WHITE ENERGY
CLEAN ENERGY FOR A CLEAN FUTURE.

June 20, 2017

Via Email & Overnight Mail

Anil Prabhu
Manager, Fuels Evaluation Section
California Air Resources Board
Industrial Strategies Division
P.O. Box 2815
Sacramento, CA 95814

Re: U.S. Energy Partners: Tier 2B Applications for Russell Kansas Ethanol Facility

Dear Mr. Prabhu,

White Energy has been an active participant in California's Low Carbon Fuel Standard since it was first implemented. All three of the company's ethanol facilities actively monitor and produce low carbon fuels into the California market from locations in Texas and Kansas. We consider ourselves proper stewards of the program as we have attempted to develop proper internal controls to accurately report and support fuels produced under our pathways. To this effect, White has in the past self-reported accounting errors that led to an over reporting of lower carbon fuel score gallons than was actually produced and exported to California. White worked with staff to mitigate this instance and immediately implemented additional internal control to mitigate continued occurrences. In addition, White has taken steps to improve our energy consumption rates there-by improving our overall Carbon Intensity (CI) value, as well as, explore additional technologies and techniques in continued efforts to lower our fuels CI. White hopes to continue its long successful partnership with California and its commitment to Greenhouse Gas reduction.

As you are aware, White Energy, Inc. ("White Energy") has applied for two new Tier 2B pathways under California Air Resources Board's ("CARB") Low Carbon Fuel Standard regulation (the "LCFS") for ethanol produced by White Energy's Russell, Kansas facility (the "Facility") that is made from a waste product (wheat waste slurry) received from an adjacent wheat gluten facility. Although CARB staff certified Method 2B pathways based on the same feedstocks and processes under the original LCFS regulation in 2011, CARB staff has to date declined to re-certify the proposed pathways for the same feedstock under the readopted LCFS regulation, based on the erroneous assumption that the wheat waste slurry could be used as feed for cattle.

As discussed below, the wheat waste slurry is properly classified as a "waste product" under the readopted LCFS regulation. In short, the wheat waste slurry is unfit for use as a cattle feed, much less human consumption, and there is no other viable economic use for the waste (which would otherwise be landfilled/land applied). Moreover, the classification of the wheat waste slurry as a "waste product" would not only be consistent with CARB's determinations regarding the same feedstock under the original LCFS regulation, but also determinations CARB has made with respect to pathways for in-state manufacturers using food waste products as a feedstock as well as the EPA's definition of waste. White Energy therefore requests that CARB staff approve the two Tier 2B pathways for the Facility.

White Energy also requests that CARB take action on White Energy's applications for these pathways on or before June 30, 2017. Specifically, since CARB issued its recommendation regarding the two Tier 2B pathways for the Facility on December 6, 2016, White Energy has been relying upon a

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temporary pathway that expires June 30, 2017. Based on this deadline, and White Energy's good faith attempts to meet and confer with staff to ascertain the basis of this conclusion, CARB staff (Anil Prabhu) committed to make a final decision on the two outstanding pathway applications by June 30, 2017. White Energy, however, was recently informed that CARB staff was unlikely to make a final determination by June 30, 2017.

Stated simply, the lack of certified pathways jeopardizes White Energy's ability to sell ethanol produced from the wheat waste slurry by-product in California, and is causing White Energy harm. This harm is both tangible and intangible. Tangible in that in order to stay within the regulatory frame work of the LCFS system; White Energy was required to buy credits in order to meet contractual obligations to customers which will likely result in a loss based on purchase dates and sales dates of those credits. Intangible harm will come from the lack of confidence that has grown among White Energy's customer base due to the lack of a certified pathway and the continued delays on reaching a conclusion. White Energy produces the ethanol from wheat waste slurry by-product for which there is no other economically viable use. White Energy is simply seeking recognition of this fact – consistent with the treatment of the same processes under the original LCFS regulation, and the treatment of other similarly-situated pathways (waste wine, tallow) and proposed pathways (Parallel Products).

As a result, White Energy respectfully requests that CARB Staff certify the two Tier 2B pathways for the Facility, consistent with White Energy's applications, on or before June 30, 2017.

A. Factual and Procedural Background

The Facility produces approximately 50 million gallons of ethanol each year. (Binder[1] at 3.) Although the primary feedstock for this plant is sorghum, roughly 30% of the ethanol produced at the Facility uses a waste wheat slurry from an adjacent wheat gluten facility. Before White Energy began producing ethanol at the Facility, the waste wheat slurry from the adjacent wheat gluten facility had been landfill/land applied.

Following the adoption of the original LCFS, White Energy received approval for a specialized fuel pathway under Method 2A/2B, which recognized that the waste wheat slurry was a "waste product." (Binder at 17.) This was consistent with U.S. EPA's classification of the waste wheat slurry as "separated food waste" (for which the Facility receives D5 RINs for ethanol produced under the federal Renewable Fuels Standard). (Binder at 104.) CARB subsequently audited the Facility on June 22nd, 2016, and found, among other things, that "the physical facility and records we received were consistent with producing ethanol at or below the respective carbon intensity scores associated with the reported pathways." (Binder at 91.)

Following the promulgation of the readopted LCFS regulation, on January 25, 2016, White Energy applied for six fuel pathways for the Facility, including two Tier 1 pathways for Corn Ethanol (DDGS and WDGS), two Tier 1 pathways for Grain Sorghum Ethanol (DDGS and WDGS), and two Tier 2B Pathways for Wheat Starch Feedstock Ethanol (DDGS and WDGS).[2] Although CARB ultimately

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[1] The term "Binder" as used in this letter references the binder presented by White Energy to CARB staff on May 8, 2017.

[2] White Energy originally filed the applications for the six fuel pathways for the Facility in January 2016, but withdrew the applications due to CARB staff's request to perform an audit of the existing pathways under the original LCFS regulation. After CARB staff performed the onsite

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approved the four Tier 1 pathways for the Facility, CARB has not yet formally act upon the Tier 2B pathways.

Specifically, on December 6, 2016, CARB staff issued a "recommendation" letter on the two Tier 2B pathways, informing White Energy that staff was recommending denial of the Tier 2B applications, asserting the waste wheat slurry was not a waste but rather a co-product that had other economically viable uses. (Binder at 15.) Although the LCFS regulation contains no definition of "waste product," and the waste wheat slurry was analyzed as a waste product under the original LCFS, in the "recommendation" CARB staff relied upon statements by experts (without the underlying data or analysis) that Starch A (which comprises approximately 80% of the waste wheat slurry used by the Facility) "is an excellent source of energy in animal feed rations," and that Starch B (which comprises approximately 20% of the waste wheat slurry) "has alternative product uses to ethanol; i.e., charcoal briquettes/drywall/adhesives and animal feed." (*Id.*)

White Energy disagrees with CARB staff's recommendation and, since December 2016, White Energy's representatives have met and conferred in good faith with CARB staff in (i) an attempt to ascertain the basis for the recommendation, and (ii) provide CARB staff evidence from a nutritionist and survey results demonstrating the waste wheat slurry is, in fact, a "waste product" and not a food product for livestock.

Because CARB staff has not approved a fuel pathway under the readopted LCFS regulation for the waste wheat slurry, White Energy has been required to rely upon a temporary pathway with a carbon intensity ("CI") value of 75.97, which is 3-4 times higher than the CI value the Facility would otherwise be entitled to use. This high CI value has led to diminished sales of ethanol from the Facility into California. Making matters worse, the temporary pathway will expire June 30, 2017, effectively preventing White Energy from selling the ethanol from the waste wheat slurry in California.

In light of this deadline, during a December 9, 2016, conference call, CARB staff committed to providing White Energy with a final ruling on the two Tier 2B pathways by June 30, 2017. However, representatives of White Energy recently learned that CARB may not take final action on the two Tier 2B pathways until well-after June 30, 2017.

B. CARB Should Allow the Inclusion of the Wheat Waste Slurry as a "Waste Product" in its Calculation of the CI Value of the Tier 2B Pathways for the Facility

White Energy requests that CARB issue a final determination on the two Tier 2B pathways for the Facility on or before the expiration of the temporary pathway on June 30, 2017. Because the evidence supports the fact that the waste wheat slurry is a "waste," and CARB staff has not presented White Energy with any evidence to the contrary (or opinion based on evidence), White Energy also requests that (i) CARB staff confirm the waste wheat slurry produced at the gluten facility is a "waste product," and (ii) CARB approve the two Tier 2B pathways for the Facility.

CARB has not provided White Energy with substantial evidence to support its determination that the waste wheat slurry is not a "waste product" under the readopted LCFS regulation. As an initial matter, the waste wheat slurry received by the Facility was properly considered a "waste

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inspection for the audit, White Energy re-submitted the six pathway applications for the Facility. As explained above, the results of the audit confirmed the accuracy of the existing pathways.

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product" under the original LCFS regulation, and there is nothing in the readopted LCFS regulation that warrants a contrary conclusion. (*Compare* Binder at 17 [CARB's 2011 approval of pathways for the Facility, including wheat waste slurry] *with* Binder at 43 ["The wheat slurry stream is a waste stream, and if it were not used in the ethanol plant, it would be disposed of . . . ."].) Neither the readopted LCFS regulation nor the original LCFS regulation contain any definition of the terms "waste product," "by-product," or "co-product." (See 17 Cal. Code Regs., § 95481.) Nor is White Energy aware of any change in the readopted LCFS regulation that authorizes CARB staff to characterize the wheat waste slurry differently than it did under the original LCFS regulation. As a result, a final determination that the classification of wheat waste slurry as a "waste product" should be disallowed under the LCFS regulation would be arbitrary, and an abuse of discretion.[3] (Code Civ. Proc., § 1094.5, subd. (a).)

Nor is White Energy aware of any substantial evidence to support the recommendation by CARB staff that the classification of wheat waste slurry as "waste" should be disallowed. Rather, White Energy is only aware of the arguments included in CARB staff's December 2016 recommendations regarding the two Tier 2B pathways. These arguments included CARB staff's assertions that (i) "commercial gluten producers" informed staff that 80% of the wheat waste slurry had "high value applications" appropriate for paper products and even "human consumption," and (ii) "One commercial producer" and two unidentified "prominent wheat experts" opined that the remaining 20% "could be used in animal feed rations." (Binder at 15-16.)

CARB staff, however, has produced no information as to how CARB staff's sources reached the above conclusions. There is no information as to who the purported experts are, what their alleged specialties may be, or whether they are in fact experts on the ultimate issues they purport to opine upon.[4] Nor is there any information as to what evidence the sources relied upon to develop their opinions, how they used any such evidence to determine the wheat waste slurry was supposedly safe for human consumption, or whether the experts are familiar with local markets and practices in the Russell, Kansas area. Likewise, there is no evidence to suggest CARB staff independently evaluated these conclusions, or the evidence upon which these conclusions were based. (See generally Binder at 15-16.)

While there is no evidence to support the opinions posited by CARB staff's sources, the evidence presented to CARB by White Energy demonstrates the wheat waste slurry is, in fact, as "waste product." Prior to its use at the Facility to produce ethanol, the wheat waste slurry was landfilled/land applied. White conducted further investigations through discussions with Dennis Walker, a former ADM gluten facility manager in addition to reviewing satellite imagery of the gluten facility located in Hamburg Iowa and confirmed that other gluten facilities landfill/land apply the waste starch stream because it lacks economic value. Finally, White Energy conducted a survey and received (and presented to CARB staff)

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[3] Of course, if CARB staff has developed standards or other regulatory guidelines that were not adopted as part of the LCFS rulemaking to help evaluate the issue of whether a particular feedstock is a "waste product," "by-product," or "co-product," White Energy would be very interested in receiving further information regarding the standard, as it would help White Energy determine which facts are relevant to CARB staff's determination.

[4] For example, it is unclear who the alleged representatives of the "commercial gluten producer" and a "commercial producer of wheat starch" are, and whether they would qualify as experts on issues relating to the chemical composition of a particular substance. (See Binder at 15.)

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confirmation from the operators of numerous feedlots in central Kansas that they would **not** be interested in taking the slurry (even if it was provided without charge). (Binder at 112-133.)

The reason there is no viable market for the wheat waste slurry is because it is unstable and lacks sufficient nutrients, and is thus inappropriate for cattle and human consumption. Indeed, White Energy has provided evidence to CARB staff from a nutritionist (Ronald H. Hale, PhD) who, in his review of the content of the slurry received by the Facility, concluded that he "would not need this product because of the continuing fermentation and production of lactic acids, the lack of other nutrients, and the potential for rapid rumen fermentation of the starch." (Binder at 107.) Todd Milton, PhD, who "provide[s] nutritional consultation for cattle feeding operations across the United States, likewise advised that he "would not recommend incorporation [of the slurry] in beef cattle diets due to variation, lack of stability, and handling characteristics," much less human consumption. (Binder at 110.) Indeed, Dr. Milton found the lack of stability of the slurry could result in the "accumulation of . . . gasses [that could] lead to explosion of containers and human health concerns." (Binder at 111.)

The classification of wheat waste slurry as a "waste product" is also consistent with Tier 2B pathway determinations CARB has made under the readopted LCFS regulation for in-state facilities. For example, the Waste Wine Pathway (ETHWB200L) received by Pacific Ethanol Stockton, LLC characterizes a "waste wine" feedstock as a "waste product." In that case, CARB staff approved the determination based on the conclusory assertion "by the winery" itself that the waste wine was considered a "waste stream," without analyzing other potential economic uses for the "waste wine." Based on White Energy's research (binder 202-222), alcohol is being fed to cattle (Kolbe Beef) and the benefits of feeding alcohol to cattle have been proven in scientific studies. Likewise, Crimson Renewable Energy converts tallow into biodiesel at its Bakersfield facility (North American Tallow Pathway, RDT201L), which CARB considers a "waste product" under the LCFS. Tallow is commonly used in cattle feed rations today and a product that ethanol DDGs compete against. Additionally, AltEn, LLC converts spent corn and sorghum seeds to produce ethanol at its Mead, Nebraska facility (ETHCSS200), which CARB asserts is a waste product even though alternative uses such as charcoal briquettes/drywall/adhesives are viable products. Waste wine, tallow and spent seed can be used in food ingredients for human consumption and animal feed, as well as numerous other products. In other words, even if the wheat waste slurry could – contrary to the evidence – be used for human consumption and animal feed, the feedstock should be treated the same as the feedstock for other in-state renewable fuels that have been classified as "waste products" under the readopted LCFS regulation.[5]

As recently as June 16th, 2017 ARB has approved a Tier 2 pathway for "Recycled Beverage to Ethanol" submitted by Parallel Products in Rancho Cucamonga, CA. This pathway describes feedstocks that are utilized as, utilizing "waste and expired sugary and alcoholic beverages" and "spent grains/brewer's yeast from local breweries" This pathway is currently available for public comment with a staff summary that does not address any of the alternative products that could be produced from these feedstocks or why they have been granted waste classification. White Energy will comment on this pathway if ARB does not resolve the waste wheat slurry pathways.

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[5] If the wheat waste slurry is treated differently from similarly situated facilities such as Waste Wine Pathway and the North American Tallow Pathway, there is no rational basis for this distinction. *See, e.g., Village of Willowbrook v. Olech*, 528 U.S. 562 (2000). Nor is there any basis to treat the out-of-state wheat waste slurry differently from these in-state facilities. *See Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977).

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In short, the evidence demonstrates the wheat waste slurry received by the Facility is a "waste product." That conclusion is not only consistent with the treatment of the wheat waste slurry under the original LCFS regulation, but also CARB staff's analysis of similarly situated feedstocks. As a result, CARB staff should modify its recommend and allow the classification of wheat waste slurry as a "waste product" under the readopted LCFS regulation.

C. Conclusion

Based on the foregoing, White Energy respectfully requests that CARB Staff certify the two Tier 2B pathways for the Facility on or before June 30, 2017. Thank you for your consideration of this important issue.

Very truly yours,

Grant Johanson
Chief Executive Officer

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