

DOCKETED

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Project Title:	Modification of Alternative and Renewable Fuel and Vehicle Technology Program Funding Restrictions
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RESOLUTION NO: 15-0812-11a

STATE OF CALIFORNIA STATE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION

RESOLUTION

WHEREAS, on February 25, 2015 the California Energy Commission ("Energy Commission") made a finding of emergency and adopted an emergency regulation that changed California Code of Regulations, Title 20, section 3103 ("§ 3103"); and

WHEREAS, on March 12, 2015 the Office of Administrative Law ("OAL") approved the Energy Commission's emergency regulation, which became effective on March 12, 2015 and is set to expire on September 9, 2015 under the 180-day limit imposed by Government Code section 11346.1(e); and

WHEREAS, Energy Commission staff now propose to readopt the emergency regulation and finding of emergency, pursuant to Government Code section 11346.1; and

WHEREAS, the Energy Commission has the authority to readopt this emergency regulation under sections 25213 and 25218(e) of the Public Resources Code, sections 44271 and 44272 of the Health and Safety Code, and pursuant to Government Code section 11346.1; and

WHEREAS, the Energy Commission has considered all comments received, staff's responses, and the entire record of this proceeding as reflected in Docket 15-OIR-02; and

WHEREAS, the Energy Commission is proceeding with diligence in conducting a regular rulemaking that will confirm the emergency changes adopted on February 25, 2015 and make additional changes, as evidenced by:

- Publication on June 12, 2015 in the California Regulatory Notice Register a Notice of Proposed Amendments to Alternative and Renewable Fuel and Vehicle Technology Program Funding Regulations Title 20, California Code of Regulations, sections 3100-3104 ("Notice"),
- Delivery on June 12, 2015 of the Notice to every person on the Energy Commission's Business Meeting Agenda, Alternative Fuels, and Transportation list servers and to every person who had requested notice of such matters,
- Posting on the Energy Commission's website on June 12, 2015 the Notice and text of the proposed regulations, initial statement of reasons, and information upon which the proposal is based; and

WHEREAS, the Energy Commission has considered the application of the California Environmental Quality Act (CEQA) to the readoption of this emergency regulation, as detailed in the analysis set forth in the July 30, 2015 Memorandum by the Chief Counsel's Office titled "Readoption of an Emergency Regulation for the Alternative and Renewable Fuel and Vehicle Technology Program is Not a Project Under the California Environmental Quality Act" ("Memorandum");

THEREFORE BE IT RESOLVED THAT the Energy Commission adopts the findings in the Office of the Chief Counsel's July 30, 2015 Memorandum that readoption of the emergency regulation is not a "project" under CEQA and California Code of Regulations, Title 14, section 15378; and that in the event that readoption was determined to be a project, it would nonetheless be exempt from CEQA requirements pursuant to the "common sense" exemption (Cal. Code Regs., tit. 14, § 15061, subd. (b)(3); and

BE IT FURTHER RESOLVED THAT the Energy Commission finds that the emergency circumstances existing at the time of adopting the emergency regulation on February 25, 2015 still exist; and

BE IT FURTHER RESOLVED THAT the Energy Commission hereby readopts the Finding of Emergency that was originally adopted by the Energy Commission on February 25, 2015, and that is attached hereto as Exhibit A; and

BE IT FURTHER RESOLVED THAT the Energy Commission hereby readopts the emergency regulation that is currently codified at California Code of Regulations, Title 20, section 3103, and that is attached hereto as Exhibit B; and

BE IT FURTHER RESOLVED THAT the Energy Commission directs the Executive Director to take, on behalf of the Commission, all actions reasonably necessary to have the adopted regulation go into effect, including but not limited to incorporating any changes approved by the Energy Commission into the final Express Terms submitted to OAL; making any appropriate nonsubstantive changes required by OAL; and preparing and filing all appropriate documents with OAL.

CERTIFICATION

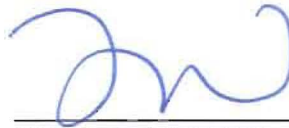
The undersigned Secretariat to the Commission does hereby certify that the foregoing is a full, true, and correct copy of a resolution duly and regularly adopted at a meeting of the California Energy Commission held on August 12, 2015.

AYE: Weisenmiller, McAllister, Hochschild, Scott

NAY: None

ABSENT: Douglas

ABSTAIN: None



TIFFANI WINTER
Secretariat

EXHIBIT A

**FINDING OF EMERGENCY
FOR
PROPOSED REGULATIONS
TO MODIFY ALTERNATIVE AND RENEWABLE FUELS AND VEHICLE
TECHNOLOGY PROGRAM FUNDING RESTRICTIONS**

February 2015

**FINDING OF EMERGENCY/EXPRESS STATEMENT OF EXISTENCE OF
EMERGENCY**

The California Energy Commission (the Commission) finds that the changes proposed herein are necessary to address a situation that calls for immediate action to avoid serious harm to the public peace, health, safety, or general welfare. Specifically, the Commission finds that removing the requirement that recipients of funds under the Alternative and Renewable Fuel and Vehicle Technology Program (ARFVTP) discount any emission credits they generate in proportion to the amount of funding received is necessary to carry out the purposes of the California Alternative and Renewable Fuel, Vehicle Technology, Clean Air, and Carbon Reduction Act of 2007 (Act). (Health and Saf. Code §44270 et seq.) The purpose of this act is to provide funding to entities to “develop and deploy innovative technologies that transform California’s fuel and vehicle types to help attain the state’s climate change policies.” (Health and Saf. Code §44272(a).) These climate change policies have a direct, beneficial effect on public health, safety, and general welfare and any unnecessary delay will impinge on these benefits.

The regulations currently require companies that receive funds from the ARFVTP to discount credits received to reduce greenhouse gas emissions from programs, such as the Low Carbon Fuel Standard (LCFS), equal to the value of grant funding received by the California projects. The Energy Commission has funded roughly \$135 million in California projects to produce low carbon fuels (biomethane, biodiesel, renewable diesel and low carbon intensity ethanol) that also generate credits obligated parties (mostly oil refineries) may buy to achieve a required 10% reduction of carbon intensity of gasoline and diesel fuel by 2020 under the LCFS. Compliance with the Energy Commission’s existing credit discounting requirement puts nineteen California ARFVTP project recipients in immediate, adverse economic harm because the value of the credits are substantial sources of revenue, which if lost, affect business operations or possible decisions to close plants. The projects are located in predominantly economically disadvantaged communities – many in the San Joaquin Valley that would lose employment and tax revenue. If nothing is done, California will also face the possibility of “sunk cost” investments in stranded assets and fewer contributors to help achieve

LCFS goals. As discussed below, the economic impacts of the current regulation result in serious harm to the public peace, health, safety, or general welfare.

This change is intended to remove the financial barriers to full implementation of the program by removing the prohibition to using credits generated by certain projects. The following information is evidence that an amendment to Title 20, Section 3103 of the program is necessary to prevent immediate and serious harm to the public health, safety, and general welfare.

California alternative fuel projects that received ARFVTP funding are in jeopardy of closure because enforcement of the credit discounting requirement would result in significant lost revenue for these projects. This revenue is critical to the financial viability of alternative and renewable fuel project fund recipients, especially because the market for alternative and renewable fuels products is currently depressed and the sale of these products alone is insufficient to compensate for the cost of production. Commission investment of over \$135 million in alternative and renewable fuel production capacity is subject to this requirement, affecting over 300 million gallons of in-state production. Requiring program participants to discount credits specifically handicaps California projects, placing them at an economic disadvantage compared to imports of biofuels or low carbon fuels from similar projects owned by competitors in other states and countries.

The dual goals of the ARFVTP and its implementing legislation are to reduce GHG emissions and displace petroleum use from the transportation sector by supporting the development of the production of alternative and renewable fuels, especially in-state. Other state programs also support these goals, such as the Low Carbon Fuel Standard administered by CARB, and together these form a web of market interventions designed to reduce California's GHG footprint and its use of petroleum fuels. It is imperative to remove this obstacle to full implementation of the Act as soon as possible to ensure that the resulting emission reductions can be realized as soon as possible and the state can more quickly meet its goal of increasing production of low carbon, renewable fuels as part of the state's strategy to reduce greenhouse gases.

Background and Justification

Several stakeholders have expressed concerns that the restriction imposes significant barriers to commercial operation and deployment of the alternative fuels. Crimson Renewable Energy, LP submitted a letter requesting the Commission revisit the discounting requirement and stating that without being able to use the value of all emission credits received, an alternative fuel production project would not work in California and that current market conditions make the economic value of LCFS credits crucial to the survival of grantees such as Crimson. (Crimson Letter, p. 3.) These sentiments were echoed in letters from Bioenergy Association of California, Waste

Management, The Coalition for Renewable Natural Gas, Clean Energy Renewable Fuels, CR&R Incorporated, and Community Fuels. These entities affirm that the existing restriction on the use of credits by fund recipients conflicts with the intent of AB 118 (Stats. 2007, Ch. 750), has had a chilling effect on producers' interest in applying for funding and entering or increasing their presence in the market, and ultimately leads to a diminished capability to produce alternative low carbon fuels in the state.

This proposed action necessitates an emergency rulemaking because it is necessary to address a situation that calls for immediate action to avoid serious harm to the public peace, health, safety, or general welfare. As discussed above, the regulations as currently written, in conjunction with current market conditions, create an impediment to alternative and renewable fuel projects coming online and producing alternative and renewable fuels. This directly conflicts with AB 118 and the state's goal of increasing the production and use of low carbon, renewable fuels to help reduce greenhouse gas emissions and petroleum consumption. Delay in meeting the state's goals of reducing greenhouse gas emissions and petroleum consumption would result in impacts to the public health, safety, and general welfare. The health and safety implications of greenhouse gas emissions are well known and well documented, as are the health implications of the heavy use of gasoline and diesel in the transportation sector. As discussed elsewhere in this document, the potential for delay is immediate and the regulations need to be changed immediately in order to remove the impediment to bringing these alternative and renewable fuel production facilities online as soon as possible to allow for the quicker displacement of heavily polluting traditional gasoline and diesel fuels.

The transportation sector is responsible for approximately 40 percent of statewide greenhouse gas emissions and significant degradation of public health and environmental quality due to air and water pollution. (Stats. 2007, Ch. 750, § 1(b), p. 90.) The Legislature established the Alternative and Renewable Fuel and Vehicle Technology Program to help reduce these impacts to the public health, safety, and general welfare by, among other things, encouraging the production of alternative and renewable fuels. The current regulations combined with current market forces affecting the competitiveness of alternative fuels will cause potentially significant delay and impedance to reducing these impacts. The proposed regulations are needed immediately to avoid any potential delay in the provision of alternative and renewable fuels.

The statute requires that priority for funding be given to, among others, those projects that are consistent with existing and future state climate change policy, reduce criteria air pollutants and air toxics and reduce or avoid multimedia environmental impacts, and that have the ability to decrease emissions of water pollutants. (Health and Saf. Code, §44272(b).) The \$135 million spent so far to fund biofuel and biomethane projects is expected to displace 98 million diesel gallon equivalents annually by 2025. The entire

ARFVTP is improving air quality and will reduce 100 to 178 tons of PM2.5 by 2025. Any delay in the implementation of projects meeting these criteria would result in the further continuation of these impacts.

These regulations were not proposed earlier because it was anticipated that there was sufficient time to contemplate proposed changes because the price of gasoline, diesel, and natural gas remained such that alternative and renewable fuels remained competitive, even with the potential restriction on the use of credits. The recently depressed prices for crude oil and natural gas, however, has now made it near impossible for alternative and renewable fuels to compete on the market without the financial assistance provided by the ability to use credits generated by the production of the alternative and renewable fuels.

The proposed changes are necessary to effectuate Health and Safety Code, section 44270 et seq., also known as the California Alternative and Renewable Fuel, Vehicle Technology, Clean Air, and Carbon Reduction Act of 2007. This statute directs the Commission to implement the Alternative and Renewable Fuel and Vehicle Technology Program “to develop and deploy technology and alternative and renewable fuels in the marketplace, without adopting any one preferred fuel or technology.” (Health and Saf. Code, §44272(a).) The changes to the regulation proposed in this emergency rulemaking are in keeping with this authorizing legislation and are necessary to carry out its goals. Without the proposed changes, the statute’s goal of developing and deploying alternative fuels will not be realized. As discussed in staff’s report *Documentation to Support Revisions to Section 3103 Regulations*, alternative and renewable fuel developers have determined that with the prohibition to using credits generated from their projects, their projects are not financially profitable given current market conditions and, thus, they cannot move forward with any plans to begin or expand production of alternative or renewable fuels. The proposed regulations would remove the prohibition from entities that voluntarily participate in credit markets, thus removing an impediment to the profitability of these enterprises and allowing such projects to proceed, in keeping with the intent of the statute.

INSUFFICIENT TIME FOR NON-EMERGENCY RULEMAKING (Government Code Section 11346.1(b)(2))

The consequences of continued implementation of the existing regulation would be catastrophic to program participants, many of whom are just now completing construction of substantial expansions in biofuel production capacity. In a survey of potential impacts, respondents have said they will not be able to complete their planned build-out if the credit discounting requirement is enforced. The Commission is continuously publishing Program Opportunity Notices (PONs) for the ARFVTP. These PONs solicit proposals to receive funding under the program and identify specific details regarding such funding, including any restrictions. All proposals accepted under

each PON must adhere to the restrictions set forth therein. Currently, the PONs identify the credit discounting restriction. Even though recent PONs also acknowledge that the restriction may be eliminated if the regulations change, older PONs do not contain such language and the mere presence of the restriction in the PONs discourages some entities from ever applying for funding. Therefore, it is imperative that the restrictions on the use of credits for voluntary projects be removed immediately so that projects are not bound by a restriction that has been determined to be detrimental to the overall objectives of the program and the goals of the authorizing statute, and potential projects are not discouraged from applying in the first place.

Immediate elimination of the restriction is necessary to ensure that projects that are on the cusp of coming online or of expanding production in fact do so, instead of being shuttered because the current market combined with the regulatory restriction makes it uneconomical to produce the needed alternative and renewable fuels.

STATUTORY AUTHORITY AND REFERENCE (Government Code Section 11349.1, 11346.5(a)(2) and Title 1, California Code of Regulations, Section 14)

The Commission proposes to adopt this modification to the program under the authority granted by Public Resources Code Sections 25213, 25218(e), and Health and Safety Code Section 44272(a). The purpose of the regulations is to implement, interpret, and make specific Health and Safety Code sections 44271 and 44272.

Authority:

- Public Resources Code Sections 25213, 25218(e), and Health and Safety Code 44272(a).

Reference:

- Health and Safety Code Section 44271, 44272.

SPECIFIC LANGUAGE PROPOSED (Government Code Section 11346.1(a)(2)(A))

The Commission proposes to modify California Code of Regulations, title 20, section 3103 to read as follows:

§ 3103. Funding Restrictions.

- a) A project shall not be eligible for funding if it is mandated by any local, regional, state, or federal law, rule, or regulation.

b) If a project is one that helps the ~~proposing entity~~ applicant meet a performance requirement mandated by local, regional, state, or federal law, rule, or regulation, the project shall not be eligible for funding.

c) To the extent a project exceeds what is required for compliance with a legally enforceable requirement, it may receive funding for that part of the project that the applicant demonstrates is not mandated to meet the requirement. Credits generated by the excess, however, may not be used or sold by the ~~proposing entity~~ applicant to offset a legally enforceable requirement, except to the extent allowed by subsection (b).

d) For purposes of this section, a legally enforceable requirement refers to any requirement enforceable by a local, regional, state, or federal agency for the purpose of reducing the emission of one or more criteria pollutants, toxic air contaminants, or any greenhouse gas. For purposes of this section, the following are not subject to the restrictions contained in subdivisions (a)-(c):

1. A project that produces opt-in fuels under the Low Carbon Fuel Standard (California Code of Regulations, title 17, section 95840.1, subdivision (b));
2. A project that produces fuel that meets or falls below the average carbon intensity requirements set forth in the Low Carbon Fuel Standard (California Code of Regulations, title 17, section 95842, subdivisions (b) and (c)) for the year in which the credits are generated;
3. A project under which the applicant has voluntarily opted-in to an emission reduction credit generating program for the purpose of participating in the program's credit market; or
4. A project that had been awarded funding under Health and Safety Code section 44272 prior to the effective date of this section as amended and also satisfies at least one of the requirements listed in subdivisions (d)(1)-(3).

~~(b) A project that generates credits that the applicant plans to claim based on the reduction of criteria pollutants, toxic air contaminants, or greenhouse gases may not be eligible for funding unless all of the following occur:~~

- ~~(1) the applicant seeks funding for only a portion of the project;~~
- ~~(2) the applicant agrees in the funding agreement to discount emission credits at least in proportion to the amount of funding received;~~

~~(3) the project satisfies one or more of the criteria in sections 3101 and 3101.5, as appropriate.~~

Note: Authority cited: Sections 25213, 25218(e), Public Resources Code; Sections 44271(e) and 44242(a) Section 44272(a), Health and Safety Code. Reference: ~~Section 44271(e),~~ Sections 44271-44272, Health and Safety Code.

INFORMATIVE DIGEST (Government Code Section 11346.5(a)(3))

Existing law requires all fund recipients under the ARFVTP wishing to use credits generated by the funded projects to discount the value of any emission credits received in an amount commensurate with the level of funding obtained from the Commission. This emergency rulemaking would remove this requirement for those that voluntarily opt-in to programs for the purpose of participating in the program's credit market, including those that produce the opt-in fuels listed in California Code of Regulations, title 17, section 95840.1(b) and those that produce fuels that meet or fall below the average carbon intensity standard established by ARB in section 95842(b) or (c) for the year in which the credits are generated. The emergency rulemaking would allow these fund recipients to receive the full value of any emission credits they create and to use or sell those credits.

Existing law refers to program applicants as "proposing entity." This emergency rulemaking would replace that term with "applicant" to make clear who specifically is subject to the funding restriction and applicable exemptions.

Summary of Effect

These proposed emergency regulations would remove the requirement that ARFVTP fund recipients must discount the value of emission credits received commensurate with the amount of funding received from the Commission, thus allowing the fund recipients to use or sell the credits and realize the full value of all the emission credits generated. This would allow the fund recipients to better compete in the current market place and ensure the commercial viability of their product, allowing continued progress in meeting the state's greenhouse gas emissions and other pollution reduction goals.

COMPARABLE FEDERAL STATUTE OR REGULATION (Government Code Section 11346.5(a)(3)(B))

The Commission has determined that there are no comparable federal regulations or statutes that address the specific provision found in California Code of Regulations, title 20, section 3103.

POLICY STATEMENT OVERVIEW: (Government Code Section 11346.5(a)(3)(C))

Health and Safety Code section 44270 et seq. is intended to provide funding to entities to “develop and deploy innovative technologies that transform California’s fuel and vehicle types to help attain the state’s climate change policies.” The program’s emphasis is on “develop[ing] and deploy[ing] technology and alternative and renewable fuels in the marketplace, without adopting any one preferred fuel or technology.” The Energy Commission is tasked with implementing the program to accomplish these goals.

Because of the current state of the marketplace for alternative and renewable fuels, the credit discounting requirement impedes the ability of the program to ensure the development and deployment of these products. Failing to remove this requirement would result in fewer alternative and renewable fuels being commercially available, thus failing to meet the goals of the program and impeding the state’s goal of increasing the production of low carbon, renewable fuels as part of the state’s strategy to reduce greenhouse gas emissions. The broad objective of removing this requirement is to allow entities that voluntarily opt-in to programs in order to participate in the program’s credit market to fully use credits generated by projects that receive funding under the ARFVTP. The specific benefits anticipated from this action include allowing entities that have already received funding under the ARFVTP to better compete in the marketplace and to begin or expand the production of alternative fuels, thus helping to meet the state’s climate change emissions reduction goals and improve air quality. The benefits would also extend to encouraging those entities that have not previously applied for funding because of the credit restriction to now apply. Having these entities apply for funding and supporting the economic viability of alternative and renewable fuels from new and existing producers benefits public health and safety and the environment by providing more alternative and renewable fuels in the market.

CONSISTENCY AND COMPATIBILITY WITH EXISTING STATE REGULATIONS:
(Government Code Section 11346.5(a)(3)(D))

This proposed emergency rulemaking is consistent and compatible with existing state regulations. No other agencies require grant recipients to discount the value of credits they receive under the Act.

OTHER STATUTORY REQUIREMENTS:
(Government Code Section 11346.1(b); 1346.5(a)(4))

None.

RELIED ON DOCUMENTS: (Government Code Section 11346.1(b)(2))

California Energy Commission, *Documentation to Support Revisions to Section 3103 Regulations*, February 13, 2015.

Harry Simpson, President, Crimson Renewable Energy, LP. Letter to Commissioner Janea A. Scott, California Energy Commission. November 12, 2014.

Floyd Vergara, Chief, Industrial Strategies Division, California Air Resources Board. Letter to Commissioner Janea A. Scott, California Energy Commission. January 30, 2015.

Paul Relis, Senior Vice President, CR&R Incorporated. Letter to Commissioner Janea A. Scott, California Energy Commission. February 12, 2015.

Harrison S. Clay, President, Clean Energy Renewable Fuels. Letter to Commissioner Janea A. Scott, California Energy Commission. February 11, 2015.

David A. Cox, General Counsel, The Coalition for Renewable Natural Gas. Letter to Commissioner Janea A. Scott, California Energy Commission. February 11, 2015.

Charles A. White, P.E., Consultant to Waste Management. Letter to Commissioner Janea A. Scott, California Energy Commission. February 11, 2015.

Julia A. Levin, Executive Director, Bioenergy Association of California. Letter to Commissioner Janea A. Scott, California Energy Commission. February 11, 2015.

Lisa Mortenson, Co-Founder and Chief Executive Officer, American Biodiesel, Inc dba Community Fuels. Letter to Commissioner Janea A. Scott, California Energy Commission. February 11, 2015.

Andy Foster, President, Aemetis, Inc. Letter to Commissioner Janea A. Scott, California Energy Commission. February 11, 2015.

LOCAL MANDATE DETERMINATION: (Government Code Section 11346.5(a)(5))

The proposed emergency rulemaking would not impose an additional mandate on local agencies or school districts. This emergency rulemaking would only remove the restriction on fund recipients from recouping the full value of emission credits. There will be no costs to any local agency as a result of this.

FISCAL IMPACTS: (Government Code Section 11346.5(a)(6))

Costs or Savings for State Agencies: This proposed emergency rulemaking would only impact the Commission, which does not anticipate any negative budgetary impact from removing the credit discounting requirement. Keeping the existing language in place would require staff time to interpret the credit discounting requirement, and monitoring and managing credits from projects awarded funding under this program.

Currently the ARFVTP manages an estimated 43 projects that would be affected by the credit discounting provision. The Energy Commission would be required to establish procedures to discount credits and practices for enforcing the provision, as well as to develop relationships with ARB and EPA staff who manage the credit programs themselves. This would require legal, management, and staff time on a weekly basis. It is estimated that each Commission Agreement Manager (estimated 12 project managers) would be tasked with spending at least four hours per month per project, dedicated to credit discounting (approximately 2,160 total hours or 180 hours each, annually). Additionally, legal staff and management would need to spend at least two hours per month working on the provision (approximately 100 hours each). Removing this requirement eliminates the need to devote staff time to these activities and ultimately saves money. The proposed changes would result in estimated savings to the Commission of \$32,590 per year.

Costs to Any Local Agency or School District Requiring Reimbursement Pursuant to Section 17500 *et seq.*: None. As discussed above, this emergency rulemaking would only remove the restriction on fund recipients from recouping the full value of emission credits. There will be no costs to any local agency or school district as a result of this.

Other Non-Discretionary Costs or Savings on Local Agencies: None. This emergency rulemaking would only remove the restriction on fund recipients from recouping the full value of emission credits. There will be no costs or savings to any local agency as a result of this.

Cost or Savings in Federal Funding to the State: None. Federal funding to the state is not affected by this change to the regulations.

EXHIBIT B

**Express Terms to Modify Alternative and Renewable Fuel and Vehicle Technology
Program Funding Restrictions**

California Code of Regulations

Title 20. Public Utilities and Energy

Division 2. State Energy Resources Conservation and Development Commission

Chapter 12. Alternative and Renewable Fuel and Vehicle Technology Program

Regulations

Article1. General Provisions Regarding Project Funding

Section 3103

February 2015

- a) A project shall not be eligible for funding if it is mandated by any local, regional, state, or federal law, rule, or regulation.
- b) If a project is one that helps the ~~proposing entity~~ applicant meet a performance requirement mandated by local, regional, state, or federal law, rule, or regulation, the project shall not be eligible for funding.
- c) To the extent a project exceeds what is required for compliance with a legally enforceable requirement, it may receive funding for that part of the project that the applicant demonstrates is not mandated to meet the requirement. Credits generated by the excess, however, may not be used or sold by the ~~proposing entity~~ applicant to offset a legally enforceable requirement, except to the extent allowed by subsection (bd).
- d) For purposes of this section, a legally enforceable requirement refers to any requirement enforceable by a local, regional, state, or federal agency for the purpose of reducing the emission of one or more criteria pollutants, toxic air contaminants, or any greenhouse gas. For purposes of this section, the following are not subject to the restrictions contained in subdivisions (a)-(c):
 - 1. A project that produces opt-in fuels under the Low Carbon Fuel Standard (California Code of Regulations, title 17, section 95840.1, subdivision (b));
 - 2. A project that produces fuel that meets or falls below the average carbon intensity requirements set forth in the Low Carbon Fuel Standard (California Code of Regulations, title 17, section 95842, subdivisions (b) and (c)) for the year in which the credits are generated;

3. A project under which the applicant has voluntarily opted-in to an emission reduction credit generating program for the purpose of participating in the program's credit market; or
4. A project that had been awarded funding under Health and Safety Code section 44272 prior to the effective date of this section as amended and also satisfies at least one of the requirements listed in subdivisions (d)(1)-(3).

~~(b) A project that generates credits that the applicant plans to claim based on the reduction of criteria pollutants, toxic air contaminants, or greenhouse gases may not be eligible for funding unless all of the following occur:~~

- ~~(1) the applicant seeks funding for only a portion of the project;~~
- ~~(2) the applicant agrees in the funding agreement to discount emission credits at least in proportion to the amount of funding received;~~
- ~~(3) the project satisfies one or more of the criteria in sections 3101 and 3101.5, as appropriate.~~

Note: Authority cited: Public Resources Code Sections 25213, 25218(e); Sections 44271(e) and 44242(a) Health and Safety Code Section 44272(a). Reference: ~~Section 44271(e)~~, Health and Safety Code Sections 44271-44272.