

IN THE
Court of Appeal of the State of California

IN AND FOR THE
Fifth Appellate District

COURT OF APPEAL
FIFTH APPELLATE DISTRICT
FILED

JUN - 3 2013

By _____ Deputy

POET, LLC et al.,

Plaintiffs and Appellants,

v.

CALIFORNIA AIR RESOURCES BOARD
et al.,

Defendants and Respondents.

F064045

(Fresno Sup. Ct. No. 09CECG04659)

BY THE COURT:

The court requests input from counsel regarding the terms of this court's possible disposition in this appeal. Attached to this letter is a tentative disposition. We invite your comments and suggestions, particularly with respect to the consequences and ramifications that may result from implementing the directions included in the disposition. **Your responses must be received no later than 5 p.m., June 11, 2013.** If your comments or proposed revisions are extensive, please feel free to present a proposed disposition of your own. In any event, your revisions or proposed disposition should be consistent with the following assumptions:

1. This court determines ARB violated CEQA because (1) the LCFS regulations were "approved" for purposes of CEQA on April 25, 2010, and that the decision-making function was split between the Board and the Executive Officer and (2) ARB improperly deferred the formulation of mitigation measures for the increase of NOx that might result from the increased use of biodiesel fuel caused by the LCFS regulations.

2. ARB's "decision" to approve the LCFS regulation and its "decision" to defer the formulation of mitigation measures regarding increased NOx emissions from biodiesel shall "be voided [(i.e., set aside)] by the public agency ... in whole" pursuant to Public Resources Code section 21168.9, subdivision (a)(1).

3. The voiding of these two "decisions" does not suspend the operation of the LCFS regulation—that is, it does not "suspend any or all specific project ... activities" for

purposes of section 21168.9, subdivision (a)(2). Thus, the LCFS will continue to operate.

4. The remedy adopted to address the CEQA violations will be sufficient to redress the violations of the APA.¹

Because the disposition requires the superior court to issue a writ of mandate, this court prefers that the disposition be drafted so the superior court can take the language from the disposition and insert it into the peremptory writ of mandate, rather than placing the superior court in a position of drafting the directions included in the writ. Please take this into account when proposing changes to the disposition or drafting an alternate disposition. Topics of interest to this court include:

(1) Timing and Deadlines. Should the disposition impose deadlines by which ARB must take the “specific action ... necessary to bring the ... decision into compliance with [CEQA]” (§ 21168.9, subd. (a)(3))?

(2) Status Quo. Pursuant to the court’s equitable powers referenced in section 21168.9, subdivision (c), should the disposition maintain the status quo by keeping the 2013 standards in effect until the corrective action is taken? Alternatively, should the LCFS regulation’s 2014 standards be allowed to be implemented even if the corrective action is not completed before year’s end? If the 2013 standards remain in effect until the corrective action is taken, what event shall be regarded as the end of that corrective action—the approval of the LCFS regulation by the Office of Administrative Law or some other event?

(3) Decision Maker. Should the disposition explicitly require ARB to take such action as may be necessary to assure that the decision maker chosen by ARB has full authority to approve or disapprove the LCFS regulations (or a modified version of the regulations)?²

¹ The court does not intend to publish its analysis of the statutory provisions that address the contents of the rulemaking file because, among other things, the arguments presented by counsel here and in the superior court did not consider the effect of Proposition 59, known as the “Sunshine Initiative” (Cal. Const., art. 1, § 3, subd. (b)), on the interpretation of the statute.

² The court does not intend to specify whether the Board or the Executive Officer should be the decision maker because that choice is committed to the agency’s discretion. (§ 21168.9, subd. (c).)

(5) Comment Period. Should the disposition explicitly state that, during the comment period preceding the possible reapproval of the LCFS regulation, the public shall be allowed to comment on the specific issues, such as the carbon intensity values attributed to land use changes including, without limitation, issues involving the application of the GTAP model and matters presented in the four emails? Alternatively, should the disposition remain silent as to the scope of issues to be addressed during the comment period because the reapproval necessarily opens all matters for reconsideration and comment?

(6) NOx Emissions. What is the proper framework for considering the NOx emissions? Should the potential adverse effect on the environment be considered by addressing NOx emissions (a) resulting from the LCFS regulation as a whole, (b) resulting from alternate fuels, including biodiesel, on an alternate-fuel-by-alternate-fuel basis, or (c) some other basis? If it is appropriate for ARB to consider changes to NOx emission caused by the LCFS regulation as a whole, should ARB be given an opportunity to make findings as to the regulation's overall impact on NOx emissions?

(7) Initial Return to Writ. Should ARB be required to file an initial return to the writ of mandate explaining what action it will take to satisfy the writ, identifying who will act as the decision maker, and setting forth a schedule for the corrective actions? If so, should a specific deadline for filing the initial return be set or is it sufficient to require the initial return to be filed within a reasonable time and allow the superior court to decide any dispute about whether ARB filed the initial return within a reasonable time? Please note that a rationale for requiring an initial return is that any objections to the proposed plan and schedule of corrective action can be raised by plaintiffs and decided by the trial court *before* ARB implements the corrective action.

 Acting P.J.

[TENTATIVE] DISPOSITION

The judgment is reversed and the matter remanded for further proceedings. The superior court is directed (1) to vacate its decision denying the petition for writ of mandate and granting the Air Resources Board's motion to strike and (2) to enter a new order that (a) denies the motion to strike and (b) grants the petition for writ of mandate.

The superior court shall issue a peremptory writ of mandate that compels the Air Resources Board to take the following action:

(1) Set aside its approval of the LCFS regulations and its decision to defer the formulation of mitigation measures relating to NOx emission from biodiesel.

(2) In the event the Air Resources Board decides to reapprove the LCFS regulations or a modified version of the regulations, (a) select a decision maker, (b) take such action as may be necessary to assure that the decision maker has full authority to approve or disapprove the LCFS regulations or a modified version of the regulations, and (c) take such action as may be necessary to assure the decision maker does not approve the LCFS regulations or a modified version of the regulations until after the environmental review is completed.

(3) Commit to specific performance criteria if the formulation of any mitigation measures relating to NOx emission from biodiesel is deferred or, alternatively, make findings of fact supported by substantial evidence that mitigation is not required.

(4) Allow public comments on the issue of the carbon intensity values attributed to land use changes (which shall include, without limitation, issues involving the application of the GTAP model) and respond to those comments before approving the LCFS regulations.

(5) Include the four emails in its rulemaking file.

(6) Preserve the status quo by continuing to adhere to the LCFS regulations standards in effect for 2013 until the corrective action is completed.

The superior court shall require ARB to proceed in good faith without unnecessary delay.³ In addition, the superior court shall retain jurisdiction over the proceedings by way of a return to the writ⁴ and shall require ARB to file an initial return explaining what action it will take to satisfy the writ's requirements, which explanation shall include a schedule and shall identify who will act as the decision maker.

Costs on appeal are awarded to plaintiffs.

³ In the event ARB fails to abide by proceed in good faith with reasonable diligence, the superior court immediately shall direct ARB to set aside the LCFS regulations (i.e., suspend the operation and enforcement of the regulations).

⁴ The statutory requirement for a return is set forth in section 21168.9, subdivision (b) and has been included in our dispositions in early appeals. (E.g., *Valley Advocates v. City of Fresno* (2008) 160 Cal.App.4th 1039, 1075; *County Sanitation Dist. No. 2 v. County of Kern* (2005) 127 Cal.App.4th 15, 1637.)