COURT OF APPEAL
FIFTH APPELLATE DISTRICT
STATE OF CALIFORNIA

2424 VENTURA STREET
FRESNO, CALIFORNIA 93721-2227

CHARLENE YNSON
CLERK / ADMINISTRATOR

JULIE N. BAGOYE
ASSISTANT CLERK / ADMINISTRATOR

PHONE (559) 445-5491
FAX (559) 445-5769

February 26, 2013

Timothy Jones
John P. Kinsey
Wanger Jones Helsley PC
265 E. River Park Circle, Ste. 310
Fresno, CA 93720
FAX 559-233-9330

Kamala D. Harris, Attorney General
Mark W. Poole, Deputy
455 Golden Gate Ave., Ste. 11000
San Francisco, CA 94102-7004
FAX 415-703-5480

SENT BY EMAIL AND FIRST CLASS MAIL

Re: Poet, LLC & James M. Lyons v. California Air Resources Board et al.; F064045

Dear Counsel:

The parties' briefing in this case does not address the appropriate remedy for the asserted CEQA violations and related issues of statutory construction raised by the application of Public Resources Code section 21168.9[1] to the facts of this case. Consequently, under the authority granted by Government Code section 68081, the court directs the parties to submit supplemental briefing on the issues set forth in this letter.

Our inquiry is similar to a request this court made in *County Sanitation Dist. No. 2 v. County of Kern* (2005) 127 Cal.App.4th 1544, 1603-1605 (*County Sanitation*) concerning "how section 21168.9 should be applied [to the facts presented] and what directions should be given to the superior court on remand." The CEQA project in *County Sanitation* was a biosolids treatment ordinance, which is similar to the LCFS regulations in that it is not a construction or development project. One question addressed in *County Sanitation*, which is of interest here, concerned whether a regulation, rule or ordinance adopted in violation of CEQA should be allowed to remain in effect pending the agency's taking corrective action to comply with CEQA. (*Id*. at p. 1604.) The parties are advised that the reasoning used in *County Sanitation* will not apply in this case because, there, the parties agreed that the ordinance should remain in effect.

Background Assumptions. Your answers to the questions asked in this letter should be based on the following assumptions: **(1)** The California Air Resources Board (ARB) violated CEQA and the principle set forth in Guidelines section 15004, subdivision (a) by giving its "approval" to

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[1] All further statutory references are to the Public Resources Code, unless stated otherwise.

the LCFS regulations on April 23, 2009, *before* it completed its environmental review by considering the final statement of reasons. **(2)** ARB violated CEQA by *splitting* the authority to approve or disapprove the project (which was exercised by the Board on April 23, 2009) from the responsibility of completing the environmental review required by CEQA. **(3)** ARB violated CEQA by impermissibly deferring the formulation of mitigation measures regarding the potential increase in NOx emissions resulting from increased use of biodiesel. **(4)** ARB committed a substantial failure to comply with the APA when it omitted the four emails from consultants from the rulemaking file, but this court, in an exercise of the discretion granted by Government Code section 11350, subdivision (a), did not declare the LCFS regulation invalid. **(5)** To remedy the CEQA violations, this court will direct the superior court to issue "a peremptory writ of mandate specifying what action by the public agency is necessary to comply with [CEQA]" (§ 21168.9, subd. (b); see *LandValue 77, LLC v. Board of Trustees of California State University* (2011) 193 Cal.App.4th 675, 681 [issuance of writ of mandate required]) and to retain jurisdiction over ARB's proceedings by way of a return to the writ (§ 21168.9, subd. (b)).

The purpose of this last assumption is to inform counsel that their answers may affect the wording of any directions this court gives to the trial court regarding the contents of a writ of mandate. Therefore, the court would appreciate counsel, where appropriate, carrying their arguments through to a conclusion that addresses the wording of the writ of mandate.

The purpose of the first through third enumerated assumptions is to identify each "determination, finding or decision of [ARB] made without compliance with [CEQA]" (§ 21168.9, subd. (a)) and, thus, provide counsel the foundation from which to address the appropriate remedy and the wording of any writ of mandate that might be issued in this matter. These assumptions also provide the foundation for addressing the statutory requirement that "the order shall be limited to that portion of a determination, finding, or decision or the specific project activity or activities found to be in noncompliance …." (§ 21168.9, subd. (b).) The court tentatively is of the view that the "approval" of the LCFS regulations and the decision to defer the formulation of mitigation measures each constitute a "decision" for purposes of section 21168.9, but counsel should feel free to argue otherwise. Otherwise, your responses **shall not** challenge the underlying assumptions. Those issues have been briefed already and can be addressed further at oral argument; by asking you to make these assumptions for purposes of argument, this court is not indicating how those issues ultimately will be decided.

Interpretation of CEQA Section 21168.9. When presenting your position on a particular question of statutory interpretations, you are directed to use the standard legal analysis that begins with the actual words of the statute and states your position as to whether that language is ambiguous (i.e., susceptible to more than one reasonable interpretation) or unambiguous. (E.g., *Grayson Services, Inc. v. Wells Fargo Bank* (2011) 199 Cal.App.4th 563, 570; *Coburn v. Sievert* (2005) 133 Cal.App.4th 1482, 1494-1495 [part III.A of opinion provides a framework for determining the meaning of a statute].)

Questions.[2]

8A. 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? Yes or No.

8B. Are you aware of any published California case in which the appellate court allowed a regulation, rule, ordinance, general order or other type of written requirement governing third party action to remain operative pending the public agency taking the corrective action necessary to achieve CEQA compliance? Yes or No. If you answer "yes," include the citation to each such case.

8C. Set forth the statutory construction, arguments and authority that support your answer to Question 8A. Please note that (1) the remedy analysis in *County Sanitation* is not directly applicable to the current situation because the parties in that case *agreed* that the ordinance could remain in effect pending CEQA compliance and (2) principles or rationale in cases involving physical project, such as construction of a building or other structure, may not necessarily apply to a situation where the project is a regulation.

9A. 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 "approval" of the project is brought into compliance with CEQA. Also, state your reasons for those terms.

9B. 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. With respect to case law authority, this court is most interested in decisions that involved regulations, rules, ordinance or other types of written standard that govern third party action and is familiar with the following Supreme Court cases in which ordinances have been set aside for CEQA violations (*Friends of Sierra Madre v. City of Sierra Madre* (2001) 25 Cal.4th 165, 196 [appropriate relief for noncompliance with CEQA was invalidation of ordinance; ordinance not allowed to remain in effect pending compliance with CEQA]; *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 88 [superior court directed to "set aside the ordinances" in question]) and the Court of Appeals decision that upheld a trial court's decision to set aside an air quality rule (*Ultramar, Inc. v. South Coast Air Quality Management Dist.* (1993) 17 Cal.App.4th 689, 698 [trial court suspended air quality rule 1410 pending reevaluation of the rule following a full 30-day public comment period, with the air quality district being order to consider and respond to any new comments raised during the comment period]).

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[2] The numbers assigned to the questions listed below pick up where the numbering used in our earlier requests for supplemental briefing ended.

Mandatory Directions. As in previous supplemental briefing, you shall number each response with the corresponding number and letter used herein to designate the issue. Where you have been directed to give a "yes" or "no" answer, give only that one word answer after the corresponding number and letter designation. Explanations or argument supporting your position shall be set forth where directed; responses need not be long.

Appellants shall deliver their supplemental letter brief so that the clerk of this court actually receives it no later than **4:30 p.m., Monday, March 18, 2013**. Respondents shall deliver their supplemental letter brief by **4:30 p.m., Tuesday, April 2, 2013**. If delivered by fax, the original and four copies of the letter brief should be delivered subsequently to the court.

The parties are advised that the court will hold oral argument in this matter and, at oral argument, counsel will be expected to present arguments regarding the existence of the violations that have been assumed to exist in this letter.[3]

Very truly yours,

CHARLENE YNSON
Court Administrator/Clerk

By: _____
Deputy Clerk

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[3] For example, at oral argument, counsel should be prepared to address whether the provisions of Government Code section 11347.3, subdivision (b) contain ambiguities (i.e., are susceptible to more than one reasonable interpretation) and whether those ambiguities must be resolve in favor of public disclosure under the constitutional directive adopted in Proposition 59 (Cal. Const., art. 1, § 3, subd. (b), par. (2)). Also, counsel should be prepared to address (with citations to the record) whether ARB carried its burden of proof regarding the deliberative process privilege by presenting actual evidence relevant to the balancing of the public interests in disclosure and nondisclosure (Gov. Code, § 6255, subd. (a); *Citizens for Open Government v. City of Lodi* (2012) 205 Cal.App.4th 296, 307 [merely invoking policy insufficient to carry burden]; see *Times Mirror Co. v. Superior Court* (1991) 53 Cal.3d 1325 [burden carried by declarations from Governor and security director]).