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California Energy Commission
Dockets Office, MS – 4
Re: Docket No. 08-OIR-01
1516 Ninth Street
Sacramento, CA 95814-5512

Re: **Docket No. 08-OIR-1 – Comments on Revised Regulatory Language**

Dear Commissioners,

This letter presents comments on the Draft Regulatory Language revised on October 30, 2008. Before I begin, I would like to make the observation, made in an earlier email to Commission staff, that the 10-day period given to make comments is not long enough, in my judgment, given the importance of this subject in the implementation of AB 118.

I also think it relevant to point out that, although I am submitting these comments in my capacity as CEO of California Renewable Energies LLC, I am an attorney and have been a member of the California Bar for 35 years. Therefore, when I reviewed the Draft Language, I did so with the eye of someone who has reviewed legislation and regulations as a professional for many years.

As a general comment, I'd like to say that the document on which we are asked to comment was presented in the September 9, 2008 Workshop. Therefore, it was prepared before the meltdown of both the California and national economies. We in California have tremendous challenges to generate jobs and tax income. One of the express purposes of AB 118, even before the economic crisis, was to provide economic stimulus and development for the state. See Section 1 (g) of the Act which finds and declares that:

“Research, development, and commercialization of alternative fuels ... in California have the potential to strengthen California’s economy by attracting and retaining clean technology businesses, stimulating high-quality job growth, and helping to reduce the state’s vulnerability to petroleum price volatility. Research, development, demonstration, and deployment of alternative and renewable fuels ... will also result in new skill and occupational demands across California industries.”

It has been my observation during these sustainability proceedings that not enough emphasis or attention has been paid to the economic and developmental benefit aspects of the statute and to what alternative fuels could be available in the short term. Given the grave nature of our economic challenges as well as vulnerability to petroleum price volatility, I would ask that these issues be fully considered and addressed when drafting the final regulations.

I would also like to point out that the process which we had been led to believe would be followed in determining the regulatory language has not been followed. In the Sustainability Working Group meeting in August, 2008, stakeholders commented on how difficult it was to understand how the sustainability language would be applied to real-life projects instead of in the abstract. It was decided at that time that there would be another Working Group meeting to present case studies to concretize the application of the regulations so stakeholders could make their comments when they understood what the language meant as a practical matter. However, no Working Group meeting was convened to present case studies. As a result, we are making comments in a vacuum.

A reading of AB 118 (the “Act”) [as well as AB 1007 and the State Alternative Fuels Plan, the Draft Goals prepared for the September 9 Workshop and the CEC Commission Staff Working Draft Discussion Paper setting forth the Staff’s proposed “Integrated Framework ... for Assessing the Sustainability of AB 118 Project Applications issued on September 4, 2008 (the “Framework”)] makes it clear that the Draft Revised Regulatory Language (“Draft Language”) is at odds with the express language of the Act.

Furthermore, the Draft Language is in conflict with what the California Legislature intended in passing the Act, as well as AB 1007, the Governor’s initiatives like AB 32 and the Low Carbon Fuel Standard, and the Energy Commission’s and CARB’s State Alternative Fuels Plan adopted in December 2007.

I base these statements on the following:

The Draft Goals, the Framework and the Draft Language elevate “sustainability” to the position of being the driver in AB 118 implementation. All projects seeking funding under AB 118 would have to first go through a sustainability “screening” process.

However, nowhere in AB 118 is there authority for the Commission to institute such a sustainability screening threshold.

On the contrary, when one reads the statute in its entirety, it is clear that sustainability is only one small piece of AB 118, and that the actual drivers for the statute are set forth in Section 1 (a) – (k) thereof, where sustainability is not even mentioned.

In fact, sustainability is only mentioned twice in the Act, in Section 5 thereof. Section 44271 (a) (2) of the California Health and Safety Code, created by Section 5, is very clear about how the issue of “sustainability” is to be applied in connection with alternative and renewable energy fuel projects.

Per Section 44271 (a) (2), the Commission is required to “[e]stablish sustainability goals to ensure that alternative and renewable fuel ... projects, on a full fuel-cycle assessment basis, will not adversely impact the state natural resources, especially state and federal lands”. [Emphasis added].

“Goal” is defined by the Compact Oxford English Dictionary to be “an aim or desired result”. This means that “sustainability goals” are aspirations, something to be achieved, not something that is attainable at this point in time. And the express language of the statute makes it clear that the legislators understood that a goal is not a standard to be followed or a screen to be used for funding programs under AB 118 when they distinguished “goals” from “requirements” in Section 1(k) of the Act.

Furthermore the legislators expressly limited the establishment of those goals to ensuring that alternative or renewable fuels funded under the Act would not adversely impact CALIFORNIA’S natural resources in Section 44271 (a) (2), and not natural resources outside the State’s borders.

Section 3101 of the Draft Language is in direct violation of section 44271 (a) (2) of the Act when it deletes “state” before the words “natural resources” in defining sustainability goals. This appears to be a way to bring iLUC into the Draft Language without specifically calling it that. Please see my discussion of iLUC later in this letter.

Additionally, Section 44271 (a) (2) requires that the goals be measured by adverse impacts as determined on a FULL FUEL-CYCLE ASSESSMENT basis. A fuel fuel-cycle assessment was done for a panoply of fuel pathways under the State Alternative

Fuels Plan, which was referred to by the legislators in AB 118, and yet none of these are referred to in the Draft Language. Additional full fuel-cycle assessments remain to be done, as discussed the September Staff Workshop. (I would ask that we utilize existing full fuel cycle analyses done for fuel pathways that don't yet exist in California and adapt them to California conditions where we can so. This will help us to not unreasonably delay the funding of worthy projects whose LCA's are well-known in other jurisdictions.)

Furthermore sustainability under AB 118 is subordinate to the State Alternative Fuels Plan (the "Plan") which is specifically mentioned in the aforementioned Section 1 of the Act. The Plan synthesizes and aggregates into one document the state's major policies with respect to "the increased penetration of alternative and non-petroleum fuels". The policies, repeated often in the Plan, are: petroleum reduction, GHG reduction, in-state biofuel production and use goals for biofuel.

Again, sustainability is not one of the state's major policies as set forth in the State Alternative Fuels Plan. In fact, notwithstanding the bias against purpose grown energy crops in evidence during the AB 118 implementation proceeding, the Plan requires that the state employ purpose grown crops for renewable transportation fuels, as it recognizes the need for biofuels in the short to medium run in order to accomplish the state's major policies.

The Plan also has something to say about sustainability. According to it, "[s]ustainability requires the state to meet its future transportation energy needs with a viable supply of alternative fuels. Sustainability also requires the state to insure that in accessing biofuels, food access and energy crops needs are balanced, biodiversity is protected..." Thus sustainability specifically contemplates purpose grown energy crops. [Emphasis added].

The only other time sustainability is mentioned in the Act is in Section 44272 (b). Besides the goals the Energy Commission are to establish under Section 44271 (a) (2), section 44272 (b) sets forth 11 specific criteria to be used "as appropriate" to each particular case how projects are to be accorded preference in receiving funding, i.e., a project is not required to meet sustainability goals, but if it "does not adversely affect the sustainability of the state's natural resources, especially state and federal lands", that is one of the features of the project that will give it a preference in funding under AB 118. Again it's worth noting that the impact is limited to state natural resources.

Unlike "goals" which are aims or desired results that don't exist yet, criteria are standards that already exist. According to the Oxford Dictionary, criterion, the singular of criteria, means "a principle or standard by which something may be judged or decided". "Criteria" are principles or standards by which something may be judged or decided.

Besides the concrete criteria that are to be used by the Commission in providing preference in funding, the Act sets forth in Section 44272 (c) the kind of projects that are eligible for funding.

Included in the list of projects that “shall be eligible for funding” are:

“(1) Alternative and renewable fuel projects to develop ... alternative and renewable low-carbon fuels, including ...ethanol, among others, and their feedstocks that have high potential for long-term or short-term commercialization ...”. [Emphasis added]. ...

(3) Projects to produce alternative and renewable low-carbon fuels in California...”

Again, I draw your attention to the bias against purpose grown energy crops and row crops in this proceeding.

Notwithstanding that the Act requires the Commission to establish limited sustainability goals (i.e., those impact the state’s resources and that are determined by reference to a full fuel-cycle assessment), but provides specific criteria for giving projects preference for funding and sets forth types of projects that are required to be eligible for funding, the Draft Language ignore the express language of the statute, and make “sustainability” the overarching concern of the law.

The Draft Language attempts to bring iLUC into AB 118 funding decisions through section 3101 (a) when it deletes the word “state” before “natural resources” in referring to natural resources that may be adversely impacted by a project.

iLUC has become a front burner issue this year after the publication of Tim Searchinger et al’s paper on the iLUC they posited were caused by using certain crops to make biofuels. However, Mr. Searchinger’s work has been the subject of severe criticism by renowned academicians, scientists, agronomists, members of the biofuels industry. (See the letter from the New Fuels Alliance of October 23, 2008 addressed to Mary Nichols but on which Commissioner Boyd was copied. If that letter is not included in the Docket for this proceeding, I hereby request that it be. I will be happy to furnish a copy if requested to do so.)

As a result of its visibility, some stakeholders apparently want iLUC to be the most important driver of AB 118 implementation. However, that position is not supported by the statute. AB was signed into law by the Governor Schwarzenegger on October 14, 2007. Although iLUC and sustainability issues were being discussed by CARB and the CEC during 2007 - see the State Alternative Fuels Plan - indirect land use change (“iLUC”) is never mentioned once in AB 118. If the Legislators wanted iLUC

and sustainability standards to be part of the Act, they could have certainly chosen to do so.

The law making role is the exclusive province of the legislature. Since iLUC is not in AB 118, if stakeholders think should be included, they must petition their representatives to include it. The statute must be implemented in accordance with the actual language of the law, not what some people outside of the legislature think should be in the law.

It is not the role of the Energy Commission to write law, only to implement it. The Draft Language reflects a usurpation of the legislature's role.

And Energy Commission staff has decided to "set a high level for sustainability in order to address public concerns about the environmental, social and economic risks associated with rapid expansion of alternative and renewable transportation fuels." Framework, p. 1 -2.

In fact, the CEC's own full fuel-cycle analysis for sugar cane ethanol under the State Alternative Fuels Plan, the State Alternative Fuels Plan itself, and Dr. Stephen Kaffka's presentations during this proceeding would lead to precisely the opposite conclusion.

As I previously commented on the record, there has been a bias against purpose grown crops and row crops in the AB 118 proceeding, although there was no evidence or data to support it. The bias was expressed in meetings of the Advisory Board, documents issued by CEC Staff and continuing comments made by senior AB 118 Staff during the AB 118 proceeding, including on September in the Staff Workshop on the Investment Plan, and now rears its head again in a more subtle fashion in the Draft Language.

In Section 3101(f) (1), as part of the third sustainability goal, the Commission shall be required to "promote and collaborate in the development of the ...international production of alternative and renewable fuels ... for California markets". This is a clear attempt to bring Brazilian sugar cane ethanol into California, apparently so we can meet the state's GHG reduction goals without growing biofuels feedstocks in-state.

Nowhere in the statute does it mention subsidizing foreign ethanol and in fact, the purpose of the statute is exactly the opposite. In addition, we California biofuels producers are already at a severe disadvantage in establishing energy crops that could be feedstocks for alternative transportation fuels because we have a severe "chicken and egg" problem. No one has discussed this issue when it comes to biofuels, but members of the Advisory Board, staff and Commission experts have mentioned it prominently in these proceedings when advocates are talking about fuel cell automobiles, infrastructure build-out, etc.

Finally, the Draft Language deals with the Advisory Body in Section 3104. I think it appropriate at this time to bring the Advisory Body into compliance with the language of the Act, which requires that the Board have representatives from private industry. There are no biofuels industry representatives on the Advisory Board, and therefore the proceedings have been a real uphill battle for those who are actually spending the money to develop these projects and the agriculture in California to support them.

I have been told that someone at the Commission decided that members of the Advisory Board could not apply for funding under AB 118 to avoid the appearance of a conflict of interest. However, the legislators apparently already considered that issue and decided there was no conflict of interest because they did mandate that representatives of private industry be on the Board.

I would therefore request that agronomists and biofuels industry representatives be appointed to the Board so their input can be taken into account when finalizing the Draft Language and in making funding and other recommendations. Naturally, it has to be stipulated that their projects will not be penalized in potentially receiving funding under AB 118 if they do.

I would also recommend that the California Secretary of Food and Agriculture be appointed to the Board since agriculture is the basis of biofuels. The Act specifically contemplates the appointment of others not expressly set forth in its language.

In closing, please note that I have raised some of the issues addressed in this letter when I flew to Sacramento to attend the Sustainability Working Group meeting at the Energy Commission on August 15, 2008. However, the transcript of that meeting is not included in the Docket for AB 118 and therefore I believe it important that these comments be included in the Docket.

Sincerely,

Nathalie Hoffman
CEO