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California Court of Appeal Strikes Down CARB's Second Review of Low Carbon Fuel Standards

By Jennifer L. Hernandez and Rob Taboada*

POET, LLC v. State Air Resources Board is the second chapter in the California Air Resources Board's troubled history meeting its California Environmental Quality Act compliance obligations while also meeting greenhouse gas reduction climate targets. The authors of this article review the decision and its ramifications.

At issue in the California Fifth District Court of Appeal's decision in *POET, LLC v. State Air Resources Board* ("*POET II*") was the California Air Resources Board's ("CARB") attempt to comply with an earlier writ of mandate resulting from the court's decision in *POET, LLC v. State Air ResourcesBd.* ("*POET I*").[1]

CASE BACKGROUND

In 2009, CARB promulgated low carbon fuel standards ("LCFS") regulations as part of its charge to meet the greenhouse gas ("GHG") emissions reduction goals of the California Global Warming Solutions Act of 2006.[2] POET, a South Dakota-based ethanol producer, challenged the LCFS regulations, alleging that CARB violated the California Environmental Quality Act ("CEQA") and the California Administrative Procedure Act ("APA"). The court in *POET I* found that CARB had indeed violated both CEQA and the APA, and directed issuance of a writ which, as relevant here, compelled CARB to fix its deficient review of the impacts from increased nitrogen oxide ("NOx") emissions from increased use of biodiesel. The *POET I* court, however, fashioned its remedy narrowly; it required the CARB to redo its CEQA process but allowed the original LCFS regulations to remain in effect. The court found this remedy to be within its statutory and equitable power as, on balance, the court found that the regulations in place would provide more protection for the

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1 218 Cal.App.4th 681 (2013).

2 Health and Safety Code § 38500 et seq.

environment than suspending their operation pending CARB's compliance with CEQA.[3]

In the case at hand, POET again challenged CARB's CEQA compliance, this time on the return to the writ. POET alleged that CARB failed to properly address the court's direction that CARB analyze whether the LCFS regulations would have a significant adverse effect on the environment due to increased NOx emissions. POET alleged that CARB's review improperly disregarded the regulations between 2010 and 2014.

CARB's attempt to comply with the *POET I* court's writ preceded its approval, in 2015, of modified LCFS regulations and Alternative Diesel Fuel ("ADF") regulations. CARB therefore studied only of the impacts of these new, modified regulations, as opposed to the whole LCFS regulatory program, including the 2010 regulations. As a result, increases in NOx emissions which potentially derived from the 2010 regulations were considered existing conditions in 2014, as opposed to project impacts. The court found CARB's choice of project definition and baseline to be improper.

PROJECT AND BASELINE

CARB interpreted the court's 2014 writ to require the study of any new LCFS regulations that CARB considered on remand. CARB therefore defined the "project," for the purposes of CEQA compliance, as the 2015 LCFS regulations and used 2014 as a baseline year against which to compare potential impacts from NOx emissions. CARB's final Environmental Assessment briefly addressed the possibility of using a 2009 baseline from prior to the adoption of the original LCFS standards, but concluded that NOx emissions from biodiesel had increased since 2009 due to multiple external incentives, and that it would be impossible to disentangle what portion of the increase was due to the new LCFS standards.

The court found CARB's project definition and baseline to be inconsistent with CEQA and with the direction of the writ. A "project" under CEQA, the court wrote, means the whole of the action—the "*underlying activity* which may be subject to approval and not the approval of that activity."[4] The court used the "related to each other" test adopted in *Tuolumne County Citizens for Responsible Growth, Inc. v. City of Sonora*[5] and determined that the original 2010 LCFS standards, the modified 2015 LCFS standards and ADF regulations

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[3] *POET I*, *supra,* 218 Cal.App.4th at 762, 767.

[4] Slip op. at 23, citations omitted.

[5] 155 Cal.App.4th 1214, 1225 (2007).

were clearly related and served the same purpose, and were the "project" for the purposes of CEQA review. Therefore, the court held that CARB erred in not considering the whole of the project.[6]

The court also found that, as consequence of CARB's overly narrow project definition, CARB failed to establish a proper baseline. When "the whole of the project is properly identified," the conditions for defining the project's baseline can be determined.[7] The court described that a baseline generally delineates environmental conditions prevailing absent the project.[8] Here, the court found that CARB's use of a 2014 baseline was based on an inadequate project definition that excluded several years of the project from impacts and improperly included them as baseline conditions.[9] The court recognized that *Neighbors for Smart Rail* allows for the use of a future baseline in certain circumstances, but held that those circumstances were not present here.[10]

The errant baseline skewed analysis of the future of the project as it compared future emissions with emissions related to the project rather than conditions without the project. CARB's failure to properly analyze the 2010 LCFS standards resulted in a misleading review of the project as NOx emissions increased between 2009 and 2014 along with the rise in the use of biodiesel. CARB's error, the court found, deprived the public of information about CARB's willingness to allow an increase in NOx emissions in order to reduce GHG emissions.[11]

REMEDY

Although the court found that CARB's second attempt to comply with CEQA failed, the court revisited its discretion to fashion appropriate remedy. First, the court found that the ADF regulations are severable from the LCFS regulations, and that they were not tainted by CARB's erroneous review of NOx emissions. Therefore, the relief granted in the appeal allowed the ADF regulations to continue while CARB addresses the NOx emissions.[12]

Second, as in *POET I*, the court independently found that, although the provisions of the LCFS regulations could increase NOx emissions due to an

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[6] Slip op. at 26.

[7] Slip op. at 29.

[8] Slip op. at 29, citing *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal.4th 439, 447.

[9] Slip op. at 32.

[10] Slip op. at 33.

[11] Slip op. at 34.

[12] Slip op. at 49.

increase in use in biodiesel, suspending the LCFS regulations while CARB performs corrective review would result in increased emissions of GHGs. "In other words, leaving the category of diesel fuel and its substitutes unregulated by the LCFS regulations would mean reporting entities would not need to lower the average carbon content of those fuels."[13] Weighing the balance of potential increase in NOx against the certain increase in GHG, the court concluded that on balance it was more environmentally beneficial to leave the LCFS standards in place, despite CARB's invalidated CEQA review. Therefore, the court directed that the LCFS regulations should remain in effect while CARB makes a third attempt at analyzing NOx emissions from the project.[14]

RAMIFICATIONS

The *POET II* case is noteworthy for two reasons:

- CARB's CEQA shortcomings left significant legal deficiencies in its impact analysis; it improperly assumed ongoing implementation of the 2010 LCFS regulations in the "baseline" for analyzing impacts of the LCSF regulations and limited its CEQA evaluation to the relatively minor 2015 amendments to the 2010 regulations. It also omitted analysis of reasonably foreseeable activities that would likely occur as the LCFS regulations were implemented. CARB had concluded that ongoing implementation of the 2010 regulations would be nearly impossible to distinguish from other incentives related to biodiesel and therefore used a baseline condition that already included compliance with these regulations. Getting the "baseline" correct is foundational to a correct assessment of impacts, and assessing the impacts of foreseeable regulatory implementation activities has been unambiguously required by CEQA for decades. The court found that CARB's baseline and project definition errors rendered the Environmental Assessment deficient as an informational document for assessing or mitigating impacts from the 2010 and 2015 regulations, and deprived the public of the right to know that CARB was accepting the risk of higher levels of NOx emissions, with attendant smog and human health impacts, in exchange for lower GHG emissions.
- The most common judicial remedy in CEQA lawsuits is vacating the agency's approval of the challenged "project"—and the "project" under challenge here was adoption of the LCSF regulations. In order to again allow the LCSF regulations to remain in effect despite CARB's CEQA shortcomings, the court made an independent determination that the

[13] Slip op. at 57.

[14] Slip op. at 60.

LCSF regulations were good for the environment and rejected the petitioner's arguments that NOx emissions from the LCSF regulations risk public health and other environmental goals, and that "fuel shuffling" market practices undermine global climate change efforts and move jobs and production out of California. Courts deciding CEQA cases have been decidedly reluctant to weigh the merits of the project independently, and allow environmentally benign or beneficial projects such as infill housing to proceed even when the identified CEQA deficiency is a minor part of a greater project (e.g., an intersection analysis in a traffic report). This case, along with the Supreme Court of California's decision in *Neighbors for Smart Rail,* invites CEQA litigants to argue the environmental merits of the underlying project as part of the remedy determination in CEQA lawsuits.