Ninth Circuit Moves Low Carbon Fuel Regulations Closer to Validation

Many CEQA and NEPA analyses of greenhouse gas impacts assume implementation of the Low Carbon Fuel Standard adopted by the California Air Resources Board. In a boost to the credibility of these analyses, the Ninth Circuit has dissolved a pending injunction and rejected multiple challenges to the Low Carbon Fuel Standard. *Rocky Mountain Farmers Union v. Corey*, No. 12-15131 (9th Cir., Sept. 18, 2013). The Low Carbon Fuel Standard addresses greenhouse gas emissions associated with fuel production, refining and transportation. The Fuel Standard measures those emissions against the amount of energy produced, resulting in a carbon intensity calculation. The Fuel Standard establishes a declining annual cap on average carbon intensity. Fuel blenders and distributors are required to stay below that limit, either by providing fuels that comply, or by purchasing credits from other regulated parties who have carbon intensity values that fall below the cap. The Fuel Standard also created a market for trading, banking and borrowing Fuel Standard credits. Farmers and fuel manufacturing groups sued to invalidate aspects of the Fuel Standard related to fuels made from ethanol and crude oil, alleging impermissible burdens on interstate commerce. Their primary ethanol-related claim was that the Fuel Standard employed default methodologies – "default pathways" – that penalized out-of-state producers by presuming, for example, that they use more coal-generated electricity than California producers. The court rejected the facial aspects of this challenge, noting that the default pathways were based upon scientific data regarding energy production in each area, and not ungrounded prejudice. "The Fuel Standard considered location, but only to the extent that location affects the actual GHG emissions attributable to a default pathway." With respect to crude-oil-based fuels, the plaintiffs challenged regulations (which have since been amended) that assigned carbon intensity values based in part upon whether a source comprised 2% of the 2006 base year California crude oil market. The court found the regulations neutral on their face and in their purpose, noting that the methodology used an average carbon intensity value that penalized in-state as well as out-of-state producers. The court also rejected claims that the Fuel Standard comprises an unconstitutional extra-territorial regulation. The court found that the Fuel Standard does not regulate out-of-state conduct or transactions, but only "encourages the use of cleaner fuels through a market system of credits and caps." The Ninth Circuit did not resolve all the challenges. It did not address preemption issues under the federal Renewable Fuel Standard. With respect to the ethanol, it ruled the regulations were not facially discriminatory, but remanded the question whether the regulations discriminate in purpose or in practical effect. With respect to crude oil, it ruled that the regulations exhibited no discrimination on their face, in their purpose or in practical effect but remanded for a determination whether the crude oil regulations "placed an undue burden on interstate commerce" under a balancing test that requires the plaintiff to show a burden on interstate commerce that is "clearly excessive" in relation to the local benefits of the regulation. Despite these open issues, the appellate court's strong language regarding the neutrality of and legitimate bases for the regulations, and its decision to dissolve an injunction the trial court had issued, have given many practitioners a positive outlook on the eventual validation of the regulations.

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