

1 **WANGER JONES HELSLEY PC**

2 265 E. River Park Circle, Suite 310

3 Fresno, California 93720

4 Telephone: (559) 233-4800

5 Facsimile: (559) 233-9330

6 Timothy Jones #119841

7 John P. Kinsey #215916

8 Dylan J. Crosby #299536

9 Attorneys for: Petitioners and Plaintiffs POET, LLC and James M. Lyons

10 **SUPERIOR COURT OF CALIFORNIA, COUNTY OF FRESNO**

11 **CENTRAL DIVISION**

12 POET, LLC; JAMES M. LYONS

Case No.

13 Petitioners and Plaintiffs,

**VERIFIED PETITION FOR WRIT
OF MANDATE; COMPLAINT
FOR DECLARATORY AND
INJUNCTIVE RELIEF**

14 v.

15 CALIFORNIA AIR RESOURCES
16 BOARD; RICHARD COREY, in his
17 official capacity as Executive Officer of
18 the California Air Resources Board; LORI
19 ANDREONI, in her official capacity as a
20 Manager of the California Air Resources
21 Board; and ELLEN PETER, in her official
22 capacity as Chief Counsel of the California
23 Air Resources Board,

24 Respondents and Defendants.

25 Petitioners and Plaintiffs POET, LLC and James M. Lyons (collectively
26 "Petitioners") respectfully submit their Verified Petition for Writ of Mandate and Complaint
27 for Declaratory and Injunctive Review ("Petition") stating claims against Respondents and
28 Defendants the California Air Resources Board ("CARB" or "the Board"), the Executive
Officer of the California Air Resources Board, a Manager of the California Air Resources
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1 3. Petitioners challenged CARB’s 2009 approval of the LCFS regulation, which
2 resulted in a decision by the Court of Appeals in *POET, LLC v. California Air Resources*
3 *Board* (2013) 218 Cal.App.4th 681, invalidating the LCFS regulation. The Court found, *inter*
4 *alia*, that Respondents engaged in impermissible *post hoc* environmental review, and that
5 CARB failed to analyze and mitigate increased emissions of oxides of nitrogen (“NOx”)
6 associated with the increased use of biodiesel contemplated under the LCFS regulation.

7 4. As a result of these violations, the Court of Appeal directed the Superior Court
8 to enter a peremptory writ requiring CARB to set-aside its approval of the LCFS regulations.
9 The Court also required CARB to address whether the LCFS regulation “will have a significant
10 adverse effect on the environmental as a result of increased NOx emissions, make findings . . .
11 regarding the potential adverse environmental effect of increased NOx emissions, and adopt
12 mitigation measures in the event the environmental effects are found to be significant.”

13 5. The Court also allowed CARB to maintain the *status quo* by “continuing to
14 adhere to the LCFS regulations standards in effect for 2013 until the corrective action is
15 completed.”

16 6. Following the decision, Respondents proceeded with two subsequent
17 rulemakings: (i) a subsequent rulemaking to consider readoption of the LCFS regulation (the
18 “Readopted LCFS regulation”) to comply with the writ issued by the court, and, after
19 considerable delays in their originally announced schedule, (ii) a new rulemaking for the ADF
20 regulation, which was purportedly designed to reduce NOx emissions associated with
21 alternative diesel fuels, such as biodiesel.

22 7. NOx emissions were a central issue in *POET v. CARB*, and the Court of Appeal
23 specifically directed Respondents to analyze NOx emissions associated with the LCFS
24 regulation. Nevertheless, CARB’s subsequent rulemakings and environmental review, which
25 are the subject of this petition, ignored or belittled the risk of increased NOx emissions as a
26 result of the newly proposed regulation, and the writ issued by the Court.

27 8. For example, Respondents did not attempt to perform any analysis of the
28 increases in NOx and other criteria pollutant emissions associated with the original LCFS

1 regulation. Rather, Respondents argued that they need not analyze or mitigate criteria pollutant
2 emissions associated with the original LCFS regulation because the “environmental baseline”
3 for the Readopted LCFS regulation is allegedly 2014 (when the environmental document for
4 the Readopted LCFS regulation was first released). In other words, instead of analyzing the
5 LCFS regulation’s impacts as a whole, or the NOx emissions that resulted from increased
6 biodiesel usage under the original LCFS regulation, Respondents instead included the
7 increased NOx emissions caused by the original LCFS regulation in the environmental
8 baseline, and asserted there is no impact because the Readopted LCFS regulation (along with
9 the ADF regulation) will reduce NOx emissions compared to existing conditions.

10 9. Respondents likewise did not adopt adequate mitigation to ensure biodiesel
11 usage would not significantly increase NOx emissions; instead, the Regulations contemplate
12 the use of an additive – Di-tert-butyl peroxide (“DTBP”) – that has not been certified for use
13 by U.S. EPA “at the maximum level needed to achieve mitigation in the ADF proposal.” In
14 other words, the mitigation proposed by CARB is legally infeasible.

15 10. Respondents likewise failed to analyze other aspects of the Regulations that
16 would increase NOx emissions, including the use of biodiesels in New Technology Diesel
17 Engines (“NTDEs”), biodiesel blends of B5 or lower, and an exemption for biodiesel blends of
18 B6 through B20 in areas other than the South Coast or San Joaquin Air Basins.

19 11. Respondents also failed to analyze, quantify, or mitigate environmental impacts
20 associated with the construction of new or modified fuel production facilities to meet demand
21 for fuels created by the Regulations, including processing plants for agriculture-based ethanol,
22 cellulosic ethanol, and biomethane, even though CARB found the impacts associated with
23 these facilities would be “significant and unavoidable.” CARB likewise refused to consider or
24 even analyze alternatives to the Regulations proposed by the public, even though those
25 alternatives would avoid the “significant and unavoidable” impacts identified in Respondents’
26 Environmental Assessment (“EA”).

27 12. Respondents also failed to comply with the APA, by failing to include all
28 required documents in the rulemaking file in a timely manner and Section 57004 of the Health

1 and Safety Code by failing to conduct an adequate peer review of the scientific portions of the
2 Regulations.

3 **PARTIES, JURISDICTION AND VENUE**

4 13. Petitioner POET, LLC (“POET”) produces ethanol from corn starch.¹ The
5 ethanol produced from corn starch by POET is one type of low-carbon fuel covered by the
6 LCFS regulation. Ethanol produced by POET is currently blended into the gasoline distributed
7 by oil companies and other parties for sale in California, including in motor vehicles operated
8 in Fresno County.

9 14. POET presented CARB with comments on the environmental effects of the
10 Regulations. POET is beneficially interested in the subject matter of this proceeding, and will
11 be injured by the implementation of the Regulations without full compliance with CEQA, the
12 Board’s regulations implementing CEQA, and APA, and the Health and Safety Code. POET
13 has standing to assert the claims presented here.

14 15. Petitioner James M. Lyons is a resident of California who presented CARB with
15 comments on the environmental effects of the Regulations. Mr. Lyons is beneficially
16 interested in the subject matter of this proceeding, and will be injured by the implementation of
17 CARB’s low-carbon fuel standard without full compliance with CEQA and the Board’s
18 regulations implementing CEQA. Mr. Lyons has standing to assert the claims presented here.

19 16. Petitioners have performed any and all conditions precedent to the filing of this
20 Petition. Petitioners have exhausted any and all administrative remedies required by law by,
21 *inter alia*, participating in the administrative and environmental review process. This
22 participation is acknowledged in various documents prepared by Respondents in the
23 rulemakings for both Regulations.

24 17. Petitioners complied with the requirements of Public Resources Code § 21167.5
25 by mailing written notice of this action to Respondents. Copies of the letters providing written
26 notice to Respondents, and proof of service of those letters, are attached hereto as Exhibit “A.”
27

28 ¹ The type of corn used to produce ethanol is “No. 2 corn,” which is used for animal
nutrition rather than human consumption.

1 18. Petitioners have complied with Public Resources Code § 21167.6 by
2 concurrently filing a request concerning the preparation of the record of administrative
3 proceedings relating to this action.

4 19. CARB is a state agency subject to the California Government Code, with certain
5 powers and duties under the California Health & Safety Code. CARB is the state agency that
6 approved the LCFS regulation. Respondents have acknowledged that CARB had a mandatory
7 duty to comply with CEQA, the APA, and the Health and Safety Code prior to approving the
8 LCFS regulation, which was a discretionary action for purposes of CEQA.

9 20. The current Executive Officer of CARB is Mr. Richard Corey, who is made a
10 party to this action in his official capacity only. Mr. Corey acts as the director and manager of
11 the CARB professional and other staff personnel, who all report to him.

12 21. Regulations adopted by CARB provide that “[f]or every rulemaking proceeding,
13 the secretary of the state board shall maintain a file as required by Government Code Section
14 11347.3.” (17 Cal. Code Regs., § 60004(b). Upon information and belief, the functions of the
15 CARB “secretary” specified in the regulation are performed by the Manager of the Board
16 Administrative and Regulatory Coordination Office, who is Ms. Lori Andreoni. Ms. Andreoni
17 reports to the Chief Counsel of CARB, Ms. Ellen Peter. Ms. Andreoni and Ms. Peter are made
18 parties in this action only in their official capacities.

19 22. Section 21080.5 of the Public Resources Code and section 1085 of the Code of
20 Civil Procedure provide for review in this Court of actions by state agencies and officers to
21 determine whether those actions comply with CEQA, the CEQA guidelines of the Resources
22 Agency, and (in the case of agencies that conduct rulemaking under “certified” regulatory
23 processes) with other regulations that implement CEQA. Section 1060 of the Code of Civil
24 Procedure provides for a judicial declaration of Petitioners’ rights and Respondents’ duties
25 with respect to one another, and sections 525-526 of the Code of Civil Procedure provide for
26 an injunction when it appears that Petitioners are entitled to the relief sought. Accordingly, and
27 based on the facts stated in this petition, this Court has jurisdiction to grant declaratory and
28 injunctive relief and to issue a writ of mandate on the claims presented here.

1 27. The preparation, public review, and final agency approval of an environmental
2 impact report (or "EIR"), or its functional equivalent, is central to the accomplishment of
3 CEQA's objectives. The heart of an EIR or equivalent document is the agency's analysis of
4 the possible impacts of the action it is considering, the agency's analysis of alternatives, and
5 the agency's response to public comments. The "cumulative effects" of related past, present,
6 and future actions must be considered. (14 Cal. Code Regs., § 15355.) In addition, when
7 relevant "[n]ew information" about an action becomes available, or when there are other
8 pertinent "substantial changes" affecting the conclusions of an earlier environmental
9 assessment, an agency must prepare an updated report that takes account of the new
10 information or changed circumstances, and must provide at least the required minimum periods
11 of time for public review and comment. (Pub. Res. Code, §§ 21091-92.1, 21166; 14 Cal. Code
12 Regs., §§ 15087-88.5, 15105.)

13 28. In 1978, in a document called "Board Resolution 78-10," CARB adopted a
14 series of procedural rules intended to provide an adequate substitute for the full EIR-related
15 procedures contained in the Resources Agency's Guidelines, and thus exempt the Board from
16 some of CEQA's requirements. (See Pub. Res. Code, § 21080.5.) Those rules were approved
17 by the California Secretary for Resources as meeting the requirements of CEQA for such
18 "certified programs." The California Supreme Court requires what it has called "strict"
19 compliance with rules intended to substitute for certain CEQA requirements.

20 29. Within the framework of CARB's regulations, there are supposed to be at least
21 two sets of environmental documents in any rulemaking raising significant environmental
22 issues: (1) an initial staff report assessing "significant long or short term adverse and beneficial
23 environmental impacts," and (2) a written response to public comments prepared by the staff
24 and then approved by the Board, before approval or adoption of the regulation.

25 30. The CEQA rules approved for use by CARB require that when CARB is
26 considering rulemaking action, the Board must obtain a "staff report" that "contain[s] a
27 description of the proposed action, an assessment of the anticipated significant long term or
28 short term adverse and beneficial environmental impacts associated with the proposed action[,"]

1 and a succinct analysis of those impacts.” (17 Cal. Code Regs., § 60005(b).) Staff reports
2 must be published “at least 45 days before the date of the public hearing” on the proposed
3 regulatory action. (*Id.*, § 60005(a).)

4 31. CARB’s rules require that after a staff report has been prepared and published,
5 the Board must permit and fully consider public testimony at a hearing on the report. If those
6 comments raise “significant environmental issues,” the staff is required to summarize and
7 respond to those comments, “either orally or in a supplemental written document.” (17 Cal.
8 Code Regs., § 60007(a).) Regardless of whether the staff responds orally or in writing,
9 however, “the decision maker shall approve a written response to each such issue” prior to
10 “final action on any proposal for which significant environmental issues have been raised.”
11 (*Id.*)

12 32. Under CARB’s certified program regulations, the “decision maker” is not
13 permitted to go forward with “any action or proposal” when the record shows that there are
14 “feasible mitigation measures or feasible alternatives available” that would “substantially
15 reduce” any adverse environmental effects. (17 Cal. Code Regs., § 60006.) Thus, in the case
16 of a rulemaking, the “decision maker” at CARB must have the power to disapprove the
17 proposed rule. This is required by the case law, by the CEQA guidelines, and by the CARB
18 legal staff’s own interpretations of the law at the time CARB obtained “certified” status for its
19 regulatory program in 1978.

20 33. Another fundamental requirement of CARB’s certified program is to maintain a
21 rulemaking file that meets the requirements of the APA. (17 Cal. Code Regs., § 60004(b).)
22 The APA requires in relevant part that CARB make available to the public “during regular
23 business hours,” and “current and in one central location,” the following documents, among
24 others:

25 (6) All data and other factual information, any studies or reports, and
26 written comments submitted to the agency in connection with the
adoption, amendment, or repeal of the regulation.

27 (7) All data and other factual information, technical, theoretical, and
28 empirical studies or reports, if any, on which the agency is relying in the
adoption, amendment, or repeal of a regulation, including any cost impact
estimates as required by Section 11346.3.

1 (Govt. Code, § 11347.3, subds. (b)(6), (7).) The entire rulemaking file, including the foregoing
2 material, must be “available to the public for inspection” from the time when the first notice of
3 the proposed rulemaking is published in the *California Regulatory Notice Register*. (*Id.* at
4 § 11347.3(a).)

5 34. The “written comments” that must be placed in the file required by the APA,
6 and thus by CARB’s CEQA regulations, are not simply those submitted to the agency in a
7 particular manner or at a particular time, such as during the period between publication of the
8 notice of a public hearing and public hearing. CARB must place “all” data and factual
9 information, including comments, it receives “in connection with” a regulatory proposal in the
10 rulemaking file. In addition, the period of public availability must “[c]ommenc[e] no later than
11 the date that the notice of the proposed action is published.” (*Id.* § 11347.3, subd. (a) .) The
12 use of the term “no later than” makes it clear that the Legislature in the APA (and the drafters
13 of CARB’s CEQA procedures) expected written comments submitted in connection with a
14 proposed regulatory action and received before publication of the required notice to be
15 included in the rulemaking file.

16 **B. Alternative Fuels and Alternative Fuel Vehicles**

17 35. The amount of carbon dioxide released from a motor vehicle powered with an
18 internal combustion engine is directly related to the carbon content of the liquid fuel on which
19 it operates. Vehicles using fuels other than gasoline and Diesel fuel – so-called “alternative
20 fuels” – have lower tailpipe CO₂ emissions than vehicles using gasoline or Diesel fuel, if the
21 alternative fuel contains less carbon per unit of energy contained in the fuel. Some potential
22 alternative fuels like hydrogen contain no carbon and if they could be used to power a vehicle,
23 would permit operation with no tailpipe CO₂ emissions.

24 36. In addition to combustion-related CO₂ emissions resulting from the carbon
25 content of a fuel, there may also be CO₂ emissions associated with the production and
26 distribution of the fuel. Electricity, for example, can be used as an alternative fuel in vehicles
27 propelled by a motor that draws its energy from a battery, which in turn is charged from the
28 power grid. If a utility company were dispatching power for use in an electric car, and if that

1 power were produced at a hydroelectric dam or a nuclear power plant, no CO₂ emissions would
2 have been produced in generating the electricity used in the car. If the electricity were
3 produced using coal-fired, oil- or natural-gas-powered processes, the combustion process used
4 to produce the electricity would result in CO₂ emissions, with coal-based electricity having the
5 highest CO₂ levels for a given unit of energy. In practice, more than one process is nearly
6 always used to produce the electric power in the grid. The proportion of electricity produced
7 using each available source and process varies according to demand, with utilities generally
8 trying to utilize the least-costly combination of sources and processes at any given time.

9 **C. CARB's Initial Development and Approval of the Original LCFS**
10 **Regulation in 2009**

11 37. Prior to CARB's adoption of the original LCFS regulation in 2009, the main
12 factors affecting the decision of a company selling gasoline in California whether to add
13 ethanol to its products (and if so, how much to add) were (i) market conditions, and (ii) certain
14 minimum requirements for oxygenates in gasoline, under the California "cleaner-burning
15 gasoline" (or "CBG") regulations that require oxygenates to reduce criteria and smog-forming
16 pollutants. The original LCFS regulation, which was initially considered by Respondents in
17 2009, completely changed that decision-making process.

18 38. The original LCFS regulation required companies marketing gasoline or Diesel
19 fuel to reduce the "carbon intensity" of the "pool" of fuels they sell, by using one or more of
20 several measures. Companies selling gasoline can blend ethanol into gasoline (for example,
21 the E85 ethanol-gasoline blend), and can sell unblended (or "neat") alternative fuels such as
22 natural gas in addition to gasoline or Diesel fuel.

23 39. The original LCFS regulation also treated electricity drawn from the California
24 power grid as an alternative fuel. While the production of electricity from some sources and
25 methods can produce significant CO₂ emissions, Respondents concluded in the 2009
26 rulemaking for the original LCFS regulation that overall, the level of GHG emissions from the
27 California transportation sector could be reduced if more vehicles powered by electricity drawn
28 from the power grid were sold and operated in California. The original LCFS regulation was

1 therefore designed so that companies marketing gasoline or Diesel fuel would receive
2 significant credit for reducing the “carbon intensity” of the “pool” of gasoline or Diesel fuels
3 they sold if they arranged for increased sales of BEVs and plug-in hybrid vehicles in
4 California, and/or increased use of electricity in such vehicles.

5 40. Under the original LCFS regulation, regulated companies were required to
6 achieve reductions in the carbon intensity of the overall pool of motor fuels they sold in
7 California by 2011. By 2020, the original LCFS regulation required a 10 percent reduction in
8 the carbon intensity (“CI”) of the pool of conventional fuels used in California. Gradual
9 reductions in the carbon intensity of the fuel pool are required in each year until 2020.

10 41. The original LCFS regulation assumed increased use of liquid alternative fuels
11 as companies marketing gasoline and Diesel fuel seek to reduce the carbon intensity of their
12 overall product mix. Ethanol can be produced from a variety of feedstocks, including No. 2
13 corn, sugar cane, and other forms of “biomass,” including switchgrass and wood.

14 42. During the initial stages of the rulemaking for the original LCFS regulation in
15 2007-08, CARB determined the reduced carbon content in ethanol would significantly reduce
16 tailpipe CO₂ emissions when E85 Flex-Fuel vehicles were operated on corn-based ethanol.

17 43. In 2008, an article appeared in *Science Express* which hypothesized that a
18 dramatic increase in the use of No. 2 corn to produce ethanol in the United States would raise
19 the price of corn, and reduce exports of No. 2 corn and other agricultural commodities to other
20 countries. According to that article, the increase in corn prices and reductions in exports would
21 cause farmers around the world to convert more land to growing crops – both No. 2 corn, and
22 other crops that would be displaced from U.S. production by the increased use of land in the
23 United States to grow No. 2 corn. The article further speculated that the conversion of land to
24 grow crops would result in significant releases of carbon to the atmosphere, because when soil
25 is disturbed and trees and other plants are cleared for crops, the carbon dioxide gas they
26 contained would be released into the atmosphere. On that basis, the authors concluded, the use
27 of corn ethanol would increase, not reduce, net greenhouse gas emissions compared to
28 conventional gasoline. A second article applying the same theory appeared later in 2008 in a

1 different publication. Because the theory developed in those articles relied on assumptions that
2 the increased use of ethanol in the United States would result indirectly in changes in land use,
3 the theory is sometimes called the “indirect land use change” (or “ILUC”) theory.

4 44. Following the publications in 2008 that had applied the ILUC theory to
5 estimating the GHG impacts of corn ethanol usage, CARB contracted with researchers at the
6 Purdue University and the University of California (Berkeley) to study how the proposed
7 LCFS regulation would affect land conversion and indirect emissions of carbon dioxide.
8 Those researchers decided to adapt an econometric model called the “Global Trade Analysis”
9 (or “GTAP”) model, so that it could estimate changes in crop acreage in different parts of the
10 world. The GTAP model was then used by CARB to estimate, for corn ethanol and for ethanol
11 produced from sugar cane, specific values called the “land use or other indirect effect” values.
12 Those indirect-effect values were added to “direct emissions” values assigned to corn- and
13 sugar-cane-based ethanol.

14 45. In addition to assigning indirect emissions impacts to corn- and sugar-cane-
15 based ethanol, the CARB staff estimated the direct GHG emissions that would be produced in
16 the process of refining ethanol and shipping it to the end-user. Those direct GHG emissions
17 values assigned to corn-based ethanol varied, based on the type of energy used at the
18 biorefinery and the type of milling performed to prepare the corn for production into ethanol,
19 and on whether the biorefinery was located in California. By the time the regulation was
20 completed, CARB staff had developed specific estimates for the GHG emissions that it
21 attributed to 13 specific corn ethanol production processes, each called a “pathway.” Each
22 pathway was assigned a carbon intensity value based on the combined level of GHG emissions
23 estimated for the production and transport of ethanol and the level of indirect GHG emissions
24 estimated for corn ethanol.

25 46. CARB staff also estimated the carbon intensity values for various sugar cane
26 ethanol pathways and electricity pathways. Other pathways were also developed for additional
27 alternative fuels, such as natural gas used as a motor fuel, propane, and hydrogen.

28 ///

1 47. In March 2009, CARB Staff circulated the Initial Statement of Reasons for the
2 original LCFS regulation for public review. The document revealed that several alternative
3 fuel pathways for corn ethanol would not provide any benefit to a company attempting to
4 comply with the LCFS regulation. Further, none of the corn ethanol pathways could
5 “compete” with ethanol from sugar cane and electricity as part of a strategy to reduce GHG
6 emissions. In CARB’s own analysis of the likely methods of compliance with the LCFS
7 standards, corn-based ethanol plainly had no long-term future as an alternative fuel in
8 California. As one of CARB’s peer reviewers stated at the time to CARB staff, the emissions
9 attributed to corn ethanol in the staff’s analysis were “enough to rule out corn ethanol as a
10 GHG reducing fuel.”

11 **D. Impact of the Original LCFS Regulation on Non-Criteria Emissions**

12 48. Like the Regulations at issue in this proceeding, the original LCFS regulation
13 was intended to implement the Legislature’s mandate in the 2006 Act to reduce GHG
14 emissions in order to address the issue of global warming. Nevertheless, CARB has previously
15 admitted that implementation of the LCFS regulation would have “little or no” impact on
16 global emissions of carbon dioxide. As CARB explained during the rulemaking for the
17 original LCFS regulation, the likely impact of the LCFS regulation would be that “fuel
18 producers [would] ship lower-carbon fuels to areas with [low-carbon fuel standards], while
19 shipping higher-carbon fuels elsewhere. The end result of this *fuel ‘shuffling’* process is little
20 or no net change in fuel carbon on a global scale.” [emphasis added]

21 49. There is no environmental advantage to fuel shuffling; the same fuels are still
22 produced and consumed, and the same GHGs are still emitted from those processes. Rather,
23 because the LCFS regulation encourages the shipment of fuels to alternative locations that are
24 further from origin facilities, “fuel shuffling” actually causes emissions of GHGs (as well as
25 criteria pollutant) emissions to increase.

26 **E. Impact of the LCFS Regulation on Criteria Pollutant Emissions**

27 50. In addition to leading to fuel shuffling, the original LCFS regulation had other
28 negative effects. In 2009, while the rulemaking process was underway, one of CARB’s peer

1 reviewers explained that “biodiesel” (one of the alternative fuels that CARB postulated would
2 reduce the “CI” of Diesel fuel sold in California), would actually increase NOx emissions:
3 “studies in the literature suggest that NOx emissions increase with the use of biodiesel versus
4 petroleum-based diesel.” Several members of the public identified the same issue. Although
5 CARB conceded, “NOx is of particular interest because biodiesel has been reported to increase
6 NOx emissions,” CARB refused to analyze the potential environmental impacts associated
7 with increased biodiesel usage, instead “assum[ing] that there will be no increase in the
8 emissions of NOx.” In support, CARB pointed to its contention that a *future* rulemaking
9 would address NOx emissions from biodiesel, and its speculation (without citation to evidence,
10 or even an explanation of the methodologies and objectives he relied upon in reaching this
11 conclusion) that future on-road engine technologies would reduce criteria pollutant emissions.

12 **F. CARB’s Approval of the LCFS Regulation Without Completing**
13 **Environmental Review**

14 51. On April 23, 2009, CARB adopted Resolution 09-31, which explained “that the
15 Board hereby “approves for adoption” the original LCFS regulation. The same day, CARB
16 issued a press release stating that it “adopted a regulation that will implement Governor
17 Schwarzenegger’s Low Carbon Fuel Standard”

18 52. Although CARB approved the original LCFS regulation in Resolution No. 09-
19 31, CARB had not resolved the significant environmental issues raised by the public during the
20 public comment period. Rather, Resolution 09-31 delegated the task of evaluating public
21 comments, responding to those comments, and completing the environmental review process to
22 the Executive Officer, stating that the “Executive Officer is the decision maker for the purposes
23 of [17 C.C.R. § 60007] and responding to environmental issues raised on the proposed
24 regulation”

25 53. On November 25, 2009, the Executive Officer issued Executive Order R-09-
26 014, and a Notice of Decision and Response to Significant Environmental Issues. The Notice
27 of Decision – the final step in the environmental review process under CEQA – states that,
28 although “Comments raising significant environmental issues have been responded to in the

1 [FSOR],” the original LCFS regulation was previously “Approved by” “Resolution 09-31” on
2 April 23, 2009.

3 **G. Environmental Issues Raised by Petitioners in the First LCFS Litigation**
4 **And the Court’s Issuance of a Writ Invalidating CARB’s Environmental**
5 **Document**

6 54. On December 23, 2009, Petitioners filed a petition for writ of mandate
7 challenging CARB’s approval of the original LCFS regulation. Petitioners argued, *inter alia*,
8 that CARB violated CEQA by (i) approving the original LCFS regulation prior to completing
9 environmental review, (ii) impermissibly delegating environmental review authority to a non-
10 decisionmaker – *i.e.*, the Executive Officer; and (iii) deferring analysis and mitigation of NOx
11 emissions associated with the increased use of biodiesel associated with the regulation.
12 Petitioners also sought relief under the APA for CARB’s failure to include all required
13 documents in the rulemaking file.

14 55. After the superior court denied Petitioners’ requested writ, Petitioners filed a
15 Notice of Appeal. Following extensive briefing and oral argument, the Fifth District Court of
16 Appeal issued its decision in *POET, LLC v. California Air Resources Board* (2013) 218
17 Cal.App.4th 681, in which the Court found:

18 A. CARB “violated CEQA’s requirement that project approval must occur
19 after the agency has considered the environmental review documentation prepared to satisfy
20 CEQA.” (*POET, supra*, 218 Cal.App.4th at 726.)

21 B. CARB “violated a fundamental policy of CEQA when it gave the
22 responsibility for completing the environmental review process to the Executive Officer
23 because he did not have the authority to approve or disapprove the project.” (*Id.* at 731.)

24 C. CARB violated CEQA by moving “forward with the project’s activity—
25 that is, [CARB] has implemented the LCFS regulations—without putting in place any
26 mitigation measures for the potential increase in NOx emissions resulting from the use of
27 biodiesel.” (*Id.* at 740.)

28 D. CARB’s “omission of [certain] emails from the rulemaking file was a
violation of the APA.” (*Id.* at 754.)

1 56. As a result of the above violations, the Court directed the superior court to enter
2 a peremptory writ requiring CARB to set-aside its approval of the original LCFS regulation.
3 The Court also required CARB to address whether the LCFS regulation “will have a significant
4 adverse effect on the environmental as a result of increased NOx emissions , make findings . . .
5 regarding the potential adverse environmental effect of increased NOx emissions, and adopt
6 mitigation measures in the event the environmental effects are found to be significant.”

7 57. The Court also allowed CARB to maintain the *status quo* by “continuing to
8 adhere to the LCFS regulations standards in effect for 2013 until the corrective action is
9 completed.”

10 58. The Superior Court issued a Peremptory Writ of Mandate including the above
11 terms on February 10, 2014.

12 **H. CARB’s Development and Approval of the Readopted LCFS Regulation**
13 **and an ADF Regulation**

14 59. Following the issuance of the Peremptory Writ of Mandate, CARB Staff
15 initiated another rulemaking process for the LCFS regulation, which included modest
16 adjustments to the original LCFS regulation at issue in the *POET v. CARB* action.

17 60. Around the same time, CARB Staff was initiating the rulemaking process for its
18 Regulation on the Commercialization of Alternative Diesel Fuels – *i.e.*, the ADF regulation.
19 According to CARB, the ADF regulation establishes a multi-stage process governing the
20 commercialization of new alternative diesel fuels (“ADFs”), such as biodiesel, in California.
21 The process begins with a screening analysis and initial evaluation with limited sales of the
22 ADF, followed by an immediate stage with expanded sales governed by additional monitoring,
23 testing, and a multimedia evaluation. The final stage contemplates full-scale commercial sales
24 of the ADF.

25 61. Respondents circulated the Notice of Proposed Rulemaking and the Staff
26 Report: Initial Statement of Reasons for both the Readopted LCFS regulation and the ADF
27 regulation (collectively, the “ISORs”) for public review and comment on December 30, 2014.
28 The notices advised that CARB would conduct an initial hearing on the LCFS regulation and

1 the ADF regulation on February 19, 2015, but would not consider either regulation for
2 approval at that time.

3 62. Respondents also circulated for public review a document called the
4 “Environmental Analysis,” which was intended to serve as CARB’s “functional equivalent”
5 document under CEQA for both the LCFS regulation and the ADF regulation.

6 63. An initial review of the ISORs and the EA revealed numerous issues with
7 respect to the environmental review performed by Respondents, including significant evidence
8 that Respondents yet again ignored increased emissions of NOx associated with the use of
9 biodiesel, and other environmental impacts.

10 A. Although the Court in *POET v. CARB* recognized the original LCFS
11 regulation would result in increases in NOx emissions associated with the increased use of
12 biodiesels, Respondents did not attempt to perform any analysis of the increases in criteria
13 pollutant emissions associated with the Readopted LCFS regulation. Rather, the EA included
14 the increased NOx emissions from the LCFS regulation in its environmental baseline, and
15 found that because the ADF regulation would decrease NOx compared to existing conditions,
16 the Readopted LCFS regulation would not have a significant effect on the environment.
17 Respondents also took the position that because CARB was “readopting” the LCFS regulation,
18 CARB’s consideration of the LCFS regulation was a “new” action, and thus the appropriate
19 baseline for environmental review was purportedly December 2014, when the environmental
20 document for the Readopted LCFS regulation was circulated for public review.

21 B. In its EA, Respondents recognized the Regulations would result in the
22 construction of new or modified fuel production facilities to meet demand for fuels created by
23 the Regulations, including processing plants for agriculture-based ethanol, cellulosic ethanol,
24 and biomethane. Although the EA concludes the construction of these facilities would result in
25 impacts that are “significant and unavoidable,” the EA makes no attempt to quantify or
26 mitigate the impacts.

27 C. Under its certified regulatory program, CARB cannot adopt a regulation
28 with “significant and unavoidable” environmental effects if there are feasible alternatives

1 available that would substantially reduce such impacts. During the rulemaking process, a
2 commenting party (---Growth Energy, an association of ethanol producers that included POET
3 plants) proposed an alternative to the LCFS regulation that contemplates an adjustment to the
4 cap and trade regulation in Title 17 of the California Code of Regulations to account for
5 whatever increment of GHG emissions reductions would be foregone by eliminating the LCFS
6 regulation. Notably, Growth Energy's alternative would (i) achieve the same emissions
7 reductions contemplated under the Regulations, and (ii) would not result in fuel shuffling, or
8 the construction of numerous fuel production plants in California. In the EA, however,
9 Respondents advised that they were (i) refusing to evaluate Growth Energy's alternative to the
10 LCFS regulation, and (ii) would be considering the Readopted LCFS regulation for adoption,
11 despite the fact that Growth Energy's alternative to the LCFS regulation would avoid
12 "significant and unavoidable" environmental impacts.

13 D. CARB also failed to consider and adopt Growth Energy's alternative to
14 the ADF regulation, and failed to consider a reasonable range of alternatives.

15 E. One of methods contemplated by CARB to reduce NOx emissions
16 associated with biodiesel was to require an additive, called Di-tert-butyl peroxide ("DTBP") to
17 biodiesel fuels. This mitigation, however, is inadequate because DTBP has not been certified
18 for use by U.S. EPA "at the maximum level needed to achieve mitigation in the ADF
19 proposal."

20 F. The EA did not analyze environmental impacts associated with "fuel
21 shuffling."

22 G. The EA did not analyze increased NOx emissions associated with the
23 use of biodiesel in New Technology Diesel Engines (NTDEs).

24 H. The EA did not analyze or discuss the impacts of criteria pollutants other
25 than NOx.

26 I. Many of the conclusions in the EA were not supported by the evidence.

27 J. Many critical documents appeared to be omitted from the rulemaking
28 file.

1 specifications to ensure there is no increase in NOx.” The Court ultimately found this
2 constituted impermissible deferral of environmental analysis and mitigation, and required
3 CARB to make “a finding of fact, supported by substantial evidence, on the question whether
4 the project will have a significant adverse effect on the environmental as a result of the
5 potential increase in NOx emissions.” (*POET, supra*, 218 Cal.App.4th at 740.)

6 70. In the rulemaking for the Regulations, however, Respondents did not attempt to
7 perform any analysis of the increases in criteria pollutant emissions associated with the LCFS
8 regulation. Rather, in its September 25, 2015, Resolution 15-36, CARB “set[] aside its
9 approval of the current LCFS regulation . . . and any decision to defer the formulation of
10 mitigation measures relating to NOx emissions from biodiesel,” and then re-adopted a similar
11 LCFS regulation, with minor modifications. (CARB Resolution 15-36 at 4-5.) Respondents
12 then argued they need not analyze or mitigate criteria pollutant emissions associated with the
13 original LCFS regulation because the “environmental baseline” for the Readopted LCFS
14 regulation is December 2014 (when the environmental document for the Readopted LCFS
15 regulation was first released). Respondents also take the position that the “environmental
16 baseline” includes the increase in criteria pollutant emissions caused by the original LCFS
17 regulation, asserting the analysis in the EA “addresses the potentially significant adverse
18 environmental impacts resulting from implementing the proposed LCFS and ADF regulations
19 *compared to existing conditions, which include existing compliance with the LCFS left in*
20 *place by the Court at the 2013 regulatory standards.*” (EA at 3 [emphasis added].)

21 71. By failing to analyze the effects of the original LCFS regulation, and instead
22 assuming that the “environmental baseline” conditions include the environmental impacts
23 caused by the original LCFS regulation, CARB acted contrary to law by, *inter alia*:

- 24 A. Failing to use the proper baseline for environmental review;
25 B. Using a vague and incomplete project description;
26 C. Failing to analyze the cumulative impacts of the Regulations, including
27 closely-related *past*, present, and reasonably foreseeable probable future projects. (Sec, e.g.,
28 Pub. Resources Code, § 21083, subd. (b));

1 D. Failing to mitigate the environmental impacts associated with increased
2 emissions of NOX (and other criteria pollutants) resulting from the original LCFS regulation;

3 E. Undermining public participating and informed decisionmaking by
4 failing to analyze the environmental impacts of the original LCFS regulation, which
5 Respondents have been implementing since 2009;

6 F. Improperly tiering off an environmental analysis that was invalidated in
7 *POET v. CARB*;

8 G. Failing to comply with the writ issued in *POET v. CARB*; and

9 H. Impermissible piecemealing environmental review by breaking up the
10 LCFS regulation into two discrete projects for the purposes of environmental review: (i) the
11 original LCFS regulation approved in 2009, for which the environmental impacts have never
12 been properly assessed, and (ii) the Readopted LCFS regulation approved in 2015.

13 72. Respondents prejudicially abused their discretion by taking the above-described
14 actions in violation of CEQA. Respondents failed to proceed in the manner required by law,
15 and Respondents' decision was not supported by substantial evidence in the record.
16 Respondents also violated CEQA by failing to independently review and analyze the
17 environmental effects resulting from their approval of the Regulations. Under Section 21080.5
18 of the Public Resources Code, Petitioners are entitled to petition this Court for a writ of
19 mandate enjoining Respondents to comply with CEQA and the Board's implementing
20 regulations.

21 73. Petitioners have a clear, present and beneficial right to performance by
22 Respondents of their duties under CEQA and the Board's implementing regulations, and
23 Respondents have the responsibility and capacity to perform their duties under CEQA and the
24 Board's implementing regulations.

25 74. Petitioners also have a clear, present and beneficial interest in the issuance of a
26 writ of mandate by virtue of the facts set forth in this Petition, in that they are and will continue
27 to be adversely affected by Respondents' continuing violations of CEQA and the Board's
28 implementing regulations. The failure of Respondents to perform their duties under the law

1 requires this Court to issue a writ of mandate directing them to discharge their duties under
2 Section 1085 of the Code of Civil Procedure.

3 **Second Cause of Action -- For a Writ of Mandate against the Board and the**
4 **CARB Executive Officer (Failure to Consider Feasible Alternatives to**
5 **Address Significant Adverse Impacts)**

6 75. Petitioners allege and incorporate paragraphs 1 to 74 above in support of their
7 Second Cause of Action.

8 76. The CEQA requirement to evaluate alternatives to the proposed activity applies
9 to certified regulatory programs. This requirement applies whether or not the project's
10 significant effects will be avoided through mitigation measures. The Board's regulations
11 implementing CEQA prohibit the Board from adopting any regulation with significant
12 environmental impacts if there are feasible alternatives available that would substantially
13 reduce such impacts.

14 77. In its public comments on the ADF regulation, Growth Energy proposed an
15 alternative to the ADF regulation, which contemplated mitigation for all biodiesel blends
16 above B1 sold in California beginning immediately. Notably, unlike the adopted ADF
17 regulation, this alternative would ensure use of biodiesel in California does not lead to
18 increased NOx emissions and otherwise avoid significant environmental effects.

19 78. Respondents, however, (i) refused to evaluate Growth Energy's alternative to
20 the ADF regulation a project alternative, and (ii) instead adopted the ADF regulation, despite
21 the fact that Growth Energy's proposed alternative would avoid increased NOx emissions
22 associated with biodiesel.

23 79. During the public comment period, Growth Energy also proposed an alternative
24 to the Readopted LCFS regulation that contemplates an adjustment to the cap and trade
25 regulation in Title 17 of the California Code of Regulations to account for whatever increment
26 of GHG emissions reductions would be foregone by eliminating the Readopted LCFS
27 regulation. This market-based approach incentivizes the achievement of the required GHG
28 reductions through the most cost-effective approaches – including but not requiring reductions
in the CI Values of transportation fuels.

1 80. Evidence in the record demonstrated Growth Energy's alternative to the
2 Readopted LCFS regulation would also reduce emissions associated with the production and
3 transportation of alternative fuels in California. In addition, Growth Energy's alternative to the
4 Readopted LCFS regulation would (i) achieve the same emissions reductions contemplated
5 under the Regulations, and (ii) would not result in fuel shuffling, or the construction of
6 numerous fuel production plants in California.

7 81. Respondents, however, (i) refused to evaluate the alternative to the LCFS
8 regulation proposed by Growth Energy as a project alternative, and (ii) instead approving the
9 Readopted LCFS regulation, despite the fact that Growth Energy's proposed alternative to the
10 Readopted LCFS regulation would reduce the "significant and unavoidable" impacts of the
11 Readopted LCFS regulation.

12 82. The EA also does not consider a "reasonable range of alternatives." Rather, the
13 EA simply analyzed the "no project" alternative and different iterations of the Regulations.

14 83. Respondents prejudicially abused their discretion by taking the above-described
15 actions in violation of CEQA. Respondents failed to proceed in the manner required by law,
16 and Respondents' decision was not supported by substantial evidence in the record.
17 Respondents also violated CEQA by failing to independently review and analyze the
18 environmental effects resulting from their approval of the Regulations. Under Section 21080.5
19 of the Public Resources Code, Petitioners are entitled to petition this Court for a writ of
20 mandate enjoining Respondents to comply with CEQA and the Board's implementing
21 regulations.

22 84. Petitioners have a clear, present and beneficial right to performance by
23 Respondents of their duties under CEQA and the Board's implementing regulations, and
24 Respondents have the responsibility and capacity to perform their duties under CEQA and the
25 Board's implementing regulations.

26 85. Petitioners also have a clear, present and beneficial interest in the issuance of a
27 writ of mandate by virtue of the facts set forth in this Petition, in that they are and will continue
28 to be adversely affected by Respondents' continuing violations of CEQA and the Board's

1 implementing regulations. The failure of Respondents to perform their duties under the law
2 requires this Court to issue a writ of mandate directing them to discharge their duties under
3 Section 1085 of the Code of Civil Procedure.

4 **Third Cause of Action -- For a Writ of Mandate Against the Board and the**
5 **CARB Executive Officer (Failure to Adopt Adequate Mitigation for NOx Emissions**
6 **Associated With Biodiesel)**

7 86. Petitioners allege and incorporate paragraphs 1 to 85 above in support of their
8 Third Cause of Action.

9 87. In the rulemaking, Respondents recognized that increased use of biodiesel to
10 comply with the Regulations would result in increases in NOx emissions. To "mitigate"
11 emissions of NOx, the ADF regulation proposes "mitigation" to reduce NOx emissions by
12 requiring "Blend Levels" – *i.e.*, the ratio of biodiesel to CARB diesel in the diesel blend. (See
13 13 Cal. Code Regs., §§ 2293.2(9), 2293.2(4).) CARB also requires mitigation strategies
14 including the addition of Di-tert-butyl peroxide ("DTBP") to biodiesel fuels as a cetane
15 improver to reduce NOx emissions.

16 88. The mitigation proposed by CARB is inadequate under CEQA. Although
17 blenders must report to CARB regarding their blending activities, the ADF regulation contains
18 no requirement that biodiesel blends of B5 or lower must be disclosed to fuel purchasers. As a
19 result, intentional or inadvertent blending of biodiesel into diesel already containing biodiesels
20 would result in higher than reported NOx emissions.

21 89. As recognized in the FSOR, the proposed addition of DTBP to biodiesel fuels as
22 a cetane improver to mitigate NOx emissions is not technically or legally feasible, as it has not
23 been certified for use by U.S. EPA at the "level needed to achieve mitigation in the ADF
24 proposal."

25 90. Respondents prejudicially abused their discretion by taking the above-described
26 actions in violation of CEQA. Respondents failed to proceed in the manner required by law,
27 and Respondents' decision was not supported by substantial evidence in the record.
28 Respondents also violated CEQA by failing to independently review and analyze the
environmental effects resulting from their approval of the Regulations. Under Section 21080.5

1 of the Public Resources Code, Petitioners are entitled to petition this Court for a writ of
2 mandate enjoining Respondents to comply with CEQA and the Board's implementing
3 regulations.

4 91. Petitioners have a clear, present and beneficial right to performance by
5 Respondents of their duties under CEQA and the Board's implementing regulations, and
6 Respondents have the responsibility and capacity to perform their duties under CEQA and the
7 Board's implementing regulations.

8 92. Petitioners also have a clear, present and beneficial interest in the issuance of a
9 writ of mandate by virtue of the facts set forth in this Petition, in that they are and will continue
10 to be adversely affected by Respondents' continuing violations of CEQA and the Board's
11 implementing regulations. The failure of Respondents to perform their duties under the law
12 requires this Court to issue a writ of mandate directing them to discharge their duties under
13 Section 1085 of the Code of Civil Procedure.

14 **Fourth Cause of Action -- For a Writ of Mandate Against the Board and**
15 **the CARB Executive Officer (Failure to Analyze, Quantify, or Mitigate Impacts Found to**
16 **Be "Significant and Unavoidable")**

17 93. Petitioners allege and incorporate paragraphs 1 to 92 above in support of their
18 Fourth Cause of Action.

19 94. Under CEQA, a lead agency may not simply label an impact "significant and
20 unavoidable" without first providing a discussion and analysis. Rather, the lead agency must
21 quantify the impact, and consider feasible mitigation based on that analysis. Indeed, both
22 CEQA and the Board's implementing regulations required Respondents to not adopt a
23 regulation with significant environmental impacts if feasible mitigation measures exist.

24 95. In its EA, Respondents recognized that the Regulations would result in the
25 construction of new or modified fuel production facilities to meet demand for fuels created by
26 the Regulations, including processing plants for agriculture-based ethanol, cellulosic ethanol,
27 and biomethane. Without quantifying the potential impacts of these facilities, the EA makes
28 the bare conclusion that several of the impacts associated with these facilities would be
"significant and unavoidable."

1 world to California and higher-CI fuels must be sent for sale elsewhere. In fact, in the 2009
2 rulemaking for the original LCFS regulation, Respondents admitted fuel shuffling would occur.
3 The Readopted LCFS regulation will also result in fuel shuffling. There is no environmental
4 advantage to fuel shuffling, as the same fuels are still produced and consumed, and the same
5 GHGs are still emitted from those processes. Rather, because the Readopted LCFS regulation
6 encourages the shipment of fuels to alternative locations that are further from origin facilities,
7 fuel shuffling actually causes emissions of GHGs and other air pollutants to increase.

8 102. Although numerous parties presented evidence the Regulations would result in
9 fuel shuffling, the environmental impacts of fuel shuffling were never discussed in the EA.

10 103. Respondents prejudicially abused their discretion by taking the above-described
11 actions in violation of CEQA. Respondents failed to proceed in the manner required by law,
12 and Respondents' decision was not supported by substantial evidence in the record.
13 Respondents also violated CEQA by failing to independently review and analyze the
14 environmental effects resulting from their approval of the Regulations. Under Section 21080.5
15 of the Public Resources Code, Petitioners are entitled to petition this Court for a writ of
16 mandate enjoining Respondents to comply with CEQA and the Board's implementing
17 regulations.

18 104. Petitioners have a clear, present and beneficial right to performance by
19 Respondents of their duties under CEQA and the Board's implementing regulations, and
20 Respondents have the responsibility and capacity to perform their duties under CEQA and the
21 Board's implementing regulations.

22 105. Petitioners also have a clear, present and beneficial interest in the issuance of a
23 writ of mandate by virtue of the facts set forth in this Petition, in that they are and will continue
24 to be adversely affected by Respondents' continuing violations of CEQA and the Board's
25 implementing regulations. The failure of Respondents to perform their duties under the law
26 requires this Court to issue a writ of mandate directing them to discharge their duties under
27 Section 1085 of the Code of Civil Procedure.

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1 **Sixth Cause of Action -- For a Writ of Mandate Against the Board and the**
2 **CARB Executive Officer (Failure to Analyze Impacts Associated with Exemptions for B6**
3 **to B20 in Areas Other than the South Coast or San Joaquin Air Basins)**

4 106. Petitioners allege and incorporate paragraphs 1 to 105 above in support of their
5 Sixth Cause of Action.

6 107. An EIR – or its functional equivalent, like the EA here – should “include detail
7 sufficient to enable those who did not participate in its preparation to understand and to
8 consider meaningfully the issues raised by the proposed project.” (*Laurel Heights*
9 *Improvement Ass’n v. Regents of Univ. of Calif.* (1988) 47 Cal.3d 376, 405.) An
10 unsubstantiated conclusion that an impact is not significant, without supporting information or
11 explanatory analysis, is insufficient; the reasoning supporting the determination of
12 insignificance must be disclosed.

13 108. CARB staff released proposed modifications to the ADF regulation through its
14 May 22, 2015, Notice of Public Availability of Modified Text and Availability of Additional
15 Documents. The proposed modifications included, *inter alia*, an exemption for producers or
16 importers allowing sales of B6 to B20 in areas other than the South Coast or San Joaquin Air
17 basins. The notice, however, did not provide any analysis of the impact of this exemption, but
18 instead found, without supporting evidence or analysis, that the new exemption would “not
19 change the significance determinations in the draft Environmental Analysis that was prepared
20 for the proposed ADF and proposed LCFS regulations, and previously circulated for public
21 comment.”

22 109. In addition, the modification detailed above constituted significant new
23 information such that recirculation of the EA was required under Section 21092.1 of the Public
24 Resources Code and Section 15088.5 of the CEQA Guidelines, yet Respondents failed to
25 recirculate the EA for public review and comment.

26 110. Respondents prejudicially abused their discretion by taking the above-described
27 actions in violation of CEQA. Respondents failed to proceed in the manner required by law,
28 and Respondents’ decision was not supported by substantial evidence in the record.
Respondents also violated CEQA by failing to independently review and analyze the

1 environmental effects resulting from their approval of the Regulations. Under Section 21080.5
2 of the Public Resources Code, Petitioners are entitled to petition this Court for a writ of
3 mandate enjoining Respondents to comply with CEQA and the Board's implementing
4 regulations.

5 111. Petitioners have a clear, present and beneficial right to performance by
6 Respondents of their duties under CEQA and the Board's implementing regulations, and
7 Respondents have the responsibility and capacity to perform their duties under CEQA and the
8 Board's implementing regulations.

9 112. Petitioners also have a clear, present and beneficial interest in the issuance of a
10 writ of mandate by virtue of the facts set forth in this Petition, in that they are and will continue
11 to be adversely affected by Respondents' continuing violations of CEQA and the Board's
12 implementing regulations. The failure of Respondents to perform their duties under the law
13 requires this Court to issue a writ of mandate directing them to discharge their duties under
14 Section 1085 of the Code of Civil Procedure.

15 **Seventh Cause of Action -- For a Writ of Mandate Against the Board and the**
16 **CARB Executive Officer (Failure to Analyze Impacts Associated with Biodiesel Blends**
Below the Required Mitigation Levels of B6 and B11)

17 113. Petitioners allege and incorporate paragraphs 1 to 112 above in support of their
18 Seventh Cause of Action.

19 114. An EIR – or its functional equivalent, like the EA here – should “include detail
20 sufficient to enable those who did not participate in its preparation to understand and to
21 consider meaningfully the issues raised by the proposed project.” (*Laurel Heights, supra*, 47
22 Cal.3d at 405.) An unsubstantiated conclusion that an impact is not significant, without
23 supporting information or explanatory analysis, is insufficient; the reasoning supporting the
24 determination of insignificance must be disclosed.

25 115. It is well understood that the addition of any biodiesel to diesel fuel increases
26 emissions of NOx, and that the magnitude of the increase depends directly upon the amount of
27 biodiesel added to the fuel. Even though CARB Staff's analysis of blends below B5 shows a
28 linear relationship between biodiesel and NOx emissions that is statistically significant and

1 statistically significant increases in NOx emissions for soy biodiesel blends at the B5 level,
2 CARB Staff has failed to require NOx mitigation of biodiesel fuels until either the B6 or B11
3 levels are reached, depending on the properties of the biodiesel and the time of year.

4 116. By failing to analyze – or mitigate – NOx impacts associated with the use of
5 biodiesel blends below the B6 and B11 levels, Respondents prejudicially abused their
6 discretion by taking the above-described actions in violation of CEQA. Under Section 21080.5
7 of the Public Resources Code, Petitioners are entitled to petition this Court for a writ of
8 mandate enjoining Respondents to comply with CEQA and the Board’s implementing
9 regulations.

10 117. Respondents prejudicially abused their discretion by taking the above-described
11 actions in violation of CEQA. Respondents failed to proceed in the manner required by law,
12 and Respondents’ decision was not supported by substantial evidence in the record.
13 Respondents also violated CEQA by failing to independently review and analyze the
14 environmental effects resulting from their approval of the Regulations. Under Section 21080.5
15 of the Public Resources Code, Petitioners are entitled to petition this Court for a writ of
16 mandate enjoining Respondents to comply with CEQA and the Board’s implementing
17 regulations.

18 118. Petitioners have a clear, present and beneficial right to performance by
19 Respondents of their duties under CEQA and the Board’s implementing regulations, and
20 Respondents have the responsibility and capacity to perform their duties under CEQA and the
21 Board’s implementing regulations.

22 119. Petitioners also have a clear, present and beneficial interest in the issuance of a
23 writ of mandate by virtue of the facts set forth in this Petition, in that they are and will continue
24 to be adversely affected by Respondents’ continuing violations of CEQA and the Board’s
25 implementing regulations. The failure of Respondents to perform their duties under the law
26 requires this Court to issue a writ of mandate directing them to discharge their duties under
27 Section 1085 of the Code of Civil Procedure.

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1 **Eighth Cause of Action -- For a Writ of Mandate Against the Board and the**
2 **CARB Executive Officer (Failure to Analyze Impacts Associated with New Technology**
3 **Diesel Engines)**

3 120. Petitioners allege and incorporate paragraphs 1 to 119 above in support of their
4 Eighth Cause of Action.

5 121. An EIR – or its functional equivalent, like the EA here – should “include detail
6 sufficient to enable those who did not participate in its preparation to understand and to
7 consider meaningfully the issues raised by the proposed project.” (*Laurel Heights, supra*, 47
8 Cal.3d at 405.) An unsubstantiated conclusion that an impact is not significant, without
9 supporting information or explanatory analysis, is insufficient; the reasoning supporting the
10 determination of insignificance must be disclosed.

11 122. Substantial evidence in the record shows that any level of biodiesel in New
12 Technology Diesel Engines (NTDEs) increases NOx emissions. Respondents, however, did
13 not analyze whether biodiesel blends used in NTDE engines would increase NOx emissions,
14 but instead postulated without supporting evidence that biodiesel in NTDEs does not result in
15 increased NOx emissions. CARB Staff refers only to one study in support of its position;
16 however, that study did not analyze the issue because the test equipment used was not capable
17 of performing proper NOx measurements.

18 123. Respondents prejudicially abused their discretion by taking the above-described
19 actions in violation of CEQA. Respondents failed to proceed in the manner required by law,
20 and Respondents’ decision was not supported by substantial evidence in the record.
21 Respondents also violated CEQA by failing to independently review and analyze the
22 environmental effects resulting from their approval of the Regulations. Under Section 21080.5
23 of the Public Resources Code, Petitioners are entitled to petition this Court for a writ of
24 mandate enjoining Respondents to comply with CEQA and the Board’s implementing
25 regulations.

26 124. Petitioners have a clear, present and beneficial right to performance by
27 Respondents of their duties under CEQA and the Board’s implementing regulations, and

28 ///

1 Respondents have the responsibility and capacity to perform their duties under CEQA and the
2 Board's implementing regulations.

3 125. Petitioners also have a clear, present and beneficial interest in the issuance of a
4 writ of mandate by virtue of the facts set forth in this Petition, in that they are and will continue
5 to be adversely affected by Respondents' continuing violations of CEQA and the Board's
6 implementing regulations. The failure of Respondents to perform their duties under the law
7 requires this Court to issue a writ of mandate directing them to discharge their duties under
8 Section 1085 of the Code of Civil Procedure.

9 **Ninth Cause of Action -- For a Writ of Mandate Against the Board and the**
10 **CARB Executive Officer (Failure to Analyze or Discuss Criteria Pollutants Other Than**
11 **NOx)**

12 126. Petitioners allege and incorporate paragraphs 1 to 125 above in support of their
13 Ninth Cause of Action.

14 127. As explained above, Respondents recognized during the rulemaking for the
15 original LCFS regulation that increased biodiesel emissions had the potential to significantly
16 increase the emissions of ROG, PM, and NOx emissions.

17 128. Although Respondents' EA analyzed potential NOx emissions associated with
18 the Readopted LCFS regulation, the EA did not analyze or quantify emissions of other criteria
19 pollutants, including particulate matter (PM), volatile organic compounds (VOCs), and reactive
20 organic gases (ROG), in violation of CEQA. Whether CARB believes these impacts are
21 insignificant is irrelevant. "CEQA places the burden of environmental investigation on
22 government rather than the public," and a lead agency may not "hide behind its own failure to
23 gather data." (See, e.g., *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 311.)

24 129. Respondents prejudicially abused their discretion by taking the above-described
25 actions in violation of CEQA. Respondents failed to proceed in the manner required by law,
26 and Respondents' decision was not supported by substantial evidence in the record.
27 Respondents also violated CEQA by failing to independently review and analyze the
28 environmental effects resulting from their approval of the Regulations. Under Section 21080.5
of the Public Resources Code, Petitioners are entitled to petition this Court for a writ of

1 mandate enjoining Respondents to comply with CEQA and the Board's implementing
2 regulations.

3 130. Petitioners have a clear, present and beneficial right to performance by
4 Respondents of their duties under CEQA and the Board's implementing regulations, and
5 Respondents have the responsibility and capacity to perform their duties under CEQA and the
6 Board's implementing regulations.

7 131. Petitioners also have a clear, present and beneficial interest in the issuance of a
8 writ of mandate by virtue of the facts set forth in this Petition, in that they are and will continue
9 to be adversely affected by Respondents' continuing violations of CEQA and the Board's
10 implementing regulations. The failure of Respondents to perform their duties under the law
11 requires this Court to issue a writ of mandate directing them to discharge their duties under
12 Section 1085 of the Code of Civil Procedure.

13 **Tenth Cause of Action -- For a Writ of Mandate against the Board and the**
14 **CARB Executive Officer (Failure to Support Conclusions With Substantial Credible**
15 **Evidence in the Record)**

16 132. Petitioners allege and incorporate paragraphs 1 to 131 above in support of their
17 Tenth Cause of Action.

18 133. In its rulemaking for the Regulations, however, Respondents did not disclose
19 any analysis in support of its conclusions that various aspects of the Regulations would not
20 result in negative air quality impacts. For example, the following conclusions are not
21 supported by any analysis or substantial evidence in the record:

22 A. Respondents' assertion that an exemption from the ADF regulation for
23 producers or importers allowing sales of B6 to B20 in areas other than the South Coast or San
24 Joaquin Air basins would not have a negative environmental impact;

25 B. CARB's estimates regarding natural gas usage;

26 C. CARB's LUC factor of 19.8 gCO₂e/MJ for corn ethanol; and

27 D. CARB's LUC factor of 11.8 gCO₂e/MJ for cane ethanol.

28 134. Respondents prejudicially abused their discretion by taking the above-described
actions in violation of CEQA. Respondents failed to proceed in the manner required by law,

1 and Respondents' decision was not supported by substantial evidence in the record.
2 Respondents also violated CEQA by failing to independently review and analyze the
3 environmental effects resulting from their approval of the Regulations. Under Section 21080.5
4 of the Public Resources Code, Petitioners are entitled to petition this Court for a writ of
5 mandate enjoining Respondents to comply with CEQA and the Board's implementing
6 regulations.

7 135. Petitioners have a clear, present and beneficial right to performance by
8 Respondents of their duties under CEQA and the Board's implementing regulations, and
9 Respondents have the responsibility and capacity to perform their duties under CEQA and the
10 Board's implementing regulations.

11 136. Petitioners also have a clear, present and beneficial interest in the issuance of a
12 writ of mandate by virtue of the facts set forth in this Petition, in that they are and will continue
13 to be adversely affected by Respondents' continuing violations of CEQA and the Board's
14 implementing regulations. The failure of Respondents to perform their duties under the law
15 requires this Court to issue a writ of mandate directing them to discharge their duties under
16 Section 1085 of the Code of Civil Procedure.

17 **Eleventh Cause of Action -- For a Writ of Mandate Against All Respondents**
18 **(Failure to Respond Adequately to Environmental Comments)**

19 137. Petitioners allege and incorporate paragraphs 1 to 136 above in support of their
20 Eleventh Cause of Action.

21 138. Section 60007(b) of CARB's certified regulatory program requires that CARB
22 receive, summarize, and respond to environmental comments received during the evaluation of
23 the Regulations. Numerous such comments were not adequately addressed in the CARB
24 Executive Officer's final environmental document, including, but not limited to, comments
25 regarding:

26 A. The fact that soy-based fuels increase NOx emissions in proportion to
27 the blend percentage because they add oxygen to the fuel and induce other combustion changes
28 in proportion to the blend level.

1 B. The fact that some animal blends will increase NOx and others will not,
2 depending on how the biodiesel blending has changed the cetane number (CN) of the blended
3 fuel itself, as well as the fact that the absence of this variable in Staff's analysis masks the
4 impact that CN changes of the blended fuel have on whether a particular animal biodiesel will
5 or will not increase NOx.

6 C. The need for CARB Staff to use a predictive model to determine
7 whether particular biodiesel blends will increase NOx emissions.

8 D. Critique of CARB Staff's assertion that biodiesel will not increase NOx
9 emissions in NTDE engines at levels below B50.

10 E. The use of DTBP as an additive as mitigation for NOx impacts.

11 F. Respondents' failure to analyze the impacts of the original LCFS
12 regulation.

13 G. Respondents' failure to analyze or discuss criteria pollutants other than
14 NOx.

15 H. Respondents' failure to analyze, quantify, or mitigate impacts found to
16 be significant and unavoidable.

17 I. Respondents' failure to analyze environmental impacts associated with
18 fuel-shuffling.

19 J. Respondents' failure to analyze environmental impacts associated with
20 exemptions for B6 to B20 biodiesel blends in areas other than the South Coast or San Joaquin
21 Air Basins.

22 K. Respondents' failure to analyze impacts associated with biodiesel blends
23 of B5 or lower.

24 L. Respondents' failure to analyze impacts associated with New
25 Technology Diesel Engines.

26 M. Respondents' failure to adopt adequate mitigation for NOx emissions
27 associated with biodiesel usage.

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1 N. Respondents' failure to consider and adopt feasible project alternatives,
2 including Growth Energy's alternative to the ADF regulation.

3 O. Respondents' failure to consider and adopt feasible project alternatives,
4 including Growth Energy's alternative to the Readopted LCFS regulation.

5 P. Respondents' estimates regarding natural gas usage.

6 Q. Respondents' LUC factor of 19.8 gCO₂e/MJ for corn ethanol.

7 R. Respondents' LUC factor of 11.8 gCO₂e/MJ for cane ethanol.

8 S. Respondents' 15-day modifications to the pilot program for alternative
9 diesel fuels.

10 T. Respondents' elimination of the Multimedia Evaluation provisions from
11 the LCFS regulation.

12 139. Under CEQA, CARB cannot ignore comments that raise significant
13 environmental issues or that offer evidence contrary to CARB's own analysis. Rather, CARB
14 must describe the disposition of each significant environmental issue raised, and set forth – in
15 detail – the reasons why any comment was rejected and why CARB considered the regulation
16 to be of overriding importance.

17 140. Conclusory comments that are unsupported by empirical information, scientific
18 authorities or explanatory information are not sufficient to discharge CARB's duties under
19 CEQA. CARB is instead required to provide the public with a good faith, reasoned analysis as
20 to why a specific comment or objection was not accepted. Far from performing that duty to
21 respond adequately, Respondents left buried in the working files of the CARB staff many
22 comments and emails that offered important clarifications, criticisms, and background
23 information on the environmental issues presented in the Readopted LCFS rulemaking.

24 141. Respondents failed to comply substantially or otherwise with 17 Cal. Code
25 Regs. § 60007(b). Nevertheless, they approved the Readopted LCFS regulation.

26 142. Respondents prejudicially abused their discretion by failing to comply with
27 CEQA and 17 Cal. Code Regs. § 60007(b). Respondents failed to proceed in the manner
28 required by law, and Respondents' decision was not supported by substantial evidence in the

1 record. Respondents also violated CEQA by failing to independently review and analyze the
2 environmental effects resulting from their approval of the Regulations. Under Section 21080.5
3 of the Public Resources Code, Petitioners are entitled to petition this Court for a writ of
4 mandate enjoining Respondents to comply with CEQA and the Board's implementing
5 regulations.

6 143. Petitioners have a clear, present and beneficial right to performance by
7 Respondents of their duties under CEQA and the Board's implementing regulations, and
8 Respondents have the responsibility and capacity to perform their duties under CEQA and the
9 Board's implementing regulations.

10 144. Petitioners also have a clear, present and beneficial interest in the issuance of a
11 writ of mandate by virtue of the facts set forth in this Petition, in that they are and will continue
12 to be adversely affected by Respondents' continuing violations of CEQA and the Board's
13 implementing regulations. The failure of Respondents to perform their duties under the law
14 requires this Court to issue a writ of mandate directing them to discharge their duties under
15 Section 1085 of the Code of Civil Procedure.

16 145. Petitioners are also entitled to a writ of mandate under Section 1085 of the Code
17 of Civil Procedure before trial on the merits of all other causes of action commanding
18 Respondents to add documents and other materials in their possession pertaining to
19 environmental issues to the file required under Section 1085 of the Code of Civil Procedure
20 and to permit additional public comment on those additional documents and other materials in
21 their possession after a reasonable and necessary period of time to review those additional
22 documents and other material.

23 **Twelfth Cause of Action -- For a Writ of Mandate Against All Respondents**
24 **(Failure to Maintain Public File Required by 17 C.C.R. § 60004(b))**

25 146. Petitioners allege and incorporate paragraphs 1 to 145 above in support of their
26 Twelfth Cause of Action.

27 147. The Board's implementing regulations for CEQA codified at 17 Cal. Code
28 Regs. § 60004(b) required Respondents to maintain a file that would comply with all elements

1 of the APA. For certified regulatory programs, strict compliance, and not merely substantial
2 compliance, with such a requirement is mandatory.

3 148. Respondents failed to comply substantially or otherwise with 17 Cal. Code
4 Regs. § 60004(b). Nevertheless, they approved the Readopted LCFS regulation.

5 149. Respondents will not correct the rulemaking file as required under 17 Cal. Code
6 Regs. § 60004(b), and that failure has disabled Petitioners from a complete assessment of
7 Respondents' activities needed in order to determine if Respondents have failed to comply with
8 CEQA and the Board's implementing regulations.

9 150. The information omitted from the rulemaking file (and/or information provided
10 after the circulation of the EA for public review and comment) also constitutes significant new
11 information such that recirculation of the EA is required under Section 21092.1 of the Public
12 Resources Code and Section 15088.5 of the CEQA Guidelines.

13 151. Respondents prejudicially abused their discretion by failing to comply with 17
14 Cal. Code Regs. § 60004(b). Under Section 21080.5 of the Public Resources Code,
15 Petitioners are entitled to petition this Court for a writ of mandate enjoining Respondents to
16 comply with CEQA and the Board's implementing regulations.

17 152. Petitioners have a clear, present and beneficial right to performance by
18 Respondents of their duties under CEQA and the Board's implementing regulations, and
19 Respondents have the responsibility and capacity to perform their duties under CEQA and the
20 Board's implementing regulations.

21 153. Petitioners also have a clear, present and beneficial interest in the issuance of a
22 writ of mandate by virtue of the facts set forth in this Petition, in that they are and will continue
23 to be adversely affected by Respondents' continuing violations of CEQA and the Board's
24 implementing regulations. The failure of Respondents to perform their duties under the law
25 requires this Court to issue a writ of mandate directing them to discharge their duties under
26 Section 1085 of the Code of Civil Procedure.

27 154. Petitioners are also entitled to a writ of mandate under Section 1085 of the Code
28 of Civil Procedure before trial on the merits of all other causes of action commanding

1 Respondents to add documents and other materials in their possession pertaining to
2 environmental issues to the file required under Section 1085 of the Code of Civil Procedure
3 and to permit additional public comment on those additional documents and other materials in
4 their possession after a reasonable and necessary period of time to review those additional
5 documents and other material.

6 **Thirteenth Cause of Action -- For Declaratory Relief Against All Respondents with**
7 **Respect to Claims Arising under CEQA and the Board's CEQA Regulations**

8 155. Petitioners allege and incorporate paragraphs 1 to 154 above in support of their
9 Thirteenth Cause of Action.

10 156. With respect to the violations of law alleged in the First through Twelfth Causes
11 of Action, there exists a clear and actual controversy between Petitioners and Respondents
12 regarding Respondents' failures to comply with CEQA, the CEQA Guidelines and the Board's
13 implementing regulations. Petitioners contend that Respondents have not complied with
14 CEQA, the CEQA Guidelines and the Board's implementing regulations, while Respondents
15 contend that they have done so.

16 157. To remedy these violations of law, Petitioners request a declaration of the duties
17 of Respondents under CEQA and the Board's implementing regulations, and a declaration that
18 Respondents have not complied with CEQA and the Board's implementing regulations. Such
19 a declaration is a necessary and proper exercise of this Court's power under section 1060 of the
20 Code of Civil Procedure and under section 11350 of the Government Code, to prevent
21 violation of the Government Code, which requires that all valid regulations shall be made "in
22 accordance with standards prescribed by other provisions of law," including CEQA, the CEQA
23 Guidelines, and the Board's implementing regulations.

24 **Fourteenth Cause of Action -- For Injunctive Relief Against All Respondents with**
25 **Respect to Claims Arising under CEQA and the Board's CEQA Regulations**

26 158. Petitioners allege and incorporate paragraphs 1 to 157 above in support of their
27 Fourteenth Cause of Action.

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1 159. With respect to the violations of law alleged in the First through Twelfth Causes
2 of Action, and as alleged in the foregoing paragraphs of the Petition, Respondents will
3 continue to proceed in a manner that will cause Petitioners harm for which they cannot be fully
4 compensated. Petitioners are therefore entitled to a permanent injunction pursuant to sections
5 525-526 of the Code of Civil Procedure commanding Respondents to cease violating CEQA,
6 the CEQA Guidelines and the Board's implementing regulations as detailed above, and to
7 follow the required legal processes for evaluating the environmental impacts of the greenhouse
8 gas regulation.

9 160. Respondents also will not correct the file required by 17 Cal. Code Regs.
10 § 60004(a) and that failure has disabled Petitioners from a complete assessment of
11 Respondents' activities needed in order to determine if Respondents have failed to comply with
12 CEQA and the Board's implementing regulations. Petitioners are therefore entitled to a
13 preliminary injunction pursuant to sections 525-526 of the Code of Civil Procedure
14 commanding Respondents to add documents and other materials in their possession pertaining
15 to environmental issues to that file and to permit additional public comment on those additional
16 documents and other materials in their possession after a reasonable and necessary period of
17 time to review those additional documents and other material.

18 **Fifteenth Cause of Action -- For a Writ of Mandate Against All Respondents**
19 **(Failure to Maintain Public File Required by Gov't Code §§ 11347.3, 11348)**

20 161. Petitioners allege and incorporate paragraphs 1 to 160 above in support of their
21 Fifteenth Cause of Action.

22 162. Pursuant to section 11347.3 of the Government Code, Respondents are required
23 to maintain a current, complete rulemaking file available to the public. In addition, section
24 11348 of the Government Code requires an agency to keep the rulemaking file "current and in
25 one central location." (Govt. Code, § 11348.) No purpose would be served by maintenance of
26 a rulemaking file that is not sufficiently "current" to permit interested members of the public to
27 review and respond to its comments in time to help shape regulatory outcomes.

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1 163. Respondents have failed to comply with the timeliness and public-access
2 requirements of Section 11347.3 of the Government Code in a substantial manner.
3 Respondents arbitrarily decided to include some of the written materials on which they relied
4 in the Readopted LCFS regulation in the public rulemaking file (including as available on the
5 Internet on the CARB website), and not other such materials. Respondents also arbitrarily
6 decided to include some written comments and other materials submitted to them in connection
7 with the approval of the Readopted LCFS regulation in that public rulemaking file, but not
8 other such materials. Respondents also waited until *after* the public comment period on the EA
9 to turn over numerous materials that should have been included in the rulemaking file.

10 164. The failure to comply with Sections 11347.3 and 11348 of the Government
11 Code was prejudicial. Without these materials, Petitioners and others were unable to review
12 and utilize the materials relied upon by Respondents in developing the Regulations.

13 165. Under Section 11342.1 of the Government Code, a regulation exceeds
14 Legislative authority if it does not comply with the requirements of the APA. Under section
15 11342.2 of the Government Code, no regulation adopted by an agency is valid and effective if
16 it is in conflict with the APA. Under section 11350 of the Government Code, regulations may
17 be declared invalid for “substantial failure” to comply with the APA.

18 166. Respondents substantially failed to comply with the requirements in the APA to
19 maintain a complete and up-to-date rulemaking file available to the public. Petitioners are
20 irreparably injured by Respondents’ noncompliance with the APA.

21 167. There exists a clear and actual controversy between Petitioners and Respondents
22 arising from Respondents’ substantial failures to comply with Sections 11347.3 and 11348 of
23 the Government Code. Petitioners contend that CARB’s failures were substantial and violate
24 the APA. Respondents disagree with those claims and will continue to proceed in a manner
25 that will force Petitioners to suffer great and irreparable harm. Petitioners cannot be fully
26 compensated for these harms.

27 168. Respondents have clear, present and ministerial duties based on the evidence
28 placed before them to comply with the APA, by providing sufficient notice of proposed

1 changes in regulations that were not otherwise described in the notice of a proposed
2 rulemaking action. The substantial failure of Respondents to perform their duties requires this
3 Court to issue a writ of mandate pursuant to Section 1085 of the Code of Civil Procedure
4 directing them to discharge their duties.

5 169. Petitioners also have a clear, present and beneficial interest in the issuance of a
6 writ of mandate by virtue of the facts set forth in this Petition, in that they are and will continue
7 to be adversely affected by Respondents' noncompliance with the APA. The substantial
8 failure of Respondents to perform their duties under the law requires this Court to issue a writ
9 of mandate directing them to discharge their duties.

10 **Sixteenth Cause of Action -- For a Writ of Mandate Against the CARB Executive Officer**
11 **(Noncompliance with Govt. Code § 11346.8(c))**

12 170. Petitioners allege and incorporate paragraphs 1 to 169 above in support of their
13 Sixteenth Cause of Action.

14 171. The APA provides, "No state agency may adopt, amend or repeal a regulation
15 which has been changed from that which was originally made available to the public . . . unless
16 the change is . . . sufficiently related to the original text that the public was adequately placed
17 on notice that the change could result from the originally proposed regulatory action." (Govt.
18 Code, § 11346.8, subd. (c); *see also* 1 Cal. Code Regs., § 42 [to be "sufficiently related,"
19 changes must be such that "a reasonable member of the directly affected public could have
20 determined from the [original text of the] notice that these changes to the regulation could have
21 resulted."].)

22 172. Despite the above authorities, Respondents made several substantive changes to
23 the Regulations following the circulation of the ISOR for public comment, including:

- 24 A. An exemption for producers or importers allowing sales of B6 to B20 in
25 areas other than the South Coast or San Joaquin Air basins;
26 B. CARB's modifications to the pilot program for alternative diesel fuels;
27 and

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1 C. CARB's elimination of the Multimedia Evaluation provisions from the
2 LCFS regulation.

3 173. The Executive Officer's action described herein substantially failed to comply
4 with the requirements of the APA. Petitioners are irreparably injured by Respondents'
5 noncompliance with the APA.

6 174. There exists a clear and actual controversy between Petitioners and Respondents
7 arising from the Executive Officer's substantial failure to comply with section 11346.8(c) of
8 the Government Code. Petitioners contend that the Executive Officer's failure was substantial
9 and violated the APA. Respondents disagree with those claims and will continue to proceed in
10 a manner that will force Petitioners to suffer great and irreparable harm. Petitioners cannot be
11 fully compensated for these harms

12 175. Respondents have clear, present and ministerial duties based on the evidence
13 placed before them to comply with the APA, by providing sufficient notice of proposed
14 changes in regulations that were not otherwise described in the notice of a proposed
15 rulemaking action. The substantial failure of the Executive Officer to perform his duty
16 requires this Court to issue a writ of mandate pursuant to Section 1085 of the Code of Civil
17 Procedure directing them to discharge their duties.

18 176. Petitioners also have a clear, present and beneficial interest in the issuance of a
19 writ of mandate by virtue of the facts set forth in this Petition, in that they are and will continue
20 to be adversely affected by the Executive Officer's noncompliance with the APA. The
21 substantial failure of the Executive Officer to perform his duty under the law requires this
22 Court to issue a writ of mandate directing him to discharge his duty.

23 **Seventeenth Cause of Action -- For a Writ of Mandate Against the Board and the CARB**
24 **Executive Officer (Noncompliance with Health & Safety Code § 57004)**

25 177. Petitioners allege and incorporate paragraphs 1 to 176 above in support of their
26 Seventeenth Cause of Action.

27 178. Section 57004 of the Health & Safety Code provides that CARB shall not "take
28 any action to adopt the final version of a rule unless" it undertakes a peer review to evaluate

1 the scientific basis for the rule. (Health & Safety Code, § 57004, subd. (d).) Among other
2 things, CARB must submit “the scientific portion of the proposed rule” — in this instance, the
3 regulation that the staff has proposed for final approval by the Board as a replacement for the
4 Readopted LCFS regulation — for review by an appropriate “external scientific peer review
5 entity,” along with “a statement of the scientific findings, conclusions, and assumptions on
6 which the scientific portions of the proposed rule are based and the supporting scientific data,
7 studies, and other appropriate materials.” (*Id.*, § 57004, subd. (d) (1).) The “external scientific
8 peer review entity” must then “prepare a written report.” That report must “contain[] an
9 evaluation of the scientific basis for the proposed rule.” (*Id.*, § 57004, subd. (d)(2).)

10 179. Section 57004 of the Health and Safety Code defines the “scientific portions” of
11 a proposed rule to include “those foundations of a rule that are premised upon, or derived from,
12 *empirical data or other scientific findings, conclusions, or assumptions* establishing a
13 regulatory level, standard, or other requirement for the protection of public health or the
14 environment.” (Health & Safety Code, § 57004, subd. (a)(2) [emphasis added].)

15 180. The external peer review for the LCFS regulation did not comply with Section
16 57004 of the Health and Safety Code for the following reasons:

17 A. The peer reviewers did not evaluate all of the scientific portions of the
18 Regulations;

19 B. The peer review process was not performed by a peer review “entity,”
20 but rather four individual reviewers;

21 C. CARB failed to provide the peer reviewers with all of the relevant
22 scientific information and data available to CARB Staff related to the adverse air quality
23 impacts associated with biodiesel;

24 D. CARB failed to utilize peer reviewers who previously assisted CARB
25 with the original LCFS regulation, but whose comments were not uniformly supportive of the
26 LCFS regulations;

27 E. The peer reviewers demonstrated bias in favor of CARB; and

28 F. The peer reviewers lacked both the expertise required to adequately peer

1 review the Regulations, as well as a basic understanding of the Regulations.

2 181. The foregoing omissions from external peer review were prejudicial, in part
3 because the direct carbon intensity values assigned to the sugarcane ethanol pathways, the
4 carbon emissions attributed to land-use change, and the impact of DGS on indirect land-use
5 change each has a significant impact on the relative overall carbon intensity values assigned to
6 different types of ethanol, and the “signal” sent to the gasoline industry about how to comply
7 with the Readopted LCFS regulation. If the statutorily-mandated peer review had been
8 conducted, the Board and the public could have received independent judgments about the
9 validity of, and defects within, the analysis of those crucial elements in the Readopted LCFS
10 regulation developed by the CARB staff and CARB’s contractors.

11 182. Respondents have substantially failed to comply with the Health & Safety Code
12 by taking action to adopt the final version of the Readopted LCFS regulation, despite the
13 noncompliance with the peer review provisions of the Code. It was a violation of the Health &
14 Safety Code for CARB to take “any action” to approve the Readopted LCFS regulation
15 without obtaining external scientific peer review of the scientific basis for important parts of
16 the analysis used to establish the carbon intensity values in the Readopted LCFS regulation.
17 (Health & Safety Code, § 57004, subd. (d).) The approval of the Regulations by CARB in
18 September 2015 were “actions” prohibited by the Health & Safety Code. Petitioners are
19 irreparably injured by Respondents’ noncompliance with the Health & Safety Code.

20 183. There exists a clear and actual controversy between Petitioners and Respondents
21 arising from Respondents’ substantial failure to comply with section 57004(d) of the Health &
22 Safety Code. Petitioners contend that Respondents’ failures are substantial and violate the
23 Health & Safety Code. Respondents disagree with those claims. Respondents will continue to
24 proceed in a manner that will force Petitioners to suffer great and irreparable harm as a result
25 of the violations of law alleged in this Cause of Action.

26 184. Respondents have clear, present, and ministerial duties to comply with the
27 Health & Safety Code, including the provisions for peer review that applied to the rulemaking
28 for the Regulations. Those duties include an obligation to obtain external scientific peer

1 review of the CARB staff's basis for assigning the specific values chosen for the direct
2 emissions of the sugarcane ethanol pathways, the carbon emissions from land-use change, and
3 the impact of DGS production and use on indirect land-use change. The substantial failure of
4 Respondents to perform their duties requires this Court to issue a writ of mandate pursuant to
5 Section 1085 of the Code of Civil Procedure directing them to discharge their duties.

6 **Eighteenth Cause of Action -- For a Writ of Mandate Against the Board and the**
7 **CARB Executive Officer (Noncompliance with AB 32)**

8 185. Petitioners allege and incorporate paragraphs 1 to 184 above in support of their
9 Eighteenth Cause of Action.

10 186. AB 32 requires Respondents, “[p]rior to the inclusion of any market based
11 compliance mechanism in the regulations,” to “(1) [c]onsider the potential for direct, indirect,
12 and cumulative emission impacts from these mechanisms, including localized impacts in
13 communities that are already adversely impacted by air pollution,” and “(2) [d]esign any
14 market-based compliance mechanism to *prevent any increase* in the emissions of toxic air
15 contaminants or criteria air pollutants.” (Health & Safety Code, § 38570, subd. (b) [emphasis
16 added].) In addition, for any regulation adopted under AB32, like the Regulations, the Board
17 must “*ensure . . . activities undertaken pursuant to the regulations do not interfere with . . .*
18 *efforts to achieve and maintain federal and state ambient air quality standards.*” (*Id.* §
19 38562(b)(4); emphasis added).)

20 187. As an initial matter, Respondents’ analysis of the Regulations is incomplete
21 under AB 32 because Respondents did not analyze the “localized impacts” of the Regulations
22 “in communities that are already adversely impacted by air pollution,” such as the San Joaquin
23 Valley, as required under AB 32.

24 188. In addition, the Regulations would actually increase NOx emissions from
25 biodiesel, as explained above. As a result, the Regulations do not meet AB’s 32’s requirement
26 of developing a “market-based compliance mechanism to *prevent any increase* in the
27 emissions” of criteria pollutants, nor do they “*ensure . . . activities undertaken pursuant to the*
28

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1 regulations do not interfere with . . . efforts to achieve and maintain federal and state ambient
2 air quality standards,” as required under AB 32.

3 189. There exists a clear and actual controversy between Petitioners and Respondents
4 arising from Respondents’ substantial failure to comply with AB 32. Petitioners contend that
5 the Respondents’ failure was substantial and violated AB 32. Respondents disagree with those
6 claims and will continue to proceed in a manner that will force Petitioners to suffer great and
7 irreparable harm. Petitioners cannot be fully compensated for these harms. Petitioners are
8 irreparably injured by Respondents’ noncompliance with AB 32.

9 190. Respondents have clear, present and ministerial duties based on the comments
10 placed before them, to comply with AB 32. The substantial failure of Respondents to perform
11 their duties requires this Court to issue a writ of mandate pursuant to Section 1085 of the Code
12 of Civil Procedure directing them to discharge their duties.

13 191. Petitioners also have a clear, present and beneficial interest in the issuance of a
14 writ of mandate by virtue of the facts set forth in this Petition, in that they are and will continue
15 to be adversely affected by Respondents’ noncompliance with AB 32. The substantial failure
16 of Respondents to perform their duties under the law requires this Court to issue a writ of
17 mandate directing them to discharge their duties.

18 **Nineteenth Cause of Action -- For Declaratory Relief Against All Respondents with**
19 **Respect to Claims Arising under the APA and the Health & Safety Code**

20 192. Petitioners allege and incorporate paragraphs 1 to 191 above in support of their
21 Nineteenth Cause of Action.

22 193. With respect to the violations of law alleged in the Fifteenth through Eighteenth
23 Causes of Action, there exists a clear and actual controversy between Petitioners and
24 Respondents regarding Respondents’ failures to comply with the APA and the Health & Safety
25 Code. Petitioners contend that Respondents have not complied with the APA and the Health &
26 Safety Code, while Respondents contend that they have done so.

27 194. To remedy these violations of law, Petitioners request a declaration of the duties
28 of Respondents under the APA and the Health & Safety Code, and a declaration that

1 Respondents have not complied with the APA and the Health & Safety Code. Such a
2 declaration is a necessary and proper exercise of this Court's power under section 1060 of the
3 Code of Civil Procedure and under section 11350 of the Government Code, to prevent
4 violation of the Government Code, which requires that all valid regulations shall be made "in
5 accordance with standards prescribed by other provisions of law," including the APA and the
6 Health & Safety Code.

7 **Twentieth Cause of Action -- For Injunctive Relief Against All Respondents with Respect**
8 **to Claims Arising under the APA and the Health & Safety Code**

9 195. Petitioners allege and incorporate paragraphs 1 to 194 above in support of their
10 Twentieth Cause of Action.

11 196. With respect to the violations of law alleged in the Fifteenth through Eighteenth
12 Causes of Action, and as alleged in the foregoing paragraphs of the Petition, Respondents will
13 continue to proceed in a manner that will cause Petitioners harm for which they cannot be fully
14 compensated. Petitioners are therefore entitled to a permanent injunction pursuant to sections
15 525-526 of the Code of Civil Procedure commanding Respondents to cease violating the APA
16 and the Health & Safety Code as detailed above.

17 197. Respondents will not comply with the requirements of Section 11347.3 of the
18 Government Code that failure has disabled Petitioners from a complete assessment of
19 Respondents' activities needed in order to determine if Respondent have failed to comply with
20 the APA and the Health & Safety Code. Petitioners are therefore entitled to a preliminary
21 injunction pursuant to Sections 525-526 of the Code of Civil Procedure commanding
22 Respondents to add documents and other materials in their possession pertaining to rulemaking
23 file and to permit additional public comment on those additional documents and other materials
24 in their possession after a reasonable and necessary period of time to review those additional
25 documents and other material.

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PRAYER FOR RELIEF

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WHEREFORE, in addition to the preliminary injunctive relief sought in the Fourteenth and Twenty-Fifth Causes of Action, Petitioners pray for judgment as follows:

1. For writs of mandate, as specified in Petitioners' First through Twelfth and Fifteenth through Eighteenth Causes of Action;

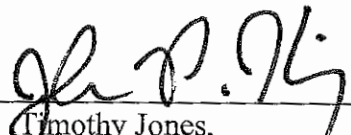
2. For declaratory relief with respect to the violations of law alleged in Petitioners' First through Twelfth, as specified in Petitioners' Thirteenth Cause of Action, and Fifteenth through Eighteenth Causes of Action, as specified in Petitioners' Nineteenth Cause of Action;

3. For an injunction restraining the violations of law alleged in Petitioners' First through Twelfth, as specified in Petitioners' Fourteenth Cause of Action, and Fifteenth through Eighteenth Causes of Action, as specified in Petitioners' Twentieth Cause of Action; and

4. For fees and costs available under the laws of California, incidental or necessary in procuring the relief sought in this petition, and for such other relief that the Court deems just and proper under California law.

DATED: October 30, 2015

WANGER JONES HELSLEY PC

By  For
Timothy Jones,
Attorneys for Petitioners and Plaintiffs

VERIFICATION
[CCP §§ 446, 1096]

I, Jeff Lutt, am the President and Chief Executive Officer of POET, LLC a petitioner in this action. I am authorized to execute this verification on behalf of POET, LLC.

I have read the foregoing Verified Petition for Writ of Mandate; Complaint for Declaratory and Injunctive Relief (the "Verified Petition"), and am familiar with its contents.

All facts alleged in the Verified Petition are either true of my own knowledge, or as I am informed and believe them to be true, and on that basis allege them to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 29th day of October, 2015, in Wichita, Kansas, ~~South Dakota~~.


Jeff Lutt

VERIFICATION
[CCP §§ 446, 1096]

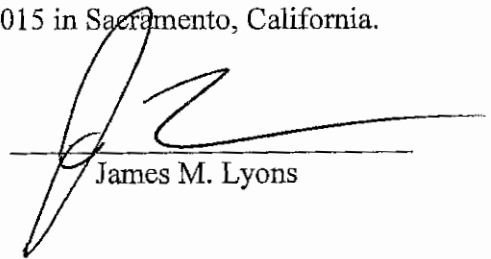
I, James M. Lyons, am one of the petitioners in this action and a resident of the State of California. As such, I make the following verification.

I have read the foregoing Verified Petition for Writ of Mandate; Complaint for Declaratory and Injunctive Relief (the "Verified Petition"), and am familiar with its contents.

All facts alleged in the Verified Petition are either true of my own knowledge, or as I am informed and believe them to be true, and on that basis allege them to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 29th day of October, 2015 in Sacramento, California.



James M. Lyons

**VERIFIED PETITION FOR WRIT OF MANDATE;
COMPLAINT FOR DECLARATORY AND
INJUNCTIVE RELIEF**

EXHIBIT "A"

WANGER JONES HELSLEY PC
ATTORNEYS



OLIVER W. WANGER
TIMOTHY JONES*
MICHAEL S. HELSLEY
PATRICK D. TOOLE
SCOTT D. LAIRD
JOHN P. KINSEY
KURT F. VOTE
TROY T. EWELL
PETER M. JONES**
JAY A. CHRISTOFFERSON**
MARISA L. BALCH
JENA M. HARLOS***
JOSIAH M. PRENDERGAST
MICAELA L. NEAL
CAMERON M. PEYTON
DYLAN J. GROSSBY

265 E. RIVER PARK CIRCLE, SUITE 310
FRESNO, CALIFORNIA 93720

MAILING ADDRESS
POST OFFICE BOX 28340
FRESNO, CALIFORNIA 93720

TELEPHONE
(559) 233-4000

FAX
(559) 233-9330

OFFICE ADMINISTRATOR
LYNN M. HOFFMAN

Writer's E-Mail Address:
ljones@wjhattorneys.com

Website:
www.wjhattorneys.com

* Also admitted in Washington
** Of Counsel
*** Also admitted in Wisconsin

October 29, 2015

VIA FACSIMILE 916-322-3928 & OVERNIGHT COURIER

Honorable Members of the Board
Attn: Clerk of the Board
CALIFORNIA AIR RESOURCES BOARD
1001 "I" Street
P.O. Box 2815
Sacramento, California 95812

RE: **Notice of Intent to Sue**
October 2, 2015, Notice of Decision
("Re-Adoption of the Low Carbon Fuel Standard Regulation")
October 2, 2015, Notice of Decision
("Regulation on the Commercialization of Alternative Diesel Fuels")

Dear Members of the Board:

PLEASE TAKE NOTICE under Public Resources Code § 21167.5, that on or about October 30, 2015, Petitioners POET, LLC and James M. Lyons (collectively "Petitioners") will file a petition for writ of mandate in Fresno County Superior Court challenging actions of Respondents the California Air Resources Board ("CARB"), Richard Corey, Lori Andreoni, and Ellen Peter (collectively "Respondents") pursuant to the California Environmental Quality Act, Public Resources Code, Section 21000 *et seq.*

Petitioners allege that in connection with their actions and approvals described in the October 2, 2015, Notice of Decision ("Re-Adoption of the Low Carbon Fuel Standard Regulation") and the October 2, 2015, Notice of Decision ("Regulation on the Commercialization of Alternative Diesel Fuels"), Respondents violated CEQA by failing to

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{7011/003/00579781.DOC}

EXHIBIT "A"

WANGER JONES HELSLEY PC

Honorable Members of the Board
Attn: Clerk of the Board
October 29, 2015
Page 2

proceed in the manner required by law, and by failing to support their findings by substantial evidence. Respondents' errors under CEQA were a prejudicial abuse of discretion.

Very truly yours,

Timothy Jones

Belinda Ordway

From: Belinda Ordway [bordway@wjhattorneys.com]
Sent: Thursday, October 29, 2015 3:59 PM
To: Belinda Ordway
Subject: Transmission Result : OK Fax Message NO.1275
Attachments: 20151029155926591.tif

This E-mail was sent from "RNP0026739414F3" (MP C6502).

Queries to: ricohuser@wjhattorneys.com

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Time : 2015/10/29 15:58

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Reason for error
E.1) Hang up or line fail
E.2) Busy
E.3) No answer
E.4) No facsimile connection
E.5) Exceeded max. E-mail size
E.6) Destination does not support IP-Fax

WANGER JONES HELSLEY PC
ATTORNEYS



OLIVER W. WANGER
TIMOTHY JONES*
MICHAEL S. HELSLEY
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SCOTT D. LAIRD
JOHN P. KINSEY
KURT F. VOTE
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MARISA L. BALCH
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MICAELA L. NEAL
CAMERON M. PEYTON
DYLAN J. GROSBY

265 E. RIVER PARK CIRCLE, SUITE 310
FRESNO, CALIFORNIA 93720

MAILING ADDRESS
POST OFFICE BOX 28340
FRESNO, CALIFORNIA 93729

TELEPHONE
(559) 233-4800

FAX
(559) 233-9330

OFFICE ADMINISTRATOR
LYNN M. HOFFMAN

Writer's E-Mail Address:
ljones@wjhallorneys.com

Website:
www.wjhallorneys.com

* Also admitted in Washington
** Of Counsel
*** Also admitted in Wisconsin

October 29, 2015

VIA FACSIMILE 916-323-1045 & OVERNIGHT COURIER

Mr. Richard Corey
CALIFORNIA AIR RESOURCES BOARD
1001 "I" Street
P.O. Box 2815
Sacramento, California 95812

RE: **Notice of Intent to Sue**
October 2, 2015, Notice of Decision
("Re-Adoption of the Low Carbon Fuel Standard Regulation")
October 2, 2015, Notice of Decision
("Regulation on the Commercialization of Alternative Diesel Fuels")

Dear Mr. Corey:

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Petitioners allege that in connection with their actions and approvals described in the October 2, 2015, Notice of Decision ("Re-Adoption of the Low Carbon Fuel Standard Regulation") and the October 2, 2015, Notice of Decision ("Regulation on the Commercialization of Alternative Diesel Fuels"), Respondents violated CEQA by failing to

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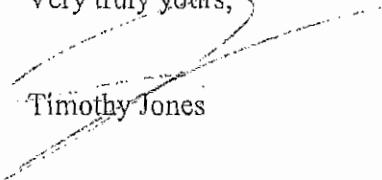
{7011/003/00579786.DOC}

WANGER JONES HELSLEY PC

Mr. Richard Corey
October 29, 2015
Page 2

proceed in the manner required by law, and by failing to support their findings by substantial evidence. Respondents' errors under CEQA were a prejudicial abuse of discretion.

Very truly yours,



Timothy Jones

Belinda Ordway

From: Belinda Ordway [bordway@wjhatorneys.com]
Sent: Thursday, October 29, 2015 4:01 PM
To: Belinda Ordway
Subject: Transmission Result : OK Fax Message NO.1277
Attachments: 20151029160124880.tif

This E-mail was sent from "RNP0026739414F3" (MP C6502).

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***** Communication Result Report(2015.10.29 16:01) *****

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Time : 2015/10/29 15:59

[Dest.] G3 :19163231045
[Sent Page/Total Page] 3/ 3 [Result] OK

Reason for error

- E.1) Hang up or line fail
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- E.4) No facsimile connection
- E.5) Exceeded max. E-mail size
- E.6) Destination does not support IP-Fax

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ATTORNEYS



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SCOTT D. LAIRD
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KURT F. VOTE
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265 E. RIVER PARK CIRCLE, SUITE 310
FRESNO, CALIFORNIA 93720

MAILING ADDRESS
POST OFFICE BOX 28340
FRESNO, CALIFORNIA 93729

TELEPHONE
(559) 233-4800

FAX
(559) 233-9330

OFFICE ADMINISTRATOR
LYNN M. HOFFMAN

Writer's E-Mail Address:
tjones@wjhatorneys.com

Website:
www.wjhatorneys.com

* Also admitted in Washington
** Of Counsel
*** Also admitted in Wisconsin

October 29, 2015

VIA FACSIMILE 916-322-3928 & OVERNIGHT COURIER

Ms. Lori Andreoni
CALIFORNIA AIR RESOURCES BOARD
1001 "I" Street
P.O. Box 2815
Sacramento, California 95812

RE: **Notice of Intent to Sue**
October 2, 2015, Notice of Decision
("Re-Adoption of the Low Carbon Fuel Standard Regulation")
October 2, 2015, Notice of Decision
(Regulation on the Commercialization of Alternative Diesel Fuels")

Dear Mr. Corey:

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{7011/003/00579789.DOC}

WANGER JONES HELSLEY PC

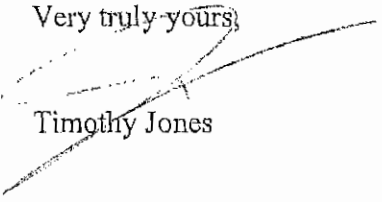
Ms. Lori Andreoni

October 29, 2015

Page 2

proceed in the manner required by law, and by failing to support their findings by substantial evidence. Respondents' errors under CEQA were a prejudicial abuse of discretion.

Very truly yours,


Timothy Jones

Belinda Ordway

From: Belinda Ordway [bordway@wjhattorneys.com]
Sent: Thursday, October 29, 2015 4:01 PM
To: Belinda Ordway
Subject: Transmission Result : OK Fax Message NO.1276
Attachments: 20151029160030280.tif

This E-mail was sent from "RNP0026739414F3" (MP C6502).

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***** Communication Result Report(2015.10.29 16:00) *****

Sender:
Time : 2015/10/29 15:59

[Dest.] G3 :19163223928
[Sent Page/Total Page] 3/ 3 [Result] OK

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- E.1) Hang up or line fail
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WANGER JONES HELSLEY PC
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KURT F. VOTE
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265 E. RIVER PARK CIRCLE, SUITE 310
FRESNO, CALIFORNIA 93720

MAILING ADDRESS
POST OFFICE BOX 28340
FRESNO, CALIFORNIA 93729

TELEPHONE
(559) 233-4800

FAX
(569) 233-9330

OFFICE ADMINISTRATOR
LYNN M. HOFFMAN

Writer's E-Mail Address:
ljones@wjhatorneys.com

Website:
www.wjhatorneys.com

* Also admitted in Washington
** Of Counsel
*** Also admitted in Wisconsin

October 29, 2015

VIA FACSIMILE 916-322-4743 & OVERNIGHT COURIER

Ellen M. Peter, Chief Counsel
CALIFORNIA AIR RESOURCES BOARD
1001 "I" Street
P.O. Box 2815
Sacramento, California 95812

RE: **Notice of Intent to Sue**
October 2, 2015, Notice of Decision
("Re-Adoption of the Low Carbon Fuel Standard Regulation")
October 2, 2015, Notice of Decision
("Regulation on the Commercialization of Alternative Diesel Fuels")

Dear Mr. Corey:

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{7011/003/00579788.DOC}

WANGER JONES HELSLEY PC

Ellen M. Peter, Chief Counsel

October 29, 2015

Page 2

proceed in the manner required by law, and by failing to support their findings by substantial evidence. Respondents' errors under CEQA were a prejudicial abuse of discretion.

Very truly yours,

Timothy Jones

Belinda Ordway

From: Belinda Ordway [bordway@wjhatterneys.com]
Sent: Thursday, October 29, 2015 4:03 PM
To: Belinda Ordway
Subject: Transmission Result : OK Fax Message NO.1278
Attachments: 20151029160233211.tif

This E-mail was sent from "RNP0026739414F3" (MP C6502).

Queries to: ricohuser@wjhatterneys.com

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Time : 2015/10/29 16:00

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[Sent Page/Total Page] 3/ 3 [Result] OK

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- E.4) No facsimile connection
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