Blogs
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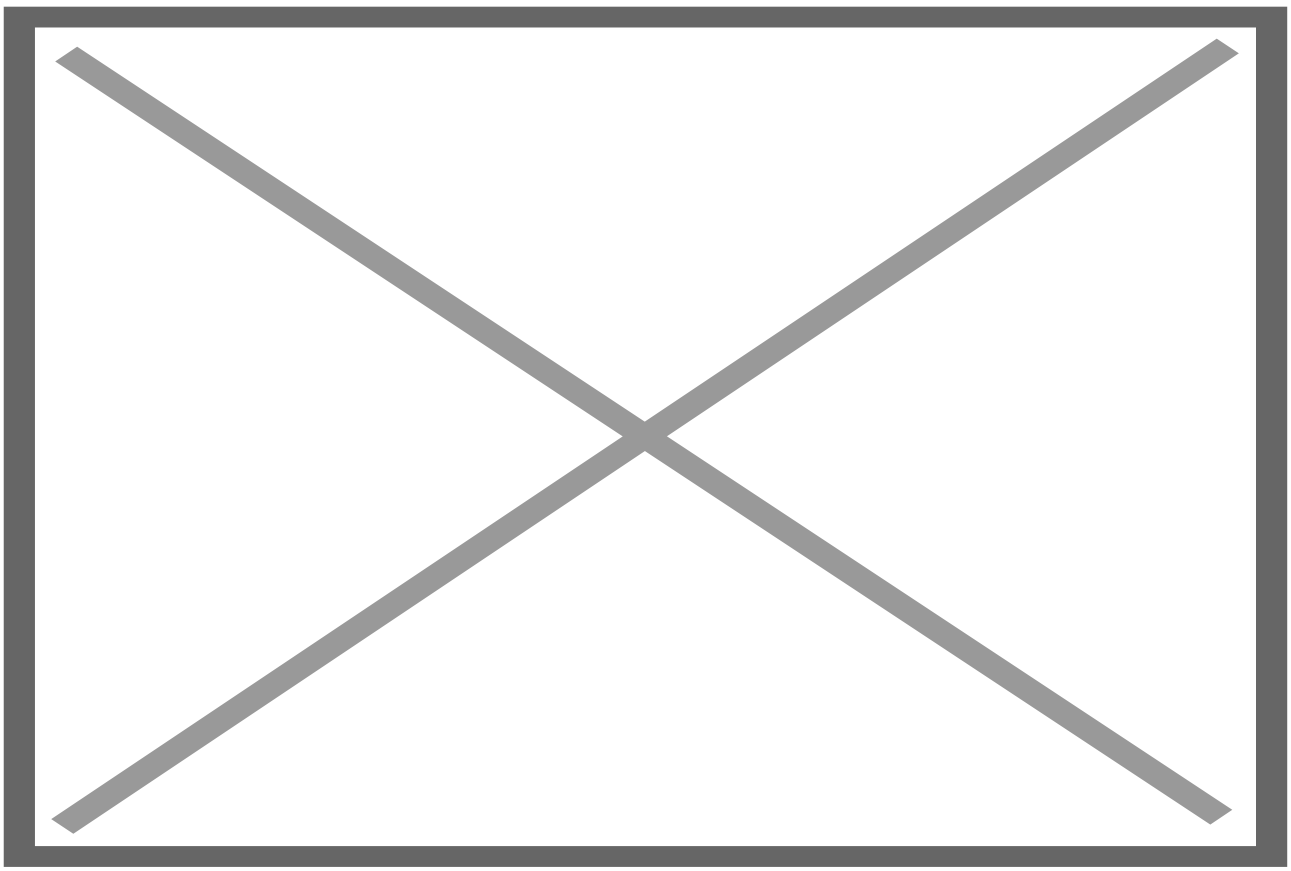
Court Finds CARB's New Analysis of Biodiesel Low Carbon Fuel Regulations Still Doesn't Comply With CEQA But Leaves Current Regulations In Place Pending Compliance

In 2013, the fifth district court of appeal ruled that the California Air Resources Board violated CEQA when it adopted its 2009 Low Carbon Fuel Standard regulations, and the court directed issuance of a writ of mandate requiring that CARB take corrective action. The court allowed the LCFS regulations to remain in effect while CARB completed a new CEQA analysis, concluding that leaving the regulations in place would provide more protection for the environment than suspending their operation.   (See our post analyzing the court's 2013 decision here.) CARB then completed a further CEQA analysis and adopted revised regulations. Now, the same court has held that the CARB's new analysis failed to comply with CEQA or its prior decision.   *POET, LLC v. State Air Resources Board*, 5th Dist. No. F073340 (May 30, 2017). This time, the court provided specific suggestions for further CEQA review, but it again allowed the revised regulations to remain in place while CARB takes further action to comply.



The Challenge to CARB's Revised CEQA Review The challenger, the largest U.S. ethanol producer, again contested CARB's analysis of the environmental effects of the biodiesel portion of CARB's LCFS regulations. Biodiesel combustion emits reduced greenhouse gases compared to other fuels, but increases NOx emissions, which have local and regional air quality impacts. The challenge attacked the Board's decisions to: 1) limit its CEQA analysis to the impact of its new biodiesel regulations rather than including the effects of its original 2009 regulations; and 2) use 2014 statewide biodiesel emissions as the baseline for CEQA analysis. **The Board Did Not Comply with the Writ of Mandate or CEQA** First, the court of appeal held that CARB had not complied with the writ of mandate because it still had not analyzed the environmental impacts of its original biodiesel regulations, adopted in 2009. Instead, the CARB analyzed only the impacts of the new regulations it adopted in 2015, and compared biodiesel use under those regulations to statewide biodiesel use in 2014. The court held that the original 2009 regulations and its impacts were part of the "project" CARB was required to analyze. Because the CEQA analysis incorrectly characterized the project to be analyzed as its 2015 regulations, the court found CARB also erred in using 2014 as its baseline year for gauging changes in NOx emissions from biodiesel. The court explained: "When this court decided to allow the original LCFS regulations to remain operative pending ARB's compliance with CEQA, we did not intend to deprive the public or decision makers of information about increased NOx emissions caused by the original LCFS regulations during that compliance period. A proper baseline would identify the conditions that existed before any impacts of the original LCFS regulations began to accrue and, thus, would provide a solid foundation for identifying those impacts." **Existing Regulations Stay In Place Pending CEQA Compliance** To decide whether the 2015 diesel LCFS regulations should be suspended until the CARB complied with CEQA, the court focused on CEQA's remedies provision, Public Resources Code section 21168.9(a)(2), and identified two questions. The first was whether keeping the 2015 regulations in effect "will prejudice the consideration or implementation of particular mitigation measures or alternatives to the project." Despite CARB's acknowledged "bureaucratic momentum" in favor of its LCFS biodiesel regulations, the court concluded that once it reconsidered NOx impacts and determined whether they were significant, CARB would be able to consider any necessary mitigation measures and alternatives. Second, the court asked whether suspension of the LCFS regulations addressing diesel fuel and its substitutes "could result" in an adverse change to the physical environment. The court concluded that suspending the regulations *would* result in adverse environmental impacts from increased emissions of greenhouse gases, and that this impact outweighed the *potential reduction* in NOx emissions that would result from suspension. Next, while acknowledging this was not a factor identified in the statute, the court considered whether CARB's bad faith should affect the relief granted. The court concluded that CARB had acted in bad faith in its CEQA review of the LCFS regulations on diesel fuel and its substitutes, but that CEQA's goal of protecting the environment "should not be compromised to punish agency bad faith." Accordingly, the court ordered that the LCFS regulations governing diesel fuel and its substitutes be frozen in place as of 2017, pending the CARB's compliance with CEQA. Finally, CARB requested that the court endorse a 2010 baseline for the further CEQA analysis required by the court's decision. The court declined, noting that the analysis of its first LCFS regulations began in or before 2009; that regulated entities might have begun modifying their behavior by in anticipation of the regulations; and that the hypothetical use of a 2010 baseline on remand was not a question properly before the court. The court's decision represents a straightforward application of CEQA principles governing the scope of a "project" and the determination of baseline conditions. Because of the impacts at stake ? climate change vs. local and regional air quality ? the opinion provides an unusually careful analysis of remedies for a CEQA violation, but concludes that the certainty of a greenhouse gas impact resulting from suspension of the LCFS regulations outweighs the potential for localized air quality impacts that may occur pending CARB's CEQA compliance. Accordingly, the case can be seen as part of the judicial trend affording heightened status to climate change impacts under CEQA.

Authors