject matter of the
25 Court of Appeal's most recent decision in that case. Just as in
26 *POET I*, petitioners again seek an order declaring that the LCFS
27 regulations were adopted based on a flawed EA approved by CARB that
28 failed to take into account the increase in NOx emissions from the

1 increased use of biodiesel fuel that would result from the
2 regulations.

3 However, the Court of Appeal's second decision in *POET I* has
4 now declared that the 2015 LCFS regulations were adopted based on
5 an improper EA, and the court has ordered the CARB to rescind its
6 approval of the EA and directed it to address NOx emissions from
7 biodiesel in a manner that complies with CEQA, including using the
8 proper baseline for NOx emissions. (*POET, supra*, 12 Cal.App.5th at
9 p. 58.) The Court of Appeal allowed the other provisions of the
10 regulation to remain in effect, albeit frozen at 2017 levels. (*Id.*
11 at p. 102.) Thus, the Court of Appeal's second decision in *POET I*
12 has already granted petitioners the relief they seek in their
13 present action, and it does not appear that granting further relief
14 in this action would be necessary or proper. In effect, the present
15 action has become moot due to the Court of Appeal's decision in the
16 prior, related action.

17 In addition, in response to the Court of Appeal's decision and
18 the writ of mandate issued by the Superior Court in *POET I*, the
19 CARB has now rescinded its certification of the portions of the
20 2015 EA related to biodiesel NOx emissions. Again, this is the
21 same relief sought by petitioners in the present case.
22 Consequently, the CARB's action in rescinding its certification of
23 the 2015 EA also makes the petitioners' claims in the present action
24 moot.

25 ""[A]lthough a case may originally present an existing
26 controversy, if before decision it has, through act of the parties
27 or other cause, occurring after the commencement of the action,
28 lost that essential character, it becomes a moot case or question

1 which will not be considered by the court."'" (Consumer Cause,
2 Inc. v. Johnson & Johnson (2005) 132 Cal.App.4th 1175, 1183,
3 internal citation omitted.)

4 "The pivotal question in determining if a case is moot is
5 therefore whether the court can grant the plaintiff any effectual
6 relief. [Citations.] If events have made such relief impracticable,
7 the controversy has become "overripe" and is therefore moot.' By
8 the same token, an appeal is moot if ""the occurrence of events
9 renders it impossible for the appellate court to grant appellant
10 any effective relief.'"" (Lockaway Storage v. County of Alameda
11 (2013) 216 Cal.App.4th 161, 174-175, internal citations omitted.)

12 "The standard this court applies in determining the mootness
13 of a CEQA appeal is whether any effective relief can be granted the
14 appellant." (County Sanitation District No. 2 of Los Angeles County
15 v. County of Kern (2005) 127 Cal.App.4th 1544, 1626.)

16 Here, this court cannot grant any effective relief to
17 petitioners on most of its claims because the Court of Appeal has
18 already granted the relief that petitioners seek, and the CARB has
19 already taken action on the Court of Appeal's order by rescinding
20 its decision to certify the EA. In light of these recent decisions,
21 there is nothing further that this court can do to provide relief
22 as to most of petitioners' claims. Indeed, to the extent that
23 petitioners seek an order requiring CARB to rescind or suspend the
24 LCFS regulations, that order would be inconsistent with the Court
25 of Appeal's decision to leave the regulations in place, frozen at
26 2017 levels, until the CARB can take further corrective action.
27 (POET, supra, 12 Cal.App.5th at p. 98.)

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1 Furthermore, to grant the relief that petitioners seek now,
2 after CARB has already withdrawn its approval of the EA, would be
3 to improperly grant an advisory opinion regarding a regulation that
4 has not yet been approved or become final. "Until a public agency
5 makes a 'final' decision, the matter is not ripe for judicial
6 review." (*California Water Impact Network v. Newhall County Water*
7 *Dist.* (2008) 161 Cal.App.4th 1464, 1485.) Here, CARB has rescinded
8 its certification of the EA regarding the 2015 LCFS regulation, so
9 the issue of whether the 2015 EA and LCFS regulations fail to
10 adequately consider and mitigate increased NOx emissions has not
11 yet become ripe for adjudication.

12 In addition, some of petitioners' claims have become moot for
13 other reasons as well. Petitioners' claims based on the limited
14 producer/importer exemption in the LCFS regulation are now moot
15 because no one ever applied for that exemption, even though
16 applications for the exemption were due by January 1, 2017. (Cal.
17 Code Regs., tit. 17, § 2293.6, subd. (a)(5)(C); Respondents'
18 Supplemental Request for Judicial Notice, Exhibit D. The court
19 takes judicial notice of this document as an official action of a
20 government agency.) In addition, petitioner's challenge to the use
21 of the additive di-tert-butyl peroxide (DTBP) to mitigate NOx
22 emissions from biodiesel has become moot because CARB has now
23 approved a different additive, VESTA 1000, to mitigate NOx
24 emissions. (Request for Judicial Notice, Exhibit D, p. 7/8, ¶ 28.
25 The court takes judicial notice of this document as an official
26 action of a government agency.)

27 Petitioners argue that the Court of Appeal's second decision
28 in *POET I* only applied to the original 2009 LCFS regulation, not

1 the 2015 LCFS and ADF regulations at issue here, and that the court
2 expressly left open the possibility that the CARB might have to
3 take further action in response to other litigation, and thus the
4 present action is not moot. However, the Court of Appeal's second
5 decision in *POET I* not only dealt with the 2009 LCFS regulation,
6 but also the CARB's attempted compliance with the court's prior
7 writ of mandate by issuing the 2015 LCFS regulation. (*POET, supra*,
8 12 Cal.App.5th at p. 84.) The court specifically found that the new
9 2015 LCFS regulation was adopted after consideration of an improper
10 baseline, namely the conditions as they existed in 2015, not as
11 they existed in 2009 when the LCFS regulation was originally
12 adopted. (*Ibid.*) Thus, the court's decision applies to both the
13 2009 LCFS regulation and the more recent 2015 LCFS regulation that
14 was adopted in response to the first *POET I* decision.

15 Petitioners also point to the Court of Appeal's statement that,
16 "Nothing in this disposition or the writ shall prevent the Air
17 Resources Board from taking action addressing issues currently
18 raised in other litigation when it takes the corrective action
19 required by this writ." (*Id.* at p. 106.) The Court of Appeal also
20 explained that, "[W]e are not asserting any authority (i.e.,
21 jurisdiction) to remedy CEQA violations alleged in another lawsuit,
22 only the authority to remedy a CEQA violation that has been a part
23 of this lawsuit since the complaint was filed in December 2009."
24 (*Id.* at p. 87, fn. 18.) They contend that these statements mean
25 that this court still has the power to grant relief on the present
26 writ petition, regardless of the Court of Appeal's decisions in the
27 *POET I* case.

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1 However, it appears that these statements simply mean that the
2 CARB has discretion to take other action as needed in addition to
3 the actions mandated by the court in *POET I*, not that the court in
4 the present case can order other actions that might be inconsistent
5 with the Court of Appeal's decision in the earlier case. Here, it
6 is unclear what relief this court could grant in the present case
7 that would not conflict with the Court of Appeal's decisions in
8 *POET I*, particularly with regard to the portions of the LCFS
9 regulations dealing with NOx emissions from biodiesel, which are
10 the foundation for the majority of petitioners' claims.

11 Also, to the extent that any of petitioners' claims do not
12 seek relief regarding the 2015 LCFS regulation and underlying EA
13 that failed to take into account NOx emissions, these other claims
14 allege procedural violations that arise out of the certification of
15 the EA and adoption of the LCFS and ADF regulations. While this
16 court might be able to rule on such violations without improperly
17 interfering with the Court of Appeal's decision in *POET I*, such a
18 ruling would likely be of little practical use. CARB has already
19 been ordered to reconsider its EA and adoption of the LCFS
20 regulation in the *POET I* case, and it will thus have to undertake
21 another round of public hearings and comments under CEQA and the
22 APA in any event. Therefore, there would be no purpose in making
23 orders regarding the remaining claims at this time.

24 As a result, the court finds that the petitioners' claims are
25 moot, and thus it hereby grants the respondents' motion for judgment
26 on the pleadings as to all causes of action in the petition, without
27 leave to amend.

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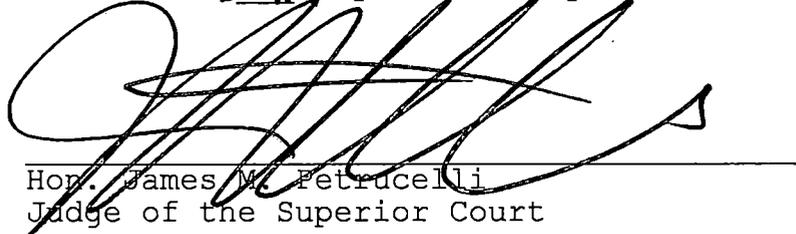
The Hearing on the Merits of the Petition is Off Calendar: In light of this court's order granting the motion for judgment on the pleadings as to the entire petition, the hearing on the merits on the writ is hereby taken off calendar.

CONCLUSION

The motion for judgment on the pleadings is granted, without leave to amend, as to all causes of action in the petition. The hearing on the merits of the petition is off calendar. Respondents are ordered to submit a proposed final judgment of dismissal consistent with this order within 10 days of the date of this order.

It is so ordered.

DATED this 5th day of January, 2018.



Hon. James M. Petrucelli
Judge of the Superior Court