

U.S. District Judge Lawrence O'Neill has ruled that the California Air Resources Board's pioneering Low Carbon Fuel Standard, a key component of California's multifaceted strategy to reduce the state's aggregate greenhouse gas emissions under AB 32, is unconstitutional. In his December 29th ruling in *Rocky Mountain Farmers Union v. Goldstene*, the Fresno-based federal judge issued an injunction preventing CARB from implementing the LCFS. But that same ruling allows CARB to pursue an immediate appeal of the decision before the U.S. Court of Appeals for the Ninth Circuit. CARB is expected to do so.

In invalidating the LCFS, Judge O'Neill agreed with industry groups who argued that the CARB rule violates the Commerce Clause of the U.S. Constitution by impermissibly interfering with and discriminating against interstate commerce. A principal industry objection to the LCFS is that it discourages California fuel marketers from relying on corn-based ethanol, which is primarily manufactured in the Midwest. Corn-based ethanol's competitive disadvantage under the CARB regulation is exacerbated by the fact that the LCFS incorporates a "life-cycle GHG emissions assessment," which means that emissions associated with transporting out-of-state fuels to California markets are part of the fuels' carbon content for purposes of calculating emissions under the LCFS.

Judge O'Neill's lengthy decision concludes that CARB's LCFS "overtly discriminates against interstate commerce." Under established dormant Commerce Clause principles, that means measure is unconstitutional unless the LCFS "substantially serves a legitimate local purpose"; and that purpose "cannot be served as well by available, non-discriminatory means." The district court ruled that California met the first test, but failed the second; alternative strategies such as a carbon tax could conceivably be substituted for the LCFS, according to Judge O'Neill.

The district court ruling is CARB's second litigation setback to its ambitious strategy to implement AB 32. Earlier this year, a California state court judge ruled that CARB had violated the California Environmental Quality Act by not completing a legally-adequate environmental analysis of its controversial cap-and-trade program. (CARB has since remedied that perceived deficiency.)

While Judge O'Neill's ruling enjoins implementation of the LCFS, CARB may well ask the Ninth Circuit to lift the injunction while it considers CARB's appeal of the district court ruling. In any event, the district court decision doesn't affect other aspects of CARB's AB 32 implementation strategy, several of which are scheduled to take effect on January 1st.

I've long believed the dormant Commerce Clause argument embraced by the district court

in *Rocky Mountain Farmers Union* to be the most formidable constitutional argument confronting California's regulatory efforts to reduce the state's aggregate greenhouse gas emissions. Judge O'Neill's decision is likely to encourage further invocations of that particular constitutional theory in future climate change litigation brought against California regulators.

The December 29th federal court ruling striking down the LCFS is actually only one of three opinions issued by Judge O'Neill in the same litigation on the same date. The second concludes that the LCFS also violates dormant Commerce Clause principles because it discriminates against out-of-state and foreign crude oil while giving an economic advantage to in-state crude oil. Judge O'Neill's third ruling preliminarily rejects CARB's argument that its LCFS is shielded from dormant Commerce Clause and federal preemption challenges by express provisions of the federal Clean Air Act.