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Can State-Level Climate Policies Survive Constitutional Scrutiny?

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Over the past five years, California has filled the void in federal leadership through implementation of comprehensive climate change legislation. Commonly known as A.B. 32, its framework includes, among other policies, a Low Carbon Fuel Standard (LCFS) that aims to gradually reduce the overall carbon intensity (CI) of all transportation fuels consumed in California to 10 percent in 2020. Each fuel "pathway" is assigned a carbon intensity value based on "field to tank" lifecycle analysis (LCA). Midwestern corn ethanol, under the California Air Resources Board's (ARB's) LCA methodology, is assigned a similar CI to that of gasoline, in part due to a large CI penalty for emissions from indirect land use change.

Trade groups representing corn ethanol, transportation, petroleum and farming interests, among others, challenged the constitutionality of California's LCFS in federal court in January 2010. They first allege that the LCFS conflicts with the federal Renewable Fuel Standard (RFS)-and therefore is preempted under the Supremacy Clause of the U.S. Constitution, because it does not exempt-like the RFS does-certain existing corn ethanol facilities from GHG emissions thresholds or allow for adjustments in GHG requirements depending on economic conditions. In failing to include these loopholes, the Plaintiffs claim that the LCFS stifles and conflicts with the goal of furthering "innovation" intended by the federal RFS, and, more importantly, for all practical matters, excludes Midwestern ethanol from the lucrative California fuel market. The Plaintiffs' second claim is that under the "dormant" Commerce Clause, the LCFS unlawfully discriminates against imported Midwestern corn ethanol in favor of chemically identical in-state fuel because of the carbon penalty associated with shipping Midwestern ethanol to California and the use of higher carbon power sources for refining. By requiring out-of-state producers to change their practices, the groups argue that the LCFS operates as an unconstitutional extraterritorial regulation, which in the end, does not result in "any measurable reduction of the effects of global warming."

After surviving ARB's motion to dismiss the lawsuit, the parties have now fully briefed cross-motions for summary judgment. ARB counters that among other broad provisions in the Clean Air Act (CAA), Congress has granted California the special prerogative to control or prohibit fuels to reduce motor vehicle emissions, including controls on fuel carbon. ARB claims that Congress also made the RFS provisions "self-contained," including grandfathering of corn ethanol, so that RFS regulations have no

effect on other more environmentally progressive federal or state programs. ARB further notes that Congress did not mandate a minimum of corn ethanol volume in the RFS, but rather capped its eligibility at 15 billion gallons, recognizing that if corn ethanol cannot be cost competitive with second or third generation ethanol pathways within a carbon economy, it would not be considered “innovative.” In addition, ARB argues that the “Plaintiffs’ attempt to characterize the LCFS as a means of protecting either California’s corn ethanol industry. . . is absurd,” given that no growth is projected in California’s already “tiny” ethanol industry, and that discovery in the case has revealed that Plaintiffs are making record profits despite operation of the LCFS. ARB further asks why Plaintiffs did not avail themselves of alternative, customized methodologies that would allow them to lower their CI score.

This case highlights the complex nature of biofuels policy as competing jurisdictions attempt to impose their own policy priority ordering to the need for energy security, climate change mitigation and rural development. Moreover, this litigation has illuminated some of the underlying structural problems in a federal biofuels policy (RFS) which purports to lay the foundation for significant reductions in greenhouse gas emissions, but yet does not incorporate standards for the carbon footprint of the non-biofuel (and majority) of the nation’s fuel needs. Aside from the RFS mandated biofuel quantities (36 billion gallons by 2022), gasoline blenders may incorporate any source of petroleum, including high carbon tar sand-derived oil that might offset the carbon savings attached to the biofuels (e.g., ethanol) component of the fuel supply. The solution from a climate change mitigation perspective, therefore, may not just be more biofuels, but rather a holistic approach to the nation’s fuel carbon content, such as a federal low carbon fuel standard. In the interim, stakeholders are watching carefully the ongoing California LCFS litigation, because if California loses, conceivably all state level programs that rely on similar LCA methodologies, including but not limited to LCFSs, would be in jeopardy of Constitutional invalidation. For further information, see *Rocky Mountain Farmers Union, et al., v. Goldstene, et al.*, Case No. 1:09-CV-02234-LJO-DLB (E.D. Cal.).