02-REN-1038
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11-RPS-01
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March 23, 2012

Chairman Robert B. Weisenmiller, Ph.D.
California Energy Commission
1516 Ninth Street
Sacramento, CA 95814

Re: RPS Proceeding, Docket Numbers 11-RPS-01 and 02-REN-1038: Notice to Consider Suspension of RPS Eligibility Guidelines Related to Biomethane

Dear Chairman Weisenmiller:

The Coalition for Renewable Natural Gas (Coalition or CRNG) is a California-based nonprofit organization dedicated to the advancement of renewable natural gas (RNG) as a clean, low-carbon, renewable energy resource. Our diverse membership and partner organizations include small businesses, consumers, engineers, energy developers, RNG marketers, environmental advocates, labor, law firms, transportation, and municipal utilities. RNG, also known as biomethane, is a viable alternative and renewable energy resource that has a myriad of economic and environmental benefits, including the reduction of greenhouse gas emissions consistent with State renewable energy policy.

On February 22, 2012, four California legislators sent a letter to the California Energy Commission (Commission) requesting the Commission to consider removing biofuels from eligibility to qualify as a renewable resource under the Renewable Portfolio Standard (RPS). On March 16, 2012, less than a week ago, the Commission issued a "**Notice to Consider Suspension of the RPS Eligibility Guidelines Related to Biomethane**." The Commission cannot and should not adopt its proposed action at the March 28, 2012, Business Meeting.

I.
CALIFORNIA LAW PROHIBITS THE COMMISSION FROM SUSPENDING RPS ELIGIBILITY FOR BIOMETHANE WITHOUT A FULL AND COMPLETE ADMINISTRATIVE EXAMINATION OF THE ACTUAL AND SEVERE ADVERSE ECONOMIC IMPACTS TO THE STATE

The Commission cannot adopt its proposed suspension of biomethane at the March 28, 2012, Business Meeting. Specifically, the Commission is not legally empowered to fast-track its consideration of a proposed suspension of biomethane from the RPS eligibility requirements.[1] California law expressly prohibits the Commission from its proposed action absent a full and complete administrative review of the actual and severe economic impacts such a decision would have on the State.

An administrative agency may only adopt regulations within the scope of its statutory authority. "Whenever by the express or implied terms of any statute a state agency has authority to adopt regulations to implement, interpret, make specific or otherwise carry out the provisions of the statute, no regulation adopted is valid or effective unless consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute." Gov't Code § 11342.2; *Bearden v. U.S. Borax, Inc.*, 138 Cal. App. 4th 429 (2006).

Administrative regulations that enlarge the scope of statutory authority are void. *Pulaski v. California Occupational Safety and Health Standards Board*, 75 Cal. App. 4th 1315, 1332 (1999). In reviewing a challenge of an administrative regulation based on the absence of statutory authority, courts will apply a narrow scope of review to determine whether the regulation (1) comes within the scope of the controlling statute, and (2) is reasonably necessary to carry out the statutory purpose. *Slocum v. State Board of Equalization*, 134 Cal. App. 4th 969, 974 (2005). A court's "first task in construing a statute is to ascertain the intent of the Legislature so as to effectuate the purpose of the law. In determining such intent, a court must look to the words of the statute themselves, giving to the language its usual, ordinary import." *Buckley v. California Coastal Commission,* 68 Cal. App. 4th 178, 188 (1999). "[W]here the language of a statute is clear and unambiguous, its meaning should generally be followed. Second-guessing the policy determination of the Legislature is an inappropriate task for a reviewing court." *Larson v. State Personnel Board*, 28 Cal. App. 4th 265, 280 (1994).

A. The Proposed Biomethane Suspension Is an Illegal Underground Regulation Prohibited Under California Law

It is well-settled that California state agencies, including the Commission, are required to adopt regulations to enforce or implement the laws they administer through procedures established by the California Administrative Procedure Act (APA). (Cal. Gov. Code §11340, et seq.) According to the Office of Administrative Law, "the requirements set forth in the APA are designed to provide the public with a meaningful opportunity to participate in the adoption of state regulations and to ensure that regulations are clear, necessary and legally

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[1] Manatt, Phelps & Phillips, LLP reviewed and assisted the Coalition for Renewable Natural Gas in the preparation of these comments.

valid."[2] Accordingly, state regulations must also be adopted in compliance with regulations adopted by the OAL. (*See*, California Code of Regulations, Title 1, Sections 1-280).

The Commission is a state agency subject to the requirements imposed by the APA. (Cal. Gov. Code §§11340, 11340.5, 11342.520.) Government Code Section 11340.5 provides in relevant part that:

> (a) ***No state agency shall issue, utilize, enforce, or attempt to enforce any guideline***, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in Section 11342.600, ***unless the guideline,*** criterion, bulletin, manual, instruction, order, standard of general application, or other rule ***has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter***. (Emphasis added.)

Therefore, where an agency attempts to enforce a rule that it did not adopt formally under the APA, ***it is an illegal or prohibited "underground regulation."*** Cal. Gov. Code § 11340.5; *see also*, *Morillion v. Royal Packing Co.* (2000) 22 Cal. 4th 575, 581 and *Tidewater Marine W., Inc. v. Bradshaw,* (1996) 14 Cal. 4th 557, 576.

The Commission's Notice regarding the suspension of biomethane from RPS eligibility states that the Commission will "consider suspending previously adopted guidelines that allow electric generation facilities to be certified as eligible for [RPS] if the facilities use biomethane to generate electricity." The "guidelines" at issue are contained in the Commission's Renewable Portfolio Standard (RPS) Eligibility Guidebook (the "RPS Guidebook"). While framed as a purported amendment of an advisory "guideline," it is in fact nothing of the sort. The Commission's proposed action is, in form and in fact, the enactment of a regulation that is subject to the APA. Specifically, California Government Code Section 11342.600 defines a "Regulation" as:

> …every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure.

In addition, the California Government Code Section 11342.548 also defines a "Major regulation" as:

> ...any proposed adoption, amendment, or repeal of a regulation subject to review by the Office of Administrative Law pursuant to Article 6 (commencing with Section 11349) that will have an economic impact on California business enterprises and individuals in an amount exceeding fifty million dollars ($50,000,000), as estimated by the agency.

In accordance with the APA, the Commission has historically allowed the public to actively participate in the development of the substantive provisions of the guidebook including extended public comment periods and workshops. In fact, it ***took over three years for the Commission to promulgate its current Fourth Edition of the RPS Guidebook*** (adopted on December 15, 2010).[3] The Commission's Notice of its proposed suspension of biomethane

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[2] *See*, http://www.oal.ca.gov/administrative_procedure_act.htm.

[3] *See*, http://www.energy.ca.gov/renewables/documents/#overall Previous editions were also promulgated only after extensive periods of review as well. Specifically, on or about April 26, 2006, after extensive review and development, the CEC adopted the First Edition of its Renewable Portfolio Standard (RPS) Eligibility Guidebook. The Second Edition was adopted over a year later (on March 14, 2007), and a Third

has articulated absolutely ***no reasoned basis for the urgency of this material and substantial change that will drastically impact the renewable energy marketplace and the entire landscape of clean energy markets throughout the country.*** Nor has the Commission provided any justifiable explanation as to ***why the Commission is not following the procedures it has historically employed in the past***. This is an enormous decision that must not and cannot be rushed.

While the Commission relies on Public Resources Code Section 25747 to fast-track this enormous decision, that reliance is woefully misplaced. Section 25747 allows the Commission to "adopt guidelines governing the funding programs authorized under this chapter, at a publicly noticed meeting offering all interested parties an opportunity to comment" and further states that "[s]ubstantive changes to the guidelines shall not be adopted without at least 10 days' written notice to the public. ***The public notice of meetings required by this subdivision shall <u>not be less than 30 days</u>***." (Emphasis added.)

As a preliminary matter, the proposed suspension does not relate to a "guidelines governing the funding programs" under existing law. Rather, the proposed "guidelines" relates to the Commission's interpretation of its responsibilities under the statute. Moreover, while the March 16 notice was issued more than 10 days before the March 28, 2012, Business Meeting, the ***Commission failed to provide 30 days notice of the special March 28 Business Meeting***. Therefore, even if Section 25747 applied, which it does not, the Commission has already violated the express provisions of the statute upon which it erroneously relies.

The Commission's proposed action cannot be enacted without proceeding with a full administrative review under the California Administrative Procedure Act.

B. <u>The Commission Must Comply with the Administrative Procedures Act and Conduct a Full and Complete Administrative Examination of the Economic Impacts of Its Proposed Ban on Biomethane</u>

With the enactment of SB 617, effective January 1, 2012, State agencies are required to consider the economic impact of any changes to their proposed regulations. SB 617 concerns development and consideration of reasonable alternatives to the regulation that is proposed for adoption along with an explanation of the reasons for rejecting the alternatives not selected, the preparation of an Economic Impact Assessment of the proposed action, an explanation of the benefits anticipated from each proposed regulation, an evaluation of consistency and compatibility of each proposed regulation with existing regulations, a statement of the problem each regulation intends to address, and the rationale for the determination that each regulation is reasonably necessary to address the problem the regulation is intended to address.

Specifically, SB 617 amended Government Code Section 11346.3 which now provides that:

> (a) ***State agencies proposing to adopt, amend, or repeal any administrative regulation shall assess the potential for adverse economic impact on California business enterprises*** and individuals, avoiding the imposition of unnecessary or

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Edition was adopted approximately nine months thereafter (on December 19, 2007). See, http://www.energy.ca.gov/renewables/documents/old_guidebooks.html#rps

unreasonable regulations or reporting, recordkeeping, or compliance requirements. For purposes of this subdivision, assessing the potential for adverse economic impact shall require agencies, when proposing to adopt, amend, or repeal a regulation, to adhere to the following requirements, to the extent that these requirements do not conflict with other state or federal laws:

> (1) The proposed adoption, amendment, or repeal of a regulation shall be based on adequate information concerning the need for, and consequences of, proposed governmental action.
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> (2) The state agency, prior to submitting a proposal to adopt, amend, or repeal a regulation to the office, shall consider the proposal's impact on business, with consideration of industries affected including the ability of California businesses to compete with businesses in other states. For purposes of evaluating the impact on the ability of California businesses to compete with businesses in other states, an agency shall consider, but not be limited to, information supplied by interested parties.

It is not the intent of this section to impose additional criteria on agencies, above that which exists in current law, in assessing adverse economic impact on California business enterprises, but only to assure that the assessment is made early in the process of initiation and development of a proposed adoption, amendment, or repeal of a regulation.

(b)(1) ***All state agencies proposing to adopt, amend, or repeal any administrative regulations shall assess whether and to what extent it will affect the following***:

> (A) ***The creation or elimination of jobs*** within the State of California.
>
> (B) ***The creation of new businesses or the elimination of existing businesses*** within the State of California.
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> (C) ***The expansion of businesses currently doing business within the State of California***.

> (2) This subdivision does not apply to the University of California, the Hastings College of the Law, or the Fair Political Practices Commission.
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> (3) Information required from state agencies for the purpose of completing the assessment may come from existing state publications.

(c) No administrative regulation adopted on or after January 1, 1993, that requires a report shall apply to businesses, unless the state agency adopting the regulation makes a finding that it is necessary for the health, safety, or welfare of the people of the state that the regulation apply to businesses.

(Emphasis added.)

The Commission has not conducted any kind of economic impact analysis at all for this proposed change which will have enormous economic ramifications across the country. For reasons described in this letter and which will be presented at the March 28 meeting, there is substantial evidence that the Commission's proposed action will have a severe economic impact on the State and cause irreparable injury on renewable energy markets everywhere. The Commission should not and cannot adopt this proposed change without following a full and complete administrative review process. The Commission's failure to

utilize a thorough and thoughtful process, not only violates the APA, it also deprives many interested parties of their constitutional due process rights, violates the constitutional dormant commerce clause and could give rise to inverse condemnation claims against the State. The Coalition respectfully requests the Commission to continue its hearing and afford all interested parties a sufficient opportunity to provide relevant information, testimony and comment so that the Commission can make an informed decision, rather than make a rush to judgment on the issue.

II.
THE COMMISSION SHOULD GIVE INTERESTED PARTIES AND AFFECTED STAKEHOLDERS A SUFFICIENT OPPORTUNITY TO PROVIDE RELEVANT INFORMATION, TESTIMONY AND COMMENT FOR THE COMMISSION'S CONSIDERATION

In addition to the reasons discussed above, the Commission should not adopt its proposed suspension of biomethane at the March 28, 2012, Business Meeting. This potential action is an industrywide game-changer that will severely impact tens of millions of dollars worth of clean-energy investment being developed for California's RPS. We respectfully request you to deny consideration of this suspension until parties have had the opportunity to provide comments with proper notice. A seven-day notice to the public of such a wide-impacting action provides insufficient notice to interested stakeholders, constitutes bad public policy and is legally questionable for the reasons described below.

It is premature for the Commission to act on this issue, without valuable input from the industries at stake. It is particularly troubling that the Commission has been influenced by a single letter from only four legislative members asking for this moratorium. The Commission has this process reversed. The status quo should remain in effect until the State Legislature definitively acts to change the rules. The Commission's proposed action next week would effectively change the rules for the electric and biofuel industries *in anticipation* of action by the Legislature.

Rather than rush to act on this proposal, the Commission should work collaboratively with all interested parties to aid the Commission with its decision in this matter. As you know, we have been working on this issue with the Commission and had the privilege of serving on an RPS panel during its September 2011 public workshop, where we addressed both Commission staff and stakeholder questions specific to the treatment of biomethane under the RPS Proceeding, Docket Numbers 02-REN-1038 and 11-RPS-01. The Commission will only sever this collaborative exchange of information and dialogue if it approves this proposed action next week.

Furthermore, in light of the public proceedings on the subject where an overwhelming majority of those in attendance and providing comments were in favor of biomethane, we are concerned with the tenor and insufficiency of the Commission's notice to the public. At a minimum, this action conveys that an approval of the moratorium on biomethane is a foregone conclusion.

Inextricably, the proposed moratorium will set bad policy at a critical time when the State economy is recovering from a poor economic climate. The moratorium will adversely affect green jobs in the RNG industry, hamper efforts to develop waste-to-energy projects in California, inhibit municipal utilities' ability to cost-effectively achieve the State's 33% RPS

goals, and hinder the renewable natural gas industry's joint ability to execute or service contracts that guarantee stable rates for California's electric consumers.

We stand ready and willing to engage the Legislature in an open public policy discussion about biomethane and the legitimate issues raised in the February 22, 2012 letter by only four of its members. However, we firmly disagree with the hasty decision by the Commission to short-circuit the public process without adequate and careful consideration of the effects of this action on the RPS itself. There is no evidence or documentation of any harm that would necessitate the Commission's immediate action.

We support the State goal to affirmatively demonstrate the environmental benefits of biomethane and the creation of a more accurate national accounting system. However, SB 2x (Chapter 1, statutes of 2011) does not contain any clear or direct authorization for the Commission to change the existing treatment of biomethane for RPS purposes. If the Legislature seeks clarification on this issue, then it should pass a bill through the legislative process and secure the Governor's signature. In fact, there are at least two legislative measures that have been introduced this year to address these very issues, including AB 1900 (Gatto).

For these reasons, we respectfully request that the Commission deny the request for an immediate, unilateral moratorium on approval of biomethane transactions, and allow the Legislature and State Administration to jointly effect any necessary changes to the existing statute regarding the treatment of biomethane produced in and out-of-state, for RPS compliance.

Sincerely,

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Cc: Carla Peterman, Commissioner
Karen Douglas, Commissioner
Darrell Steinberg, Senate President Pro Tempore
John A. Perez, Speaker of the Assembly
John Laird, Secretary, California Natural Resources Agency
Gareth Elliott, Legislative Affairs Secretary, Office of the Governor
Rob Oglesby, Executive Director, CEC