

POET v. California Air Resources Board (August 8, 2013) 218 Cal.App.4th 681

In December 2008, CARB adopted the AB 32 “scoping plan” describing the programs and methods by which the state will achieve the target of a reduction in greenhouse gas (GHG) emissions to 1990 levels by 2020. One aspect of the scoping plan is the “low carbon fuel standard” (LCFS) for transportation fuels, a regulation requiring the lowering of the carbon content gasoline, diesel, and their replacements. The LCFS is identified as a “discrete early action” under the scoping plan, and CARB moved to adopt the necessary regulations by 2010. In this vein, the Air Board conditionally approved the LCFS regulations by resolution in April 2009 and the Board’s Executive Officer approved the “final” LCFS regulations at the end of the rulemaking process in November 2009 and March 2010. The environmental review of the LCFS was not completed at the time of the Board’s action in 2009.

CARB’s rulemaking is subject to a “certified regulatory program” which exempts CARB from the need to prepare an EIR. POET asserted that CARB had approved the LCFS prior to completing the CEQA analysis embodied in its certified regulatory program. CARB countered that its certified regulatory program essentially described the only CEQA requirements that applied to CARB and that it was not subject to the CEQA Guidelines. Further, following the provisions of its certified regulatory program meant that it could not have acted improperly and that the court should give deference to CARB’s interpretation of the CEQA statutes and regulations. The Court disagreed. It reiterated the rule for judicial examination: when claims are based a question of law, the Court will apply its independent judgment; and when claims are based on questions of fact, the Court will review the record to determine whether the agency’s action is based on substantial evidence. This is a question of law.

The Court held that CARB’s certified regulatory program had improperly allowed the LCFS to be approved before its environmental review was complete. Contrary to CARB’s assertion, its certified regulatory program was subject to the CEQA Guidelines and “while exempt from certain requirements of CEQA, [is] not exempt from the timing requirements in Guideline Section 15004.” Section 15004 provides that prior to project approval the lead agency must consider the EIR or negative declaration, or “another document authorized by [the] guidelines to be used in place of an EIR or negative declaration.” The Court took this to be a reference to certified regulatory programs.

Given that the environmental analysis was required to be completed before project approval, what constituted “approval” in this case? The Court applied the definition of approval in Guidelines Section 15352 (“the decision by a public agency to a definite course of action in regard to a project”) to answer this question. CARB claimed that the LCFS regulations were not approved for CEQA purposes until its Executive Office took final action. The Court rejected this argument, holding that the principle set out by the California Supreme Court’s in its *Save Tara* decision applies to this case. *Save Tara v. City of West Hollywood* involved the preliminary approval of a development agreement and commitment of city funds with a condition that CEQA review would be completed at a future time. The Supreme Court rejected the City of West Hollywood’s approach because the city had essentially committed itself to the project by that action, regardless

of its intention to take additional actions and complete CEQA review in the future.

The Court looked to the background of the Board's April 2009 resolution to determine whether that action constituted approval of the project. It saw that the public notice of the Board meeting stated that it would "consider adoption" of the LCFS at the meeting. In addition, the resolution passed by the Board included the statement that "the Board hereby approves for adoption." Further, the Board filed a notice of determination referencing approval of the resolution. Based on this record, the Court concluded that the April 2009 resolution created "significant bureaucratic momentum" for the LCFS. After reviewing the action of the Executive Officer under the authority delegated by the Board, the Court found that the resolution "effectively precluded the Executive Officer from adopting alternatives []." The Court held that CARB had violated CEQA by acting to approve the project prior to completing the environmental review.

POET claimed that CARB had improperly split responsibility for environmental review by delegating it to its Executive Officer, who did not have approval authority, rather than to the Board. The Court agreed:

Under the facts of this case, it is clear that ARB violated a fundamental policy of CEQA when it gave the responsibility for completing the environmental review process to the Executive Officer because he did not have the authority to approve or disapprove the project. In particular, the Executive Officer had no authority to alter the way the Board resolved the controversy regarding the carbon intensity values added to certain fuel pathways to account for indirect effects caused by land use changes.

Using reformulated gasoline and low sulfur diesel fuels as the benchmarks, the LCFS established performance goals for transportation fuels, ratcheting down the carbon value yearly between 2011 and 2020. Fuel producers and importers would be required to meet these standards, but the regulations did not prohibit or require the use of any particular type of fuel. The carbon intensity value assigned to the various fuels was determined using a lifecycle analysis of the GHG emissions from producing and using the fuel.

One method for reducing the carbon content of transportation fuels is to promote the increased use of biodiesel. In the initial statement of reasons for the LCFS, CARB noted that "Biodiesel feedstocks can have a significant effect on emissions of ROG, PM, and NOx. NOx is of particular interest because biodiesel has been reported to increase NOx emissions." Despite commenters' concerns over the potential for NOx emissions increases, the issue of biodiesel NOx was not resolved in the LCFS and it in fact provided for two pathways for biodiesel to be substituted for diesel. CARB began a study of how to avoid NOx emissions from biodiesel after adoption of the LCFS, but it did not adopt any regulations that would do so.

POET asserted that this constituted an improper deferral of mitigation measures. The Court agreed. The Court reviewed the key cases describing the proper method for deferring mitigation measures and drew from them the following two principles

important to the case:

[] First, the deferral of the formulation of mitigation measures requires the agency to commit itself to *specific performance criteria* for evaluating the efficacy of the measures implemented. Second, the “activity” constituting the CEQA project may not be undertaken without mitigation measures being in place “to minimize any significant adverse effect on the environment of the activity.” (§ 21080.5, subd. (d)(3)(A).) In other words, the deferral relates only to the *formulation* of mitigation measures, not the mitigation itself. Once the project reaches the point where activity will have a significant adverse effect on the environment, the mitigation measures must be in place.

Here, CARB did not commit to any specific performance standards. CARB’s statement that future rulemaking will establish specifications to ensure there is no increase in NOx “established no objective performance criteria for measuring whether [that] stated goal will be achieved.” In addition, CARB proceeded with adoption of LCFS regulations without concurrently putting in place mitigation measures to address the increase in NOx.

The Court set aside CARB’s CEQA equivalent document and decision to approve the regulations. However, because of the importance of the LCFS to achieving California’s AB 32 goal for carbon emissions reduction, the regulations themselves were left in place, pending CARB’s timely compliance with the writ.

POET also challenged CARB under the Administrative Practices Act (APA), alleging that CARB had illegally omitted key e-mail correspondence with its consultants regarding modeling of the indirect effects on land use of establishing the low carbon fuel standard (for example, changes in cropping due to increase in ethanol-source plantings) from the record. The correspondence was also needed in order to determine the extent to which the production of biofuels could increase GHG emissions. POET argued that this thwarted the public’s right to information.

The Court agreed. It held that as a matter of law, interpretation of the APA was subject to the independent review of the Court, without deference to the agency. The e-mails were considered “other factual information” under the APA, which obligated CARB to include them in the rulemaking file. As with CEQA issues, rather than overturn the LCFS, the Court ordered CARB to include the e-mails in the rulemaking file that would be compiled for its reconsideration of the LCFS. Of interest to state agencies contemplating a rulemaking, the Court’s opinion carefully describes the APA’s requirements for the contents of the rulemaking file.