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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Calif. Fuel Plan Ruling Won't Stop Commerce Clause Attacks

By **Juan Carlos Rodriguez**

Law360, New York (August 19, 2015, 9:06 PM ET) -- Although a California federal judge tossed the majority of a dormant Commerce Clause challenge to California's low carbon fuel standard, experts say programs in other states that may discriminate against fuel produced outside its borders could still be vulnerable to similar attacks.

Last week, U.S. District Judge Lawrence J. O'Neill largely dismissed challenges against California's low carbon fuel standard, or LCFS, following the direction of the Ninth Circuit, which had overturned his previous ruling striking down the program. Judge O'Neill found that the variety of industry plaintiffs had not shown that crude oil provisions in the plan are discriminatory, one of the issues the appeals court left him to decide.

California's LCFS calls for a 10 percent reduction in carbon pollution by 2020 by setting limits on "carbon intensity," which measures not only the amount of carbon released when fuel is spent but also the carbon released during the process of manufacturing and distributing fuels.

California has gotten the farthest in implementing a LCFS thus far, but Oregon is going forward with its own, and Washington has flirted with the idea as have several Northeastern states. The results and the nature of the cases in the other states will vary depending on how the states set up their program, according to Richard Lehfeldt, a partner at Crowell & Moring LLP.

Lehfeldt noted that the Oregon plan is being challenged, also under dormant Commerce Clause claims, as has a Minnesota emissions law that would bar any new power source that produced or supplied 50 or more megawatts and increased carbon emissions, unless the emissions were offset by reductions elsewhere.

"My view is it really is case by case. It's so fact-specific and then goes so much to legislative or regulatory intent that it’s very difficult to draw general rules. The lower courts, in particular, have at times been frustrated with trying to figure out the exact contours of the doctrine. There's very little prospective guidance you can glean from a particular decision," he said.

Dormant Commerce Clause challenges aren't likely to go away anytime soon, according to Joshua Bledsoe of Latham & Watkins LLP. He noted that Judge O'Neill's order focuses on the issue of burdening in-state versus out-of-state producers. But there is a difference between Oregon and California about where the fuels are produced, Bledsoe said.

"The devil is in the details here about how the regulations function. The facts on the ground are going to be different too, as far as where crude is produced and where fuels are refined and where the biofuels comes from. I think that you'll probably continue to see ... challenges and for good reason — when doing this kind of thing, you very well could run afoul of the dormant Commerce Clause," he said.

But Morgan Gilhuly, a partner with Barg Coffin Lewis & Trapp LLP, suggested that if Judge O'Neill's decision is upheld on appeal, it could make it much harder for challengers to challenge a low carbon fuel standard on Commerce Clause grounds.

"I think it's likely to be upheld. And if it is, I don't see a successful challenge to a low carbon fuel standard on the immediate horizon. Somebody will have to come up with a new theory," he said.

He said that the judge found that in California, the effect of the LCFS hurts California producers in some respects and helps them in others and has the same impact on producers outside the state.

"What he decided was that where you have that overlap, even though on balance it helps California producers more than it helps out-of-state producers, that's not enough to state a Commerce Clause claim. And I think if that's upheld, that will make it much tougher to sustain a Commerce Clause challenge to this type of rule," Gilhuly said. "California is blazing a path, and opponents are helping them to plant legal mileposts as they go, saying, 'This is the way you can go and it will be upheld.'"

Lehfeldt said the dormant Commerce Clause is a "sticky nook" of the law that has spawned a fair amount of activity at the U.S. Supreme Court in recent years.

"There are at least some folks on the Supreme Court who have questioned its legitimacy and viability going forward, but nothing yet to command a majority that would do serious havoc to the doctrine. It's still definitely good law and requires a fairly close assessment of what the state was doing, what it intended to do and what the effects of what it did were and whether there were other, less intrusive ways to accomplish a legitimate objective," he said.

The future of low carbon fuel standard programs is unwritten, but states are looking at a variety of options to comply with President Barack Obama's signature climate change initiative, the Clean Power Plan, which seeks to control emissions from existing power plants.

While LCFS programs address a completely different source category, if the Clean Power Plan survives the numerous legal challenges it faces, there may be a role for the programs in statistics, according to Cameron Prell of Crowell & Moring.

If a state decides to pursue a state measures plan, which gives it some flexibility in meeting carbon emission targets, and wants to use transportation-related reductions for purposes of compliance, hypothetically, it may be able to count the reductions under certain specific circumstances, Prell said.

"But that would have to go through EPA approval, so it's highly speculative at this point," Prell said.

--Additional reporting by Vidya Kauri, Keith Goldberg and Daniel Wilson. Editing by Katherine Rautenberg and Christine Chun.
