Oregon Clean Fuels Program: U.S. Court of Appeals for the 9th Circuit Addresses Judicial Challenge

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The United States Court of Appeals for the Ninth Circuit addressed a challenge to Oregon's Clean Fuels Program ("Program"). See *American Fuel & Petrochemical Manufacturers v. O'Keeffe,* No. 15-35834, 2018 WL 4263250 (9th Cir. Sept. 7, 2018).

The challenge was based on an argument that the Program violated the United States Commerce Clause art. I, § 8, cl. 3, or is preempted by § 211(c) of the Clean Air Act.

The Oregon Program regulates the production and sale of transportation fuels based on greenhouse gas emissions in or imported into the state. American Fuel and Petrochemical Manufacturers, American Trucking Association, and Consumer Energy Alliance ("Plaintiffs") filed a lawsuit in the United States District Court ("Court")(Oregon) against representatives of the Oregon Department of Environmental Quality and Oregon Environmental Quality Commission. Several conservative organizations, along with a California and Washington agency intervened.

The Plaintiffs argued that the Program facially discriminates against out-of-state fuels by assigning petroleum and Midwest ethanol higher carbon intensities than Oregon biofuels. However, a state may regulate with reference to local harms, structuring its internal markets to set incentives for firms to produce less harmful products for sale within its borders.

The Court held that the Program discriminated against fuels based on lifecycle greenhouse emissions, not state of origin. Therefore, the Plaintiffs' Complaint was held to have failed to plausibly allege that the Program was discriminatory in purpose.

Oregon requires that a regulated party keep the average carbon intensities of all transportation fuels used below an annual limit. A fuel with carbon intensity below the limit generates a credit. One with carbon intensity above the limit generates a deficit. Regulated parties can buy or sell credits, store them for future use, or use them to offset immediate deficits. The Plaintiffs argued that the credit and deficit program creates a burden on producers or importers of petroleum and Midwest ethanol, who must purchase credits.

The Court rejected the claim that the Program's assignment of carbon intensity credits and deficits effectuated a discriminatory effect because the credits and deficit program is based on carbon intensity, not state of origin.

It also rejected the claim that the Program violates the Commerce Clause and principles of interstate federalism by attempting to control commerce occurring outside the state boundaries. The Program expressly only applies to fuels sold in, imported to, or exported from Oregon.

The Court also held that the United States Environmental Protection Agency's decision not to regulate methane under § 211(k) of the Clean Air Act did not constitute a finding that regulating methane's contributions to greenhouse gas emissions was unnecessary. As a result, the decision not to regulate was not preemptive under § 211 (c)(4)(A)(i).

A copy of the opinion can be found here.