

## **Courts Have Discretion to Allow Agency Regulations Adopted in Violation of CEQA to Remain in Place Based on Their Environmental Benefits While Agency Takes Corrective Action**

Agencies promulgating regulations under a certified regulatory program may not bypass CEQA's environmental review procedures by approving the regulations prior to completion of the environmental review. [\*POET LLC v. California Air Resources Board\*, 218 Cal. App. 4th 681 \(2013\)](#). However, the decision in *POET* demonstrates that a court has discretion to consider the regulations' environmental benefits and allow the regulations to remain in place while the agency takes corrective action to comply with CEQA. In *POET*, the largest U.S. ethanol producer and a citizen concerned about zero emission vehicles sued to challenge the Air Resources Board's approval of Low Carbon Fuel Standard (LCFS) regulations. The case alleged three CEQA violations:

- First, that ARB improperly approved the regulations before completing its environmental review.
- Second, that ARB improperly "split the decision-making authority" to approve and disapprove regulations from responsibility for completing the environmental review.
- Third, that ARB impermissibly "deferred" mitigation of potential increases in emissions of oxides of nitrogen (NOx) resulting from the use of biodiesel.

The court of appeal agreed with all three claims. *Factual Background of the Case*. The LCFS regulations require reduction in the carbon content of transportation fuels sold or supplied in the state. Adopting these regulations was among the "early action measures" meant to facilitate the implementation of AB 32. The regulations calculate carbon content based on the full fuel cycle (from "seed-to-wheels") and fuel pathways (the steps involved in producing, transporting, and using fuel). The regulations used a statistical model for measuring carbon content that incorporated the "indirect land use effects" of biofuels, such as increased conversion of land to farmland for crop cultivation. This resulted in the failure of certain biofuels to meet the 2020 LCFS standards for gasoline, which negatively affected the demand for such fuels. In an effort to comply with the CEQA duties under a certified regulatory program, ARB presented environmental information about the regulations in an extensive staff report. In April 2009, after a public hearing, ARB adopted a resolution that "approved for adoption" the proposed LCFS regulations. It also released a press statement after the hearing indicating it had adopted the regulations. Pursuant to the resolution, the Executive Officer subsequently addressed the comments raised on the environmental issues, although the resolution prohibited him from making substantive changes to the regulations. *The Court's Ruling*. The court of appeal began its analysis by stating that an agency acting under a certified regulatory program remains subject to CEQA. The court stated that "[b]efore granting any approval of a project subject to CEQA, every lead agency or responsible agency shall consider a final EIR or negative declaration *or another document authorized by these guidelines to be used in the place of an EIR or negative declaration*." (Court's emphasis.) The court concluded that "another document" includes environmental documentation for a certified regulatory program. The court next turned to the issue of whether the April 2009 ARB resolution constituted an "approval" under section 15352(a) of the CEQA Guidelines. The court observed that the test established by the Supreme Court in *Save Tara v. City of West Hollywood*, 45 Cal. 4th 116 (2008), for defining when an "approval" occurs should be extended to certified regulatory programs. Under this test, courts look to the "surrounding circumstances to determine whether, as a practical matter, the agency has committed itself to the project . . . so as to effectively preclude any alternatives or mitigation measures that CEQA would otherwise require to be considered." Applying the *Save Tara* test, the court found that ARB's April 2009 resolution impermissibly committed the agency to the adoption of the regulations before the Executive

Officer's completion of the environmental assessment. The court rejected ARB's contention that the resolution was merely an "initial approval," and that the regulations did not take effect until after environmental analysis was concluded. The court emphasized that once ARB adopted its resolution, the regulations "had significant bureaucratic momentum." It also reasoned that the resolution barred the Executive Officer from considering alternatives and mitigation measures that CEQA would require to be considered, including the alternative of not going forward with the regulations. According to the court, the Executive officer's lack of decision-making authority created another CEQA defect, by separating the project approval from the environmental review. This separation, the court reasoned, is inconsistent with the purpose served by an environmental assessment, because it insulates the decision-maker from the debate and resolution of the environmental issues. The CEQA policy against such separation applies with equal force "whether the environmental review document is an EIR or a documentation prepared under a certified regulatory program." The court found another CEQA defect in the mitigation of NOx emissions. ARB indicated it would conduct "an extensive testing program" to "establish specifications to ensure there is no increase in NOx." But according to the court, this was not an adequate performance standard to justify a deferral of the particulars, since it "established no objective performance criteria for measuring how the stated goal will be achieved." *The judicial remedy*. Despite these deficiencies, the court allowed ARB to continue to implement the regulations while it took the necessary actions to comply with CEQA. In so doing, the court cited the environmental benefits the regulations would provide, noting: "we will avoid the irony of violations of an environmental protection statute being used to set aside a regulation that restricts the release of pollutants into the environment." This last holding is especially newsworthy as it reflects the courts' growing willingness to tailor remedies in CEQA cases based upon equitable considerations.

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