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March 20, 2012

Mr. Robert B. Weisenmiller, Ph.D.
Chairman
California Energy Commission
1516 Ninth Street
Sacramento, CA 95814-5512

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

Dear Chairman Weisenmiller:

As you are no doubt aware, there has been an active and ongoing debate on the role and eligibility of biomethane under California's RPS dating back to the September 20, 2011 Commission workshop on this topic. This dialog has lead to two bills being introduced during the current legislative session that specifically address the issue. Most stakeholders, including Clean Energy Renewable Fuels, recognize the need to revise California's rules and regulations as necessary to (1) create a more favorable environment for development of pipeline quality biomethane projects within California and (2) harmonize the rules and regulations related to RPS eligibility of renewable fuels used in power generation with the rules and regulations related to renewable power generation more generally.

Over these past six months we have spent many hours in discussions and debate with those who favor immediate change to the CEC's existing rules to eliminate pipeline quality biomethane from outside of the State of California as an RPS eligible fuel. For many reasons, most importantly the negative impact the rule change could have on the prospects for the in-State industry, we do not believe sudden and wholesale elimination of biomethane from the RPS program – through agency action – is the right approach. Nevertheless, while we do not agree with biomethane opponents on many facts or policy issues, we do concede that new limitations will be placed on the eligibility of biomethane produced outside of California as an RPS eligible fuel. We have conceded and accepted that in all likelihood future biomethane sale contracts will be treated in a manner similar to electricity generation under the RPS – i.e. the origin and manner of delivery of the fuel (like electricity) will determine its classification under the RPS (as a "bucket 1" or other type of resource) in much the same way the origin and manner of delivery of electrons determines classification of renewable power. We have therefore worked to craft an "orderly transition" that phases in these new limitations to prevent disruption of existing contracts and large financial and job losses that will be suffered if the rule change is implemented hastily or without protecting existing contracts and investments that were made in good faith under the Commission's existing rules.

We have also worked together with many parties (many of whom disagree with us on maintaining the existing rules of the CEC) to collaborate on ways to support legislative and regulatory changes that might facilitate growth of pipeline quality biomethane projects within the State of California. This is a topic on which most parties concerned with this issue agree – significant steps need to be taken by the Legislature, PUC and Energy Commission to foster the right environment for in-State biomethane projects. This has also been a priority of our company, a California-based biomethane producer, for many years. We have pursued legislation and PUC action that might open up an opportunity to develop projects in the State. We have to-date been highly optimistic that the current controversy over the role of biomethane RPS eligibility would bring much needed attention to this issue and lead to positive momentum to open up the State's potential for in-State biomethane production.

It is therefore with great dismay that we received and reviewed the Commission's Notice to Consider Suspension of the RPS Eligibility Guidelines Related to Biomethane and reviewed the description therein of the proposed "suspension." We are left to conclude that despite the months of discussions regarding compromise and the near-term prospect of a democratic resolution to these issues in the Legislature that the Commission is poised to impose a "moratorium" that will disrupt tens of millions of dollars in renewable energy projects and retroactively abrogate existing contracts between California-based biomethane producers like Clean Energy Renewable Fuels and California buyers.

As a matter of principle and legal process, this maneuver by the CEC is questionable at best. Should developers and investors, many of whom have spent millions in reliance on the CEC RPS Guidelines, assume that any rule or long-standing eligibility classification of a renewable energy resource can be eliminated by unilateral agency action at any time – prompted solely by a letter from no more than four California legislators? What kind of precedent does this set? I note, as well, that a dozen California legislators have also sent letters to the Commission opposing this moratorium – yet, the Commission sees fit to cite only the letter supporting the moratorium in its Notice.

At this stage it is likely pointless to reiterate our strong disagreements with the oft-repeated assertions that biomethane, when sold and delivered to a California load-serving entity for power generation, produces "no benefits" for the State of California. It suffices to simply point out that, if our customers were not buying biomethane from us, they would be buying fossil fuel natural gas from a traditional producer somewhere else. Our product thereby directly displaces fossil fuel and any argument to the contrary is specious. The concerns regarding additionality, double counting and potential fraud are certainly legitimate but have been addressed already in the context of AB 32 and are clearly capable of being dealt with outside

of the imposition of a moratorium.

I recognize that the Commission may defend its action as a temporary measure. However, it will not be perceived as such by investors or developers. California's forward thinking on harvesting and using pipeline quality biomethane has led the nation in developing the biomethane industry. However, multimillion dollar renewable energy projects cannot be put "on ice" while the Commission engages in further debate on this issue. The relative freeze that has occurred subsequent to the September 20th workshop has been damaging enough. The imposition of a moratorium which places existing contracts in limbo "until further notice" will deliver a fatal blow to many projects that are underway - projects that will not survive to see the final outcome on this issue when and if it arrives. This includes a project in which we have invested millions of dollars over the past eighteen months and that has a signed sale agreement with a SCPPA municipal utility, all of which will be placed in jeopardy by this proposed "suspension."

If the Commission must impose a suspension, there are certain issues that must be addressed to prevent disruption to project development and renewable energy capital formation. Specifically:

(1) **The Moratorium, as proposed, would directly impact and derail biomethane projects currently under construction that have signed contracts with CA buyers and filed precertification applications. <u>There is no "glide period" provided for in the proposed moratorium</u>**. The proposed moratorium must protect projects that are under construction, have signed sale agreements with California buyers and have filed precertification applications (identifying the source) with the Commission. We can only assume, based on the language in the Notice, that the intent of the proposed moratorium is to block any biomethane sales from RPS eligibility other than those delivering biomethane to a certified facility prior to the date of the moratorium. This will destroy projects that have signed sale agreements with California load-serving entities and in which investors have already invested tens of millions of dollars in reliance on the existing rules of the Commission. This will destroy and severely damage significant investors as well as the California-based companies they back, like Clean Energy Renewable Fuels, that hope to be the foundation of the State's own biomethane production industry.

(2) **The proposed Moratorium will retroactively interfere with and abrogate terms of existing contracts delivering biomethane to certified facilities.** The Notice states that power plant operators currently receiving biomethane will be required to supply documentation to the CEC of the amount of biomethane that they are receiving today, and suggests that they may be

capped at these levels. How does this affect contracts that already specify increases in the delivered volume in their existing contracts? If the Notice is to be understood as implying that producers will be capped at their current production levels notwithstanding the contractual terms it will disrupt or potentially destroy projects that have been in operation for years delivering biomethane to certified facilities in California. Many biomethane production sites anticipate production increases and these increases are built into their existing contracts. Some of these projects have been financed on the assumption that they will produce and deliver these increased volumes under their existing contracts. More generally, all biomethane projects have some variability in production based on rainfall, trash generation rates, and other variable inputs. The "cap" concept described in the Notice - if that is what is intended - is akin to capping a solar power project at the power generation it achieves on one cloudy day, and disallowing credit for anything in excess of that notwithstanding that more may be produced and sold under its PPA. This would also have a severe and detrimental impact on utilities that are counting on these future production increases to meet their compliance targets on affordable terms. This interference with existing projects, which may cause financial failure, could deprive the utilities entirely of access to renewable resources they are counting on to prevent rate-shock and thereby lead to substantial rate increases.

SUGGESTED SOLUTIONS:

We believe that the right thing for the Commission to do under the circumstances is to allow the California legislature time to determine how biomethane eligibility should be treated under the RPS without imposition of a suspension that will directly and immediately derail renewable energy projects. The legislative process will enable the best policy to be implemented – a policy that is balanced and ensures that the State's goals set forth in SB X1-2 are met without imposing huge financial losses on companies and investors that have acted in good faith to provide renewable resources to California under the existing rules of the Commission.

If, however, the Commission concludes that a moratorium must be imposed, we believe that the following modifications and clarifications are essential to prevent severe disruption of a promising renewable energy industry that has the potential to provide tremendous economic and environmental benefits to the State of California.

(1) **The moratorium should not have any effect on the terms of contracts entered into prior to the date of the moratorium and that are currently delivering biomethane to certified facilities.** Both for practical reasons and as a matter of principal, any moratorium imposed by the CEC must recognize and protect the sanctity of contracts entered into prior to the date of

imposition of the moratorium. Projects that are, today, delivering biomethane to certified facilities in California must be allowed to continue to deliver their biomethane product (including increased volumes) in accordance with the terms of their pre-existing contract without interference by the Commission.

(2) **The CEC must state unequivocally in the moratorium that power plants that have completed RPS pre-certification applications for biomethane and signed contracts to procure biomethane prior to the date of the moratorium will have their final certification application processed in accordance with the Fourth Edition of the *RPS Guidebook* - even if the final certification application is filed after the effective date of the moratorium.** At present, a power plant that signs a biomethane procurement contract and completes pre-certification is required to file an amendment on the date that biomethane deliveries from the project begin. This amendment is treated as the "final certification" and, in accordance with CEC current practice, evaluated under the CEC rules in place at the time of the final certification application. For example, we have a project under construction (outside the State of California) that has signed a biomethane sale agreement with a California buyer. The power generation facility is certified and our biomethane supply has filed for precertification. However, if the moratorium is imposed as described in the Notice, when our production facility first delivers biomethane to our buyer (projected in July 2012), presumably the buyer will be unable to receive CEC "final certification" and use our biomethane to generate renewable power due to the moratorium. This will have a devastating impact on the financial viability of our project, eliminate our ability to raise capital to fund the project and place our entire enterprise at risk. ***Interference with existing contracts and disruption of projects that are under construction should be avoided at all costs!*** The failure to do so sets a terrible precedent for the State's RPS program.

We have heard and understand the concerns that enabling California buyers to file pre-certification applications for biomethane supplies that will begin deliveries after the date of the moratorium will lead to a "gold rush" of speculative biomethane deals and precertification applications. In order to prevent this "gold rush" for prospective biomethane supplies the Commission can simply require that the application for final certification must be filed and biomethane deliveries must commence prior to January 1, 2013 or it will be subject to the moratorium. Only projects in which significant capital has already been deployed are capable of commencing deliveries prior to January 1, 2013. *This is crucial to protect the investment developers have made in projects currently under construction and that are being pursued based on existing contracts those developers have with CA buyers.*

In closing I will note that our company, Clean Energy Renewable Fuels, is precisely the kind of

growing, California-based, green energy company that the RPS program is designed to incentivize. We have attempted to act prudently and responsibly to build renewable energy projects that can meet California's demand for low-carbon and renewable fuels. We have also expended significant resources trying to develop this State's own potential for pipeline quality biomethane projects and we have a number of in-State projects "in the pipe" that we hope to pursue when conditions are favorable. We have raised significant capital and put many people to work, almost all of them in California, to expand our production capabilities. We have a long term strategic goal of producing no-carbon, fully sustainable renewable fuel that can be used not only for power generation but also to displace petroleum in our nation's fleets. The California RPS program has been indispensable to our success. We have, however, seen enough to know that we will not prevail in our battle to remain a part of the RPS program on the same terms that we have operated under for the past three years. We do not have the money, connections or influence of the big solar and wind power developers that are supporting our elimination from the RPS based on their belief that the affordability and availability of biomethane may reduce their market opportunity in the State's RPS program. But we can only adjust our business plan so quickly.

Therefore, we have tried to work with those agitating for immediate change to craft a solution that can provide us an orderly transition - a runway to land our projects that are "in flight" – so that they do not crash and burn. I recognize that the fate of our business is not a concern of the Commission or the four Legislative members that have pushed for this moratorium. Nevertheless, I urge you to consider the precedent the Commission will set if this proposed moratorium is adopted as described in the Notice.

It is this simple: what the Commission does to us (through rule changes that are not substantiated by any legislative directive) the Commission can do to anyone. I ask you to consider, who will raise and invest the billions of dollars necessary to build the new renewable energy infrastructure in California if the regulators administering the program act without protecting the sanctity of pre-existing contracts entered into in good faith under the existing rules? TURN? Legislative staffers? Agency officials? I can assure you they will not between them produce one kilowatt of renewable energy to meet the State's demand. Only the private market has the ability to make this happen, and when the Commission runs ram-shod over the contractual rights of private market participants with little regard for the impact on the industries developing renewable energy projects or rate-payers it sets the stage for a spectacular failure of the RPS.

I believe we share the Energy Commission's desire to see California regain its place as one of the strongest and most competitive economic forces in the world. Punishing the sources of

private capital who are trying to help us create jobs and better incomes while protecting the environment cannot be helpful. The proposed moratorium is bad for California, bad for the State's economy and bad for the environment. The "unintended consequences" of this proposed action will be severe and entirely negative. We strongly urge you to reconsider, or at a minimum, accept our proposed changes to the moratorium concept contained herein.

Sincerely,

Harrison Clay
President

Cc: Carla Peterman, Commissioner
Karen Douglas, Commissioner
Steven Bradford, Assemblymember, 51st District
Wesley Chesbro, Assemblymember, 1st District
Nancy Skinner, Assemblymember, 14th District
Darrell Steinberg, Senate President Pro Tempore
John A. Perez, Speaker of the Assembly
Gareth Elliott, Office of the Governor
Kate Zocchetti
Mark Kootstra