



777 North Capitol Street, NE, Suite 805, Washington, D.C. 20002
PHONE 202.545.4000 FAX 202.545.4001

GrowthEnergy.org

November 20, 2009

By Electronic Mail and Federal Express

Mr. James N. Goldstene
Executive Officer
California Air Resources Board
1001 I Street, 23rd Floor
Sacramento, CA 95814

Re: Rulemaking to Establish Low-Carbon Fuel Standards (10-Z Cal. Reg. Notice Register 371 (Mar. 6, 2009)) -- Notice of Deficiencies in the Rulemaking File

Dear Mr. Goldstene:

I write on behalf of Growth Energy, an association of the nation's leading ethanol manufacturers and other companies who serve the nation's need for alternative fuels. Growth Energy and its members have a vital interest in the Air Resources Board's rulemaking to establish a low-carbon fuel standard ("LCFS") regulation pursuant to the California Global Warming Solutions Act of 2006 ("the 2006 Act"). Growth Energy testified at the Board's hearing on the LCFS regulation on April 23, 2009, and has filed comments on the subsequent 30- and 15-day notices that you have issued.

In its prior comments, Growth Energy requested that you return the regulatory proposal to the Board for reconsideration, based on what we considered to be substantial issues under the 2006 Act, the California Administrative Procedure Act (the "APA"), and provisions of the California Health & Safety Code that predate the 2006 Act. The purpose of this letter is to request that, in addition to returning the regulatory proposal to the Board, you correct apparent deficiencies in the rulemaking file that is required by Gov't Code § 11347.3, and that you permit public comment on the additional materials that belong in the rulemaking file.

Growth Energy believes that the current rulemaking file is deficient because it does not include numerous written comments submitted to ARB in connection with the LCFS regulatory proposal, both outside and within the periods allowed for public comment. *See* Gov't Code § 11347.3(b)(6). There is also evidence that the rulemaking file may not include all materials on which the ARB staff and ARB are relying in adopting an LCFS regulation. *Id.* § 11347.3(b)(7).

Growth Energy bases these conclusions on a review of documents provided to it in response to a request for public access to records submitted to ARB under the California Public Records Act ("PRA") on August 31, 2009. The California Office of Administrative Law ("OAL") could not approve any final action until the rulemaking file deficiencies have been examined and addressed. *See id.* § 11349.1(f). If you decide not to grant the requests presented in this letter, Growth Energy asks that you add the letter and its attachments to the rulemaking file (after

allowing public comment), so that OAL will be fully informed of our concerns and the legal basis for our requests. Growth Energy also asks you to consider fully the contents of this letter and its attachments in the California Environmental Quality Act (“CEQA”) analysis that you and the Board are required to conduct. .

Growth Energy has no obligation to demonstrate that failures to comply with Gov’t Code § 11347.3 are prejudicial in order to request that the deficiencies in the rulemaking file be corrected. Nevertheless, Growth Energy believes that it can so demonstrate, if you believe that is necessary. Attached to this letter are approximately 70 documents provided to Growth Energy in response to its PRA request. As explained in an index at the front of those attachments that describes those documents (hereinafter “Descriptive Index”), many of these documents are public comments that should have been placed in the rulemaking file in a timely manner, or refer to other documents that the ARB staff apparently archived in their own working files but did not arrange to have placed in the public rulemaking file during the periods allowed for comment on the regulatory proposal.

Growth Energy’s review of the PRA documents indicates that ARB staff conducted an extensive deliberative process, both before and after the formal comment periods opened and closed, with various organizations and individuals, during which the staff and those organizations and individuals exchanged written comments and other information. Such interactions can be critical to the rulemaking process. But the APA requires such comments to be placed in the rulemaking file in a timely manner, so that the deliberative process with some stakeholders does not become a closed process in which the public at large cannot participate.

Growth Energy’s document review has also revealed that some individuals outside ARB, who were either consultants to the Board or otherwise interested, sent detailed technical material to the ARB staff in connection with the rulemaking but requested that the ARB staff withhold their submissions from public access. To the extent that the ARB staff may have honored those requests, the development of the LCFS regulation may have veered into a type of virtual rulemaking, in which some parties had special (and secret) input into the development of the ARB staff’s analysis of the Board’s options.

We are particularly concerned about the impact of the deficiencies in the rulemaking file on the staff’s preparation of a Final Statement of Reasons document (the “FSOR”), in the event that you do not grant our earlier request that the regulatory package be sent to the Board. The FSOR would presumably be prepared by the same staff who have received and archived in their working files the comments that are included among the attachments to this letter, along with other comments that may not have been placed in the rulemaking file in a timely manner. Even if they refrain from directly citing any of the specific, non-public comments they have received from some consultants or stakeholders in the FSOR, we cannot imagine that the staff’s views and judgments have not been affected by what they have read in the materials supplied by those commenters. This is fundamentally unfair to other parties, who -- not knowing in a timely manner exactly what the non-public commenters have said -- have had no chance to point out errors in the non-public comments or to try to persuade you and your staff why ARB should (or should not) adopt certain positions and regulatory requirements.

The balance of this letter is divided into three parts. Because this letter is not being submitted during a time period when public comment on the proposed regulation has been officially authorized under the APA, Part I explains why the letter is being submitted now.¹ Part II summarizes the relevant requirements of the APA. Part III discusses briefly a few of the omitted documents in order to illustrate why their omission was prejudicial. Each

¹ Growth Energy believes that you and the Board have an independent duty to consider this letter and its attachments and to respond under CEQA even if you conclude you have no obligation to do so under the APA, because it appears the environmental assessment of the LCFS regulation is still under way, no notice to the contrary having been filed with the Secretary of Resources.

omitted document included among the attachments to this letter is listed on the Descriptive Index, and Growth Energy requests a complete response to each of our questions and concerns noted on the Index. Part IV specifies our requests for action to address the deficiencies in the rulemaking file and presents a number of questions about ARB's understanding of its requirements under the APA that we believe should be addressed in your response to this letter.

I.

The originating notice for the LCFS rulemaking required by Article 5 of the APA was issued on or about February 24, 2009. Notice of the public hearing was published in the *California Regulatory Notice Register* on March 6, 2009. The public hearing was held on April 23, 2009, at which many other parties were permitted to testify for brief periods (usually less than five minutes per witness, except for ARB consultants). There have been three periods for public comment on the proposed LCFS regulation.

In its work on the first post-hearing request for comments (issued in July 2009), Growth Energy was advised by experts it had retained to assist it and to file comments that substantial portions of the staff's environmental and economic analyses appeared to be based on assumptions, rather than technical analyses deposited in the rulemaking file. When its representatives inquired about the status of the rulemaking file in August 2009, Growth Energy was advised that the "rulemaking file" that the staff believed it was required to maintain under the APA consisted of the following: (i) various staff publications on or after the rulemaking notice was issued on or about February 24, 2009; (ii) other documents and records shown on the LCFS "Subject Top Page" on the ARB website, such as the public hearing transcript and various technical papers and papers from the "informal" regulatory process; (iii) documents or records cited in the documents and records in categories (i) and (ii); and (iv) comments posted and hyperlinked electronically into the "Public Comments" sections of the LCFS "Subject Top Page" on the ARB website. The "Public Comment" sections of the relevant portion of the ARB website contained relatively few entries, given the apparent level of interaction among ARB staff, the staff's consultants, and some stakeholders. At that point, Growth Energy became quite concerned that important material was missing from the rulemaking file.

Acting upon its concerns, Growth Energy submitted its PRA request. (See Attachment J.) Growth Energy commends the efforts of the Office of Legal Affairs to assemble and provide documents in response to its PRA request.² An initial set of documents in response to the PRA request were provided on October 26, 2009, and

² While Growth Energy is grateful for the efforts of the Office of Legal Affairs with respect to the PRA request, the ARB staff in charge of the LCFS rulemaking may not have been not fully familiar with the requirements of Gov't Code §§ 11347.3(b)(6), (7). Paragraph 20 of Growth Energy's PRA request of August 31, 2009, sought the following records:

Except to the extent required to be provided in response to the preceding requests, all records that contain or refer to data or other factual information, analyses or opinions, or technical, theoretical or empirical studies (i) submitted to ARB in connection with the proposed adoption of the LCFS regulation, or (ii) upon which ARB is relying in the proposed adoption of the LCFS regulation.

See Attachment J at 7 (emphasis added). Paragraph 20 substantially tracked the text of Gov't Code §§ 11347.1(b)(6), (7), and sought to ensure that any documents that should have been in the rulemaking file were in the rulemaking file. Growth Energy was therefore surprised by the ARB letter of October 8, 2009, in response to its PRA request that called Paragraph 20 of the PRA request "overly broad and vague." See Attachment K at 2. Given the clear and unambiguous requirements of Gov't Code §§ 11347.1(b)(6), (7), it is difficult to understand why Paragraph 20 of the PRA request could be considered "vague" in any respect.

included a substantial number of electronic mail (“email”) messages. A preliminary review of those documents by Growth Energy revealed that many attachments to the emails released on October 26 had not been included. Growth Energy advised ARB staff of this problem, and on November 3, 2009, received approximately 1,800 pages of additional material. Growth Energy understands that ARB staff plans to complete its response by January 15, 2010, and believes it is important that ARB staff comply with that plan. Growth Energy is available on short notice to confer with the ARB staff concerning the PRA request to avoid any unnecessary burden or expense for ARB or Growth Energy, and again, wishes to acknowledge the professionalism of the PRA staff in responding to Growth Energy’s PRA request.

This letter is based on more than 75 hours of review of the PRA documents provided to date. Growth Energy has acted with as much diligence and dispatch as possible to pursue its concerns about the completeness of the rulemaking file. We believe the burden should now be placed on ARB staff and on other interested parties to examine carefully the issues of APA compliance presented in this letter. We hope you will also understand that we have worked as quickly as possible to review the materials provided in response to our PRA request to date and to bring our concerns about compliance with the APA to your attention.

II.

Section 11347.3 of the Government Code requires ARB to maintain a “file of [the] rulemaking proceeding” for any proposed regulatory action subject to the APA, including the LCFS regulation.” The rulemaking file must include, among other items, the following:

(6) All *data and other factual information*, any studies or reports, and written comments submitted to the agency in connection with the adoption, amendment, or repeal of the regulation.

(7) All data and other factual information, *technical, theoretical, and empirical studies or reports*, if any, on which the *agency is relying* in the adoption, amendment, or repeal of a regulation, including any cost impact estimates as required by Section 11346.3.

Gov’t Code § 11347.3(b)(5), (6) (emphasis added). The entire rulemaking file, including the foregoing material, must be “available to the public for inspection” from the time when the first notice of the proposed rulemaking is published in the California Regulatory Notice Register, *id.* at § 11347.3(a), which in the case of the low-carbon fuel standards occurred on March 6, 2009. *See* Cal. Reg. Notice Register, Vol. 10-Z at 371.

As the above-quoted text makes clear, rulemakings at ARB must include the creation of a rulemaking file that includes “[a]ll data and other factual information, any studies or reports, and written comments submitted to the agency” in connection with the proposal. Gov’t Code § 11347.3(a), b)(6) (emphasis added). To assure immediate public access to the supporting materials as soon as the 45-day materials are released, the APA requires that the 45-day notice include a statement that the agency on the date of the notice “has available *all* information upon which [the] proposal is based.” *Id.* § 11346.5(a)(16) (emphasis added). A separate provision confirms that the agency must in fact make those records, and any other “public records, including reports, documentation, and other materials, related to the proposed action,” available. *Id.* § 11346.5(b).

The “written comments” that must be placed in the record are not simply those submitted to the agency in a particular manner or at a particular time, such as during the period between publication of the notice of a public hearing and public hearing -- an agency must put “all” it receives “in connection with” a regulatory proposal in the

rulemaking file.³ The Legislature’s choice of words to describe what comments must be placed in the file -- “in connection with” -- sweep with intentional breadth, and require inclusion of any comments that bear on the subject of the regulatory effort. In addition, the period of public availability must “[c]ommenc[e] *no later than* the date that the notice of the proposed action is published.” *Id.* § 11347.3(a) (emphasis added). The use of the term “no later than” makes it clear that the Legislature expected written comments submitted in connection with a proposed regulatory action and received before publication of the required notice to be included in the rulemaking file. In this instance, regulatory action to establish an LCFS dated from at least the time when the LCFS program was designated as an early-action measure under the 2006 Act, and ARB has included some (but far from all) public comments predating February 2009 on the ARB website and thus, under the staff’s interpretation of the APA, in the rulemaking file.⁴

Section 11348 of the Government Code, in turn, requires an agency to keep the rulemaking file “*current and in one central location.*” Gov’t Code § 11348 (emphasis added). No purpose would be served by maintenance of a rulemaking file that is not sufficiently “current” to permit interested members of the public to review and respond to its comments in time to help shape regulatory outcomes. *See Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal. 4th 557, 569 (goal of APA is to “ensure that those persons or entities whom a regulation will affect [can] inform the agency” of their views on proposed regulations). Parties not given the same data and analysis and other comments as an agency’s staff cannot properly and fully provide the staff with their views on proposed regulations.

Compliance with Gov’t Code § 11348 is particularly important in the LCFS regulatory effort. The Board’s schedule allowed for only brief oral testimony from a large number of parties in April 2009. Substantial time at the podium was allowed only to ARB staff and ARB’s consultants from Purdue and the University of California. The Board decided to permit only tightly limited periods of time for comment on staff’s analysis. This placed a premium on written comments by stakeholders, and on stakeholders’ timely access to the written comments of other parties. Merely to place documents in the rulemaking file long after the close of the last comment period, and perhaps on the eve of finalization of a regulation, is not substantially compliant with section 11348. *See also* Gov’t Code § 11347.1

III.

Growth Energy’s review of the documents provided to date in response to its PRA request has revealed inconsistencies in how the Stationary Sources Division (“SSD”) and perhaps other program offices have interpreted the Board’s obligations under Gov’t Code §§ 11347.3 and 11348, and overall a substantial failure to comply with those two important provisions of the APA. Some memoranda and other communications from ARB consultants and contractors are available by hyperlink on the LCFS “Subject Top Page” on the ARB website; far more are not. Some externally-prepared materials with subject matter that ARB staff considered sufficiently related to the rulemaking to place on the website (and thus by the staff’s view in the rulemaking file) do not mention the LCFS

³ ARB appears to have understood the term “in connection with” in the same manner as Growth Energy, and thus placed on the LCFS “Subject Top Page” materials it received from a May 2008 conference at an academic institute on “bioenergy sustainability and lifecycle analysis,” as well as a paper prepared by a University of California researcher in 2005. As will appear below, however, the omission of many other comments from the rulemaking file and the ARB website shows that ARB was not consistent in applying such an understanding of the APA.

⁴ *See* page 3 above. Growth Energy does not agree that placing documents on a hyperlink to the LCFS “Subject Top Page” on the ARB website necessarily complies with Gov’t Code § 11348, *see text infra*, but is not pursuing that issue in this letter.

rulemaking; far more material sent to SSD and perhaps other offices that specifically refers to the rulemaking effort, and even to comments by other parties in the rulemaking process, were not placed in the rulemaking file.

Growth Energy requests that you review the Descriptive Index that accompanies this letter for our specific views on the reasons why it is concerned about the rulemaking file, and the specific responses that we request with respect to the attachments. Growth Energy believes that the Board's obligation extends further and requires you to augment the rulemaking file in all necessary respects and to permit public comment on documents that must now be added to the rulemaking file, as explained below in the final section of this letter. In the same section we also present several general questions on which we need your guidance in order to understand ARB's position on the requirements of the APA. (*See* p. 11 below.) In this section of its letter Growth Energy wishes to provide a few examples of the inconsistencies and omissions that are apparent from the PRA documents provided to date.

1. Omission of Clarifying and Explanatory Public Comments

First, there are a substantial number of emails and apparently other documents (most of which could not be located in the PRA release to date) that provide significant clarifications or that otherwise explain previously unknown elements in the staff's environmental and economic analyses offered to support the LCFS regulation. Many of those documents are included as Attachments A-1 to A-21 of this letter, as well as in other Attachments relevant to the APA issues presented here for additional reasons. Growth Energy would certainly have responded to many of those clarifications and additional descriptions of the staff's analyses during the periods allowed for written public comment, if not at the public hearing, had it had access to this information in a timely manner in the rulemaking file.

Several specific examples will illustrate the point. As the initial rulemaking notice stated, in its description of an important part of the staff's environmental assessment:

To assess the emissions from land use changes, staff used the Global Trade Analysis Project (GTAP) to estimate the GHG emissions impact. The GTAP model is discussed in the Staff Report and related Appendices. In general, the model evaluates the worldwide land use conversion associated with the production of crops for fuel production. Different types of land use have different rates of storing carbon. In general, multiplying the changes in land use times an emission factor per land conversion type results in an estimate of the GHG emissions impacts of land conversions.

Notice of Public Hearing to Consider Adoption of a Proposed Regulation to Implement the Low Carbon Fuel Standard (dated Feb. 24, 2009) at 8. Growth Energy's document review demonstrates that both prior to and during the periods allowed for public comment, SSD received and retained comments that clarified or amplified the inputs, assumptions and coefficients used in various applications of the GTAP model and the inputs used to estimate carbon storage and release. *See, e.g.*, Attachment A-3 (email dated March 17, 2009 states that enclosure "contains emissions factors incorporated in the GTAP analysis between August and now," and "all runs [of the model] ... sent to ARB" for two types of ethanol and biodiesel); Attachment A-8 (email dated March 13, 2009, explaining source for the "carbon accounting" used in the GTAP analysis). The public was entitled to the inputs, assumptions, coefficients and results from "all runs" of GTAP, as well as prompt clarification of the sources for the "carbon accounting" used in the ARB staff's analysis. As Attachment A-8 indicates, by mid-March 2009, the ARB staff had been "receiving repeated requests for a technical appendix on the methodology for utilizing the carbon emission factors into the GTAP analysis." *See id*; *see also* Descriptive Index at 1-7.

