

## ENFORCEMENT OF CALIFORNIA LOW-CARBON FUEL STANDARD BLOCKED

*January 6, 2012 by Heather Zinkiewicz and Olivier Theard*

California's effort to reduce the carbon footprint of producers and refiners of fuel has hit a snag. Shortly after the passage of the Global Warming Solutions Act (AB32), requiring reduction of greenhouse gases to 1990 levels by 2020, former California Governor Arnold Schwarzenegger signed an Executive Order setting a statewide goal of reducing "the carbon intensity of California's transportation fuels by at least 10 percent by 2020." Pursuant to this Executive Order, the California Air Resource Board (ARB) adopted the Low Carbon Fuel Standard (LCFS) in June 2007 as an early action measure under AB32. In April 2010, the regulation was formally adopted. On December 29, 2011, District Judge Lawrence O'Neill in the Eastern District of California issued a preliminary injunction blocking ARB from implementing LCFS.

### **Brief History of the LCFS**

The purpose of LCFS is to "reduce greenhouse gas emissions by reducing the full fuel-cycle, carbon intensity of the transportation fuel used in California." LCFS regulates transportation fuels that are sold, supplied, or offered for sale in California, and regulates any person who is responsible for the transportation of fuel. LCFS focuses on the "carbon intensity" of fuels to estimate emissions related to a fuel's lifecycle, including greenhouse gases emitted when fuel is extracted, refined, and transported to California. LCFS creates different standards for gasoline and diesel fuels that were to be gradually implemented.

The LCFS requires providers to identify the type of fuels, whether the fuel is blended, and the fuel's production process. Providers must calculate the "carbon intensity" of each component, and this score is compared with the statewide average carbon intensity level for the year. If the score is below the statewide average, the party receives credits that can be accumulated or sold to other providers. If the score is above the average, the party must use accumulated credits or purchase credits from other providers.

## **Summary of Legal Developments: Federal Judge Blocks the LCFS**

Reductions in the average carbon intensity level were set to begin in 2011, but the corn ethanol industry, the refining industry, truckers and other interests have challenged the constitutionality of LCFS in a consolidated action before District Judge Lawrence O'Neill in the Eastern District of California (*Rocky Mountain Farmers Union v. Goldstene*). Plaintiffs argue that LCFS violates the Commerce Clause and is preempted by federal law.

On December 29, 2011, Judge O'Neill issued a preliminary injunction blocking ARB from implementing LCFS for the remainder of the *Rocky Mountain Farmers Union* litigation. The court held that plaintiffs established a likelihood of success on the merits on a Commerce Clause claim and raised serious questions regarding a preemption claim, that there is a likelihood of irreparable harm, and that the balance of equities tip in the plaintiffs' favor.

The court found that LCFS impermissibly discriminates against out-of-state corn ethanol and impermissibly regulates beyond California in violation of the dormant Commerce Clause doctrine.<sup>[1]</sup> LCFS assigns carbon intensity scores for gasoline and gasoline substitutes. Because Midwest ethanol requires more electricity to produce and travels a longer distance in interstate commerce, Midwest corn-derived ethanol receives a higher carbon intensity score than California corn-derived ethanol even though they are chemically and physically identical. The court held that this is facially discriminatory. LCFS may not regulate interstate commerce based on the distance the product travels. Additionally, the court found that LCFS impermissibly regulates the channels of interstate commerce because merchants are forced to seek regulatory approval in California before commencing a transaction in another state. Although California has a local and legitimate interest in reducing global warming, LCFS violates the dormant Commerce Clause because California has not established that there are no available nondiscriminatory means of reducing greenhouse gas emissions.

The court denied without prejudice plaintiffs' summary judgment motion related to its preemption claim because neither party addressed the correct standard of review in their motions. However, the court noted that plaintiffs raised serious questions as to whether the Clean Air Act preempts LCFS.

A preliminary injunction is extraordinary relief that the court does not grant without a clear showing that the plaintiff is entitled to relief. Granting a preliminary injunction in *Rocky Mountain Farmers Union* indicates that the Judge believes plaintiffs will prevail. The ruling allows ARB to appeal the decision immediately to the US Court of Appeals for the Ninth Circuit. After the ruling,

ARB issued a statement that it intends to appeal the rulings and seek an order staying the preliminary injunction. ARB will request an order that states that LCFS requirements are enforceable and that ARB can continue its stakeholder and rulemaking processes. If ARB's appeal is unsuccessful, it may not enforce LCFS for the remainder of the litigation. At this point, the entire LCFS appears to be in some jeopardy.

[1] The Commerce Clause expressly grants Congress the power to regulate commerce "among the several states." The idea behind the Dormant Commerce Clause is that this grant of power implies a negative converse — a restriction prohibiting a state from passing legislation that improperly burdens or discriminates against interstate commerce. The restriction is self executing and applies even in the absence of a conflicting federal statute.