



Regulatory Advisory

July 2013



Low Carbon Fuel Standard (LCFS) Regulatory Advisory 13-01

SCOPE

The Air Resources Board (ARB) is issuing a Regulatory Advisory today, 13-01 ("Advisory 13-01"), effective immediately. This Advisory 13-01 will remain in effect through midnight (local time) December 31, 2014, unless otherwise superseded by a subsequent ARB regulatory action, advisory, or other notice. The LCFS regulation was amended on November 26, 2012, with the amendments being filed with the Secretary of State on the same day ("amendments"). As specified in Regulatory Advisory 10-04B, it was and remains ARB's intent for the amendments to be applicable and enforceable beginning January 1, 2013, notwithstanding the amendments' filing date. Accordingly, the ARB began implementing the amendments on January 1, 2013, except as otherwise noted herein, and will continue to implement them.

All prior regulatory advisories have expired and are no longer in effect starting January 1, 2013. This Advisory 13-01 supersedes all prior regulatory advisories (10-01, 10-02, 10-03, 10-04, 10-04A, and 10-04B). All section references are to title 17, California Code of Regulations (CCR), sections 95480 through 95490, except as otherwise noted.

BACKGROUND

In 2010, the California Air Resources Board (ARB or Board) adopted the Low Carbon Fuel Standard (LCFS) regulation, which became fully effective in April 2010 and is codified at title 17, California Code of Regulations, sections 95480-95490. The regulatory text is available at http://www.arb.ca.gov/fuels/lcfs/CleanFinalRegOrder_112612.pdf. The LCFS will reduce greenhouse gas emissions by reducing the carbon intensity of transportation fuels used in California by at least 10 percent by 2020. Carbon intensity (CI) is a measure of the GHG emissions associated with the various production, distribution, and use steps in the "lifecycle" of a transportation fuel.

In its hearing on December 16, 2011, the Board approved amendments to the LCFS regulation. The Office of Administrative Law (OAL) approved those amendments after they underwent the formal rulemaking procedure required under State law, and they became effective November 26, 2012. Among other things, the amendments included refinements that clarify and enhance the LCFS' provisions addressing the treatment of crude oil, as well as provisions governing the opt-in/opt-out process, the "Method 2" process for review of modified or new fuel pathways; the banking, retirement, and trading of LCFS credits and the reporting of such credits; and other enhancements.

On December 29, 2011, the U.S. District Court for the Eastern District of California issued several rulings in the federal lawsuits challenging the LCFS. One of the court's rulings preliminarily enjoined the Air Resources Board (ARB or Board) from enforcing the regulation during the pendency of the litigation. While the injunction was in effect, we withheld enforcement of the LCFS requirements. ARB argued to the Ninth Circuit that a stay would enable the emissions reductions anticipated in 2012 to be realized, and that a stay would return conditions to pre-injunction 2011. On April 23, 2012, the Ninth Circuit Court of Appeals granted to ARB a stay of the preliminary injunction during the pendency of the litigation. With the injunction now stayed, we believe we are able to enforce the LCFS requirements while the appeal remains pending. In other words, consistent with the understanding and intent we communicated in our listserve announcement, Regulatory Advisory 10-04B (issued on December 30, 2011), and our briefs requesting the stay, ARB expressly indicated that a stay would permit the LCFS to go back into effect as though the injunction had never been issued.

ACTIONS TAKEN UNDER THIS ADVISORY

Use of Generic CI Value for Ethanol and Biomass-Based Diesel

Starting January 1, 2013, section 95486(a)(4) and (5) specifies the conditions under which the use of a generic carbon intensity value for ethanol and biomass-based diesel will be permitted.

Applicability of Advisory 13-01 to 2013 Reporting

Except as noted below, this Advisory 13-01 relates solely to 2011 and 2012 reporting, credits, and deficits. It does not apply to reporting for calendar year 2013 (January 1, 2013 through December 31, 2013), which is governed by the regulation as amended.

The exception to the above is the following: A regulated party who produced a fuel or blendstock in 2012 but did not sell in California or import into the State the fuel or blendstock until 2013 should report the volume, carbon intensity, and other required information for that fuel or blendstock in its 2013 quarterly and annual compliance reports.

Effect of Amendments on 2011 and 2012 Carbon Intensity Standards

As indicated above, in the event the Ninth Circuit Court of Appeals granted the requested stay, it was ARB's intent to maintain the 2011 and 2012 carbon intensity standards during the period when the injunction was in effect (December 29, 2011 through April 23, 2012, inclusive). Accordingly, there will be no adjustments to the 2011 or 2012 CI standards, and regulated parties will be responsible for maintaining compliance with the 2011 and 2012 CI standards for the entirety of calendar years 2011 and 2012, respectively.

Applicability of Amendments to 2012 Reporting

For calendar year 2012, regulated parties are subject to the pre-amended regulation. As specified in Regulatory Advisory 10-04B, it was and remains ARB's intent for the amendments to be applicable and enforceable beginning January 1, 2013, notwithstanding the amendments' November 26, 2012 effective date. Therefore, ARB began implementing the amendments starting January 1, 2013. Because ARB implemented the amendments starting January 1, 2013, regulated parties are not required to meet the requirements (specified in the amendments) from November 26, 2012, through December 31, 2012, inclusive.

However, ARB will permit a person, who entered pursuant to section 95480.2 of the amended regulation, into a fuel purchase agreement between November 26, 2012, and December 31, 2012, inclusive, to take on the compliance obligation for that fuel and to report such a transaction to ARB in the LCFS Reporting Tool (LRT) as the regulated party. Any such person who reports as the regulated party must maintain and provide all records documenting such a transaction and its resulting regulated party status within 20 days upon request. Further, ARB will permit a person, pursuant to an enforceable agreement it entered in reliance on section 95480.2, to report itself as the regulated party for fuel transactions sold under that agreement for the entire fourth quarter 2012 (Q4 2012) if the agreement provides for such reporting.

All other regulated parties are advised to meet their 2011 and 2012 quarterly and annual compliance reporting requirements based on the pre-amended regulatory language (in existence prior to November 26, 2012) and the administrative actions provided in Regulatory Advisories 10-04, 10-04A, and 10-04B.

Supplemental Guidance to Advisory 10-04B on Adjustment of 2011 Net Credits Derived from Potential HCICOs

Advisories 10-04A and 10-04B provided guidance applicable to the treatment of credits/deficits that were generated for a fuel pool in calendar year 2011 that is comprised in some part of fuel/blendstock derived from potential high carbon-intensity crude oil ("potential HCICO"). In Advisory 10-04B, we provided three options and stated that the process for adjusting 2011 net credits will be more fully specified in a subsequent advisory.

We have reconsidered those options and determined that the best course of action is to not require any adjustments to the 2011 net credits. This determination was based on consideration of the uncertainties involved in estimating crude oil production and transport CI values from potential HCICOs in 2010 and 2011 and the methodology used at that time for estimating CIs from such potential HCICOs. Since then, we have developed and used the Oil Production Greenhouse Gas Emission Estimator (OPGEE) model, version 1.0, which the ARB formally adopted in November 2012 (see section 95486(b)(1) of the regulation). Because of this, we have determined that it would be appropriate not to require adjustments of the 2011 net credits. Regulated parties who used crude oil supplied to California refineries in 2011 will not be required to adjust their 2011 net credit balances in the LCFS Reporting Tool, even if the crude oil was derived at least in part from potential HCICOs.

Please note that the above determination applies only to 2011 volumes of crude oil. Now that the LCFS regulation calculates crude oil CI values using OPGEE, which underwent the public rulemaking process required by State law, regulated parties will be required to report the volumes, names, etc. for crude oils supplied to California refineries in calendar year 2012 and subsequent years, as provided in the regulation.

FOR MORE INFORMATION

The rulemaking documents related to the recent amendments can be found in the LCFS rulemaking website at: <http://www.arb.ca.gov/regact/2011/lcfs2011/lcfs2011.htm>. The complete LCFS regulation, as amended, can be found at: http://www.arb.ca.gov/fuels/lcfs/CleanFinalRegOrder_112612.pdf. For any questions regarding this advisory, please contact Mr. Floyd Vergara, Chief, Alternative Fuels Branch at (916) 327-5986 or via email at fvergara@arb.ca.gov. If you need this document in an alternate format or language, please contact Ms. Katrina Sideco (916) 323-1082 or ksideco@arb.ca.gov. TTY/TDD/Speech to Speech users may dial 711 for the California Relay Service.

*cited in Rocky Mountain Farmers Union v. Corey
No. 12-15131 archived on October 7, 2013*