

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOR THE FIFTH APPELLATE DISTRICT**

Civil No. F064045

POET, LLC and JAMES M. LYONS

Petitioners/Appellants,

v.

CALIFORNIA AIR RESOURCES BOARD, et al.

Respondents/Appellees.

Appeal from the Superior Court of the State of California
in and for the County of Fresno
The Honorable Jeffrey Y. Hamilton, Jr.
Fresno County Superior Court No.: 09 CE CG 04659

**APPLICATION TO FILE *AMICI CURIAE* LETTER BRIEF and
LETTER BRIEF OF *AMICI CURIAE* NATIONAL BIODIESEL BOARD AND
CALIFORNIA BIODIESEL ALLIANCE IN SUPPORT OF
RESPONDENTS/APPELLEES**

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**APPLICATION TO FILE *AMICI CURIAE* LETTER BRIEF
IN SUPPORT OF RESPONDENTS/APPELLEES**

INTRODUCTION

Pursuant to California Rules of Court, Rule 8.200(c), *amici* National Biodiesel Board and California Biodiesel Alliance respectfully request leave to file the accompanying letter brief in support of Respondent, California Air Resources Board (CARB). The attached brief is in letter form based on the Court's correspondence dated February 26, 2013 (the "Issue Letter"), which requests the filing of letter briefs.

INTEREST OF *AMICI CURIAE*

The National Biodiesel Board (NBB), a national non-profit trade association, serves as the unifying coordinator for biodiesel research and development in the United States. Established in 1992, NBB has approximately 400 members nationwide comprised of biodiesel producers; state, national and international feedstock and feedstock processor organizations; fuel marketers and distributors; and technology providers. The NBB and its members are committed to environmental sustainability and expanding use of renewable, lower emission fuels in the United States. To this end, the NBB has been an active participant in the administrative

rulemaking process on issues such as the Low Carbon Fuel Standard (LCFS), U.S. EPA Clean Air Attainment, and criteria pollutant controls.

The California Biodiesel Alliance (CBA) is a not-for-profit trade association promoting the use and production of high quality, renewable biodiesel fuel in California. Since 2006, CBA has participated in important issues relating to biodiesel in the state and at the national level. CBA was an active participant in the LCFS rulemaking process and has also been involved in other important issues including, but not limited to, the CDFA Division of Measurement Standards (DMS) fuel variance program, biodiesel pump labeling regulations, and underground storage tank and dispenser rules.

The questions presented by the Court in its Issue Letter raise issues of vital concern to the membership of the NBB and the CBA. An injunction disrupting LCFS regulations would directly impact the biodiesel industry's market growth and affect current and future investment in production, feedstock research and development, and distribution infrastructure. If LCFS regulations are not allowed to remain operative, advancements in biodiesel fuel technology will be chilled and the long-term health of California's

citizens and natural environment substantially harmed.

For the reasons discussed above, *amici* have a substantial interest in ensuring that the issues presented by the Court in its Issue Letter are justly and properly determined on appeal. The accompanying letter brief is timely filed within 14 days of Appellants' last brief, as required by Rule 8.200(c)(1) of the California Rules of Court. Alternatively, good cause exists for the filing of the proposed letter brief because the Court's Issue Letter specifically requests argument relating to, among other things, (i) the continued operation of LCFS; and (ii) nitrogen oxide emissions from biodiesel. The accompanying letter brief addresses these important issues and will assist the Court in its consideration of this case.

No party or counsel for a party in the appeal, or any other person or entity other than the proposed amici and their counsel authored the proposed letter brief in whole or in part or contributed monetarily to the preparation or submission of the proposed letter brief.

CONCLUSION

NBB and CBA respectfully request that the Court grant their application for leave to file the accompanying *amici curiae* letter

brief in this appeal.

Dated: April 2, 2013

KAHN, SOARES & CONWAY, LLP

By:



Louie A. Brown/Joshua J.
Bettencourt, Attorneys for
NATIONAL BIODIESEL
BOARD and CALIFORNIA
BIODIESEL ALLIANCE

April 2, 2013

Hon. Brad R. Hill, Administrative Presiding Justice
Honorable Associate Justices
Fifth District Court of Appeal
2424 Ventura Street
Fresno, California 93721

Re: Letter Brief of *Amici Curiae* In Support Of Respondents/Appellees

***Poet, LLC & James M. Lyons v. California Air Resources Board, et al.*; Case No. F064045**

Dear Administrative Presiding Justice Hill and Associate Justices:

This letter brief is submitted by the National Biodiesel Board (NBB) and the California Biodiesel Alliance (CBA) in support of Respondents/Appellees, California Air Resources Board (CARB), et al. On February 26, 2013, this Court presented the following issues, among others, for supplemental briefing:

8.A. Based on the three assumed CEQA violations, should this court allow the LCFS regulations to remain operative pending ARB taking the corrective action necessary to achieve CEQA compliance?

...

9.B. Pursuant to subdivision (a)(3) of section 21168.9, set forth the terms that you contend this court should direct the trial court to include in the writ of mandate so that ARB's decision to defer the formulation of mitigation measures for nitrogen oxide emission from biodiesel is brought into compliance with CEQA. Also, state your reasons for those terms.

...

10. Set forth any other positions, arguments and authorities regarding the remedy question that you believe are appropriate and have not been presented in your earlier answers.

In response to these issues, *amici* are writing to respectfully inform the Court of the serious consequences that would result in the event California Low Carbon Fuel Standard (LCFS) regulations are not allowed to remain operative pending any needed corrective action by CARB and the substantial benefits associated with enhanced use of biodiesel under the LCFS.

I.

Interrupting LCFS Regulations Will Chill Advancements In Biodiesel Fuel Technology And Adversely Impact Use And Production Of Renewable, Lower-Emissions Fuels.

As background information, biodiesel is a renewable diesel replacement fuel that can be made from any natural plant oil or animal fat. Common feedstocks used to make biodiesel include canola oil, soybean oil, animal fats, used cooking oil, and inedible corn oil. These materials produce a finished fuel that is nontoxic and biodegradable, while matching the performance characteristics of conventional petroleum based diesel fuel. Biodiesel is the only motor vehicle fuel to complete Tier I and Tier 2 Health Effect Testing under the United States Environmental Protection Agency's (U.S. EPA) implementation of the Clean Air Act, proving it has no adverse health impacts. Biodiesel is the only renewable diesel substitute to establish a stringent fuel quality and performance specification through consensus of engine manufacturers, petroleum distribution companies, and regulatory agencies participating in ASTM International (formerly the American Society of Testing and Materials). Biodiesel is approved for use by every vehicle manufacturer offering diesel engines in the United States up to blends of 5 percent; and every medium and heavy duty engine manufacturer approves blends of 20 percent or more.

The biodiesel industry is primarily comprised of small and medium sized businesses that source feedstock and sell product locally and regionally. This is one key to biodiesel's low greenhouse gas (GHG) emissions profile, but it is also a primary component in the fuel's substantial economic impacts. A small one million gallon per year production facility, for example, can employ up to 15 people at the plant, and even more at the farm where the feedstock is cultivated. As the California LCFS requirements increase, *Amici* expect the biodiesel industry to grow in concert. *Amici's* experience nationally has been that, where biodiesel markets develop, domestic feedstock production, biodiesel manufacturing

capacity, and distribution infrastructure grow. All of these areas appear to be expanding in California at a pace that meets or exceeds the requirements of the LCFS.

There are currently eight operating biodiesel plants in California, with a production capacity of more than 40 million gallons per year, with six new plants being built and several existing facilities expanding. These production facilities have provided more than 100 direct new jobs, hundreds of indirect and construction jobs, and have poured tens of millions of dollars into California's economy. With the impetus of the LCFS, the biodiesel industry in California is poised to triple in the next few years with substantial investments and new jobs in many of California's most economically disadvantaged areas. If the LCFS is enjoined, however, not only would biodiesel investment in California come to a halt, existing producers and projects would be in danger of scaling back or going out of business altogether. Some of these projects are located in very high unemployment areas such as Western Fresno County where unemployment rates have been as high as 41 percent. It would take the industry years to recover from such a setback, if it recovered at all.

One need only look to the past to predict the result of a suspension of the operation of LCFS by this Court. In December 2011, the U.S. District Court for the Eastern District of California issued an injunction blocking CARB's enforcement of the program. This ruling sent shock waves of doubt through the industry, resulting in reduced biofuel use by in state jobbers and obligated parties, who had been gearing up for an increase in the mandate. It also resulted in decreased and delayed investments as well as higher interest rates for borrowers within the industry. Although the program was allowed to move forward in April of 2012, the temporary suspension was extremely harmful to the biodiesel market and biodiesel companies are still working to recover from the devastating effects of the district court's injunction.

In addition to economic consequences, a chilling effect on the biodiesel industry would adversely impact public health and the natural environment. Biodiesel offers numerous emissions benefits when compared to petroleum diesel such as decreased levels of carcinogens including polycyclic aromatic hydrocarbons (PAH) and nitrated PAH compounds. Test results indicate that all PAH compounds are reduced by 75 to 85 percent with the exception of benzo(a)anthracene, which is reduced by approximately 50

percent¹. In addition, particulate matter, an emission linked to asthma and other diseases, is reduced by approximately 47 percent, while carbon monoxide, a poisonous gas, is reduced by 48 percent. An air quality modeling study conducted by the U.S. Department of Energy's National Renewable Energy Laboratory entitled, "Impact of Biodiesel Fuels on Air Quality and Human Health: Incorporate Biodiesel Data into Vehicle Emissions," demonstrated that 20 percent biodiesel blended with CARB diesel reduces ozone and smog formation in the southern California airshed due to significant reductions in hydrocarbon emissions from biodiesel.

NOx is not directly harmful to human health; however, NOx is of concern because it interacts with volatile organic carbons (VOCs) like unburned hydrocarbons from diesel fuel. This is a critical point because, even though a blend of 20 percent biodiesel (B20) may have a small NOx increase in pre-2010 diesel engines using specially formulated CARB diesel, the net effect of biodiesel's use is reduced ozone and smog formation due to significant decreases in particulates and unburned hydrocarbons relative to diesel fuel. Ozone and smog impact human health and are the primary reasons that NOx emissions are monitored. Biodiesel reduces ozone and smog, so there are multiple net health benefits of using biodiesel in place of conventional diesel fuel.

Low carbon intensity is another benefit offered by biodiesel. According to the U.S. EPA, all domestic feedstocks used to make biodiesel result in a GHG savings of at least 50 percent compared to average 2005 petroleum based diesel, making biodiesel America's first commercial scale "Advanced" biofuel under the federal Renewable Fuels Standard. In addition, according to U.S. EPA and CARB, several types of biodiesel offer GHG reductions of more than 80 percent relative to petroleum based diesel fuel. This is why biodiesel is such an important component of the California LCFS. A modest 12 percent biodiesel blend, for example, can meet the low carbon fuel standard's long term 10 percent GHG reduction requirement. Blends higher than 12 percent could accrue credits to be used for offsetting gasoline pool requirements or future obligations under the policy.

For the foregoing reasons, interrupting LCFS regulations will disrupt advancements in biodiesel fuel technology and adversely impact human health and California's natural environment. Consequently, LCFS

¹ "A Comprehensive Analysis of Biodiesel Impacts on Exhaust Emissions"; www.epa.gov/otaq/models/analysis/biodsl/p02001.pdf.

regulations must be allowed to remain operative during any necessary corrective action by CARB.

II.

CARB Has Acted Diligently Relative To Biodiesel NOx Emissions.

With respect to question 9.B presented by the Court, Appellants suggest that CARB has impermissibly “deferred” analysis and mitigation related to NOx emissions from biodiesel. As regular participants in the California administrative rule promulgation process, we respectfully disagree with Appellants’ position. As a preliminary matter, blends of biodiesel at or below 5 percent (e.g., B5), which represent the vast majority of blends in the California marketplace, do not have a measurable increase in NOx emissions. With regard to higher blends of biodiesel (e.g., B20), CARB has actively engaged in the testing and analysis process to ensure technical staff are satisfied that forthcoming regulations are appropriate, based on sound science, and accomplish their intended goals.

From the perspective of *amici*, CARB has been diligently and continually engaged in the rule promulgation process by conducting testing, drafting white papers, holding public workshops, and consulting a multitude of stakeholders as well as scientists at leading institutions such as the National Renewable Energy Laboratory. NOx testing is an extraordinarily complex matter and, in *amici*’s view, CARB has acted responsibly by thoroughly testing various blends of fuel on various engines under various drive cycles. CARB has also been responsible in choosing to analyze that information carefully, especially since the vast majority of existing data has been gathered through tests with U.S. EPA diesel and not CARB certified diesel.

NOx emissions are much more dependent upon engine type, load, and driver behavior than on the fuel used in a particular engine. Nationwide testing has demonstrated that biodiesel is NOx-neutral in comparison to conventional diesel fuel. The minor variations in NOx emissions from different fuels – including specially formulated CARB diesel, which is designed to produce less NOx than diesel fuel sold in other states – are approaching the limits of precision for the test methods currently available. This is increasingly true with new technology diesel engines.

The new technology diesel engines and emission control technologies that were introduced in every on-road diesel application in 2010 include closed-loop control of NOx emissions. Every diesel vehicle sold since model year 2010 (and every year thereafter) monitors engine performance and adjusts

fuel injection to avoid NOx emissions, regardless of the fuel used. California has specific regulations in place that mandate the replacement of older technology diesel equipment with 2010 technology. This means that any potential NOx impacts from blends of biodiesel exceeding 5 percent are temporary. CARB is thoroughly evaluating all of the complexities related to this issue and has acted responsibly to this point.


**III.
Conclusion**

For the reasons more fully articulated herein, we encourage the Court to allow LCFS regulations to remain operative pending corrective action by CARB, if any. The uninterrupted operation of LCFS regulations will not only provide certainty in the biodiesel fuel market, but will also protect the health of California's citizens and natural environment.

Respectfully,

KAHN, SOARES & CONWAY, LLP

By:



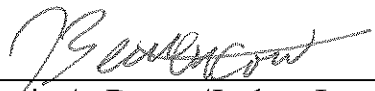
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BOARD and CALIFORNIA
BIODIESEL ALLIANCE

**CERTIFICATION OF WORD COUNT
PURSUANT TO CALIFORNIA RULE OF COURT 8.204(c)(1)**

The text of this brief consists of 2,433 words as counted by the Microsoft Word 2010 version word-processing program used to generate the brief. The font is 13 point Times New Roman.

Dated: April 2, 2013

KAHN, SOARES & CONWAY, LLP

By: 

Louie A. Brown/Joshua J.
Bettencourt, Attorneys for
NATIONAL BIODIESEL
BOARD and CALIFORNIA
BIODIESEL ALLIANCE

PROOF OF SERVICE

1013A (3) CCP Revised 5/1/88

I am employed in the County of Kings, State of California. I am over the age of 18 and not a party to the within action. My business address is: 219 N. Douty St., Hanford, CA 93230.

On April 2, 2013, I served the foregoing document described as **APPLICATION TO FILE AMICI CURIAE LETTER BRIEF and LETTER BRIEF OF AMICI CURIAE NATIONAL BIODIESEL BOARD AND CALIFORNIA BIODIESEL ALLIANCE IN SUPPORT OF RESPONDENTS/APPELLEES** on the interested parties in this action by placing true copies thereof enclosed in sealed envelopes addressed as follows:

Supreme Court of California Office of the Clerk, First Floor 350 McAllister Street San Francisco, CA 94102 <i>[Four (4) copies Via U.S. Mail]</i>	Honorable Jeffrey Y. Hamilton, Jr. Judge of the Superior Court c/o Appeals Clerk Fresno County Superior Court 1130 O Street Fresno, CA 93721 <i>[One (1) copy Via U.S. Mail]</i>
Mark W. Poole Gavin G. McCabe David Zonana State of California, Department of Justice 455 Golden Gate Avenue, Suite 11000 San Francisco, CA 94102-7004 <i>[One (1) copy Via U.S. Mail]</i>	David R. Petit Natural Resources Defense Council 1314 2 nd Street Santa Monica, CA 90401 <i>[One (1) copy Via U.S. Mail]</i>
Timothy Jones John P. Kinsey Wanger Jones Helsley PC 265 E. River Park Circle, Suite 310 Fresno, CA 93720 <i>Attorneys for Appellants</i> <i>[One (1) copy Via U.S. Mail]</i>	

(BY MAIL) I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepared at Hanford, California in the ordinary course of business.

Executed on April 2, 2013 in Hanford, California.

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



PATTY L. AVILA