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# Ninth Circuit Upholds Cal. Low Carbon Fuel Standard

Alan Ramo

*Golden Gate University School of Law*, alan\_ramo@att.net

Tim O'Connor

*Golden Gate University School of Law*, toconnor.bc@gmail.com

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## Ninth Circuit Upholds Cal. Low Carbon Fuel Standard

Posted on [October 1, 2013](#) by [alanramo](#)

By Prof. Alan Ramo and Tim O'Connor, 2nd year GGU law student

The Ninth Circuit's [decision](#) September 18, 2013, reversing the Rocky Mountain Farmers Union District Court [preliminary injunction](#), virtually vindicated the California Air Resources Board's Low Carbon Fuel Standard ("LCFS"). It was also a resounding affirmation by the panel's majority of California's overall experiment in addressing climate change on the state level.

The background of this case is discussed in this [blog](#) back on January 31, 2012. In discussing the District Court's staying of California's pathbreaking program requiring fuels to have lower carbon intensity, the blog authored by Luthien Niland noted the larger picture that the "decision will significantly impact the ability of states to pass local laws to reduce GHG emissions." The blog further stated: "From an environmental perspective, the best outcome should be the 9<sup>th</sup> Circuit's (and possibly higher courts') affirmation of CARB's position that the LCFS is not discriminatory, but rather applies to all ethanol producers equally. By upholding the LCFS, the court would not only pave the way for California to meet its AB 32 goals, but also encourage other states to pass similar laws." Ms. Niland's forecast aptly states the nature and significance of the Ninth Circuit's decision.

This case involved the use of what is increasingly becoming the disfavored dormant commerce clause, a negative constitutional provision deemed implicit in Congress's enumerated power to regulate interstate commerce. The dormant commerce clause as developed in case law prohibits a state's protection of its own

economic interests at the expense of other states' economic interests in a manner that impedes interstate commerce. In general, it will be unconstitutional for a state to give beneficial treatment to in-state economic entities at the expense of an outside economic interest. California, for instance, can only impose greater costs on outside entities if there is a nondiscriminatory reason to do so.

The Supreme Court's most conservative members (originally Rehnquist and now Thomas and Scalia) increasingly hate this jurisprudence unless there is blatant facial discrimination as it is a vague license to curb state's rights. As Scalia has stated: "I would therefore abandon the balancing approach in these negative Commerce Clause cases . . . and leave essentially legislative judgments to the Congress. . . . In my view, a state statute is invalid under the Commerce Clause if, and only if, it accords discriminatory treatment to interstate commerce in a respect not required to achieve a lawful state purpose."<sup>[1]</sup> Ironically, they are now the allies to California's innovative experiment in global warming regulation and to a permissive decision from the Ninth Circuit so long as the regulation at issue is not discriminatory.

The California Air Resource Board (CARB) had adopted the LCFS as transportation is the [largest state source of greenhouse gas emissions](#). In doing so, it analyzed fuels based not only on the fuel emissions itself, but the emissions involved with manufacturing and transporting the fuel, among other factors.<sup>[2]</sup> Ethanol, a prime example, burns extremely clean from the back end of your 'Ethanol Edition Jeep Grand Cherokee.' But the green house gasses pumped into the atmosphere to manufacture and transport to you that clean burning ethanol may be doing more damage than what the new fuel is saving on the back end.

To address this issue, CARB places its regulations across the entire lifecycle of the fuel, from the cornstalk to the pump. As it turned out, Midwest ethanol manufactured using its local grid energy supply may emit more greenhouse gases as that electricity has far more coal and oil than the grid used by local California producers. Company A, who may be in the Midwest, will use more energy (thus contributing more green house gasses) to get their ethanol to the California pump than Company B, who creates their ethanol in Modesto, CA.

This is where the dormant commerce clause comes in. Under this body of law, a court can find regulations to be discriminatory in three different ways: the facially discriminatory, the purposefully discriminatory and the discriminatory in effect. In this case, the District Court and now the Ninth Circuit have addressed just the facial discrimination issue.

Now, California did not help its cause any by labeling different ethanol products by the location where they were manufactured. Calling some fuels "Midwest" and others "California" is suspicious,

let alone including the location of their manufacturing in the life cycle analysis, and it led two federal judges, the District Court Judge and the Ninth Circuit panel dissenter, Judge Mary H. Murguia, to consider the LCFS facially discriminatory. It is no surprise then that the Rocky Mountain Farmer's Union, along with a handful of plaintiffs joining, sued claiming CARB's regulations were discriminatory. They claimed they had been discriminated against because the Fuel Standard set by CARB "discriminated against out-of-state corn ethanol by (1) differentiating between ethanol pathways based on origin and (2) discriminat[ed] based on factors within the formula that were "inextricably intertwined with origin."<sup>[3]</sup>

Judge Ronald Gould on behalf of the Ninth Circuit majority (including Judge Dorothy W. Nelson) basically went beyond the appearance of the labels to evaluate the reasonableness or content behind the label. As Professor Kathleen Morris, one of GGU's constitutional law professors, put it, Gould rejected "bootstrapping semantics into a violation of the constitution." Agreeing that CARB's original intentions of lowering all green house gasses was reasonable and consistent with a legitimate state purpose of mitigating global warming, Gould was willing to look past the geographical nature of the label to determine if the label was meaningful based upon the entire pathway of the fuel. The lower court in its commerce clause analysis had excluded emissions related to the creation, formation, and transportation of the fuel. All parties agreed that ethanol, regardless of source, had "identical physical and chemical properties."<sup>[4]</sup> All ethanol is the same when it hits the car's engine, so the District Court believed that all ethanol, regardless of origin or method of production, should be treated the same.

The lower court was willing only to compare "production processes" such as milling and refining, that were not linked to origin. As a result it avoided the larger lifecycle analysis including transportation, and efficiency and found facial discrimination. Then using a strict scrutiny test, it found that California could avoid the discrimination and compensate for the extra emissions by using a carbon tax, a less discriminatory alternative.

But the Ninth Circuit majority saw location as "factors that contribute to the actual [green house gas] emissions from every ethanol pathway."<sup>[5]</sup> The LCFS was not seen to be facially discriminatory because the life cycle analysis does not care about where the fuel comes from per se, but the energy used and the method and distance involved with transportation.

Energy grid mixes are usually determined on the state level, as each state in our energy system governs its own energy mix through public utility commissions. While it might have been smarter for the ARB to simply classify ethanol by the energy mixes of the grids utilized by the manufacturers, it took the shortcut of labeling the energy mix by its state (or in the case of Brazil, national) location. The location only

comes into play when it is traceable to the green house gasses that will be released by using that location's energy supply. If a producer causes more GHG, it will have to pay more, no matter where it is located. So long as CARB bases its regulations on these real-world factors (which is the case here) it is nondiscriminatory.

The Plaintiffs in the case raised an interesting derivation of the facial discrimination argument. On the one hand, CARB does allow a Midwest manufacturer to seek an individual carbon rating based upon its individual pathway. For example, if an ethanol manufacturer gets off the grid and uses solar or wind power, its carbon rating can be reduced. The Midwest designation is merely the default.

While California thereby seems accommodating to out-of-state manufactures, a strategy the dissent believes California should have used for all of its designations to avoid facial discrimination, the Plaintiffs argued that this represented still another burden to out-of-state manufacturers. They had to expend resources to avoid their default, while a California manufacturer gets to coast on the lower California carbon intensity figure.

As this may be a true benefit that an in-state producer may see, it reflects the "full costs of ethanol production, taking into account the harms from GHG emissions."<sup>[6]</sup> "The [dormant commerce clause] does not require California to ignore the real differences in carbon intensity among out-of-state ethanol pathways."<sup>[7]</sup> In essence, the Court is saying it is reasonable for the state to assume a manufacturer is using the local grid to carry out its greenhouse gas regulation unless shown otherwise.

The Ninth Circuit panel majority goes beyond this analysis, however, into a broader philosophical analysis of a state's role in addressing climate change. While professing not to take a position on our industrial society's role in causing climate change<sup>[8]</sup>, the majority all but endorses enthusiastically California's attempt to address the problem. Judge Gould speaks of California's "tradition of leadership"<sup>[9]</sup> and the "innovative, nondiscriminatory regulation to impede global warming."<sup>[10]</sup> It notes the danger to California: "With its long coastlines vulnerable to rising waters, large population that needs food and water, sizable deserts that can expand with sustained increased heat, and vast forests that may become tinderboxes with too little rain. California is uniquely vulnerable to the perils of global warming."<sup>[11]</sup> It notes the Supreme Court in *Massachusetts v. EPA*, 549 U.S. 497, 522 (2007), recognizes the risks can be "local threats."<sup>[12]</sup> It bemoans plaintiffs using "archaic formalism" to block action and reprises Justice Jackson's quote that "the constitutional Bill of Rights is not a suicide pact" and states "nor is the dormant commerce clause a blindfold."<sup>[13]</sup>

If there is any doubt left about Judge Gould's sentiments about global warming, he summarizes:

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“California should be encouraged to continue and to expand its efforts to find a workable solution to lower carbon emissions, or to slow their rise. If no such solution is found, California residents and people worldwide will suffer great harm.”[\[14\]](#)

The decision specifically allows California to “consider all factors that cause those emissions when it assesses alternative fuels,”[\[15\]](#) and carry out a life cycle analysis. It remands the case to determine whether lurking behind the LCFS was a purpose or intent to discriminate, and whether whatever burdens result to out-of-state manufacturers are not justified by its benefits under *Pike v. Bruce Church, Inc.*, 39U.S. 137 (197), a test few if any observers believe the state will fail.

Ms. Niland in the prior blog on this case ended with the classic quote from Justice Brandeis affirming the role of the states as the labs to “try novel social and economic experiments without risk to the rest of the country.” The panel majority explicitly adopted Justice Brandeis’ approach in its decision, noting “those experiments may often be adopted by other states without Balkanizing the national market or by the federal government without infringing on state power.”[\[16\]](#) Hint, Hint.

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[\[1\]](#) *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* 486 US 888 (1988)(Scalia, J., dissenting).

[\[2\]](#) See Appendix II in the Ninth Circuit decision, *Rocky Mt. Farmers Union v. Corey*, 2013 U.S. App. LEXIS 19258, at 79 (9th Cir. Cal. Sept. 18, 2013).

[\[3\]](#) *Rocky Mountain Ethanol*, 843 F. Supp. 2d at 1087

[\[4\]](#) *Rocky Mountain Ethanol*, 843 F. Supp. 2d at 1081

[\[5\]](#) *Rocky Mt. Farmers Union v. Corey*, 2013 U.S. App. LEXIS 19258, at 34 (9th Cir. Cal. Sept. 18, 2013)

[\[6\]](#) *Id.* at 42.

[\[7\]](#) *Id.* at 42.

[\[8\]](#) *Id.* at 11.

[\[9\]](#) *Id.* at 14.

[\[10\]](#) *Id.* at 70.

[\[11\]](#) *Id.* at 69.

[\[12\]](#) *Id.* at 69.

[\[13\]](#) Id. at 70.

[\[14\]](#) Id. at 70.

[\[15\]](#) Id. at 38.

[\[16\]](#) Id. at 31.

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