

You might think that the U.S. Supreme Court, having decided the *Utility Air Regulatory Group v. EPA* Clean Air Act case on Monday, was done for the current Term when it comes to environmental law and policy.

Think again.

Today the justices met in conference to decide whether to grant review in a large number of pending cases. Among them is an important set of cases from California involving climate change, energy policy and the scope of constitutional limits on state environmental regulatory initiatives: *Rocky Mountain Farmers Union v. Corey, et al.* At issue is whether California's Low Carbon Fuel Standard—a critical component of the state's multifaceted strategy to reduce California's aggregate greenhouse gas emissions—violates the U.S. Constitution's Dormant Commerce Clause.

(My Legal Planet colleagues and I have previously written a good deal about this litigation in the lower federal courts; to view all the relevant posts, locate the "search" box on the Legal Planet home page and type "Low Carbon Fuel Standard." Briefly, however...)

Research pioneered by U.C. Davis Professor of Engineering and transportation expert Dan Sperling concluded that one way California could reduce state greenhouse gas emissions is by reducing the carbon content of fossil fuels combusted within state borders, and that such a reduction is technologically feasible. As it happens, Professor Sperling also serves as a member of California's Air Resources Board (ARB), and he convinced his Board colleagues that a state Low Carbon Fuel Standard (LCFS) could and should be part of California's strategy to implement the state's Global Warming Solutions Act, better known as AB 32.

That landmark 2006 legislation commits the state to reduce its overall greenhouse gas emissions by 20%, as compared to 1990 GHG emission levels. ARB's adoption of a LCFS is a key component of ARB's so-called Scoping Plan, its detailed strategy for achieving AB 32's ambitious GHG emission reductions.

Out-of-state ethanol manufacturers and crude oil producers immediately challenged the LCFS in federal court. Their argument was that the LCFS discriminates against interstate commerce and constitutes an impermissible attempt by the ARB to regulate "extraterritorially"—i.e., beyond state borders. Accordingly, they claimed, the LCFS violates the Dormant Commerce Clause, a constitutional principle developed by the Supreme Court that prohibits state and local government measures that unduly interfere with interstate commerce.

In 2011, a federal district judge agreed, ruling that California's LCFS both discriminates

against interstate commerce and regulates extraterritorially, in violation of Dormant Commerce Clause principles. But the Ninth Circuit Court of Appeals in 2013 reversed the district court ruling in a decision by a three-judge panel, thus upholding the constitutionality of the LCFS.

Then things really got interesting. The out-of-state energy companies petitioned the Ninth Circuit to re-hear the case *en banc*-i.e., by a special, 11-member panel of the Court of Appeals. The Ninth Circuit declined to do so, but several of that court's judges filed a dissent from the denial of rehearing *en banc*, asserting that the three-judge panel had erred in its Dormant Commerce Clause analysis and improperly upheld a constitutionally-defective LCFS. (Such published dissents from the denial of rehearing are becoming rather common in the Ninth Circuit, and are viewed by many observers-including yours truly-as a not-so-subtle message to the Supreme Court that the High Court should take up the case to correct their Ninth Circuit colleagues' legal error.)

Next came three separate petitions for certiorari to the Supreme Court, filed by the energy companies. Those petitions are in turn supported by amici briefs filed by eight states and the U.S. Chamber of Commerce, arguing that California is indeed discriminating against other states and their industry constituents by implementing an unconstitutional LCFS.

It is those three, related petitions that the justices were scheduled to consider in their closed-door conference today.

At this point, three things could happen. First, the Court could announce as early as next Monday-the final day of the justices' current Term-whether they will grant or deny the LCFS petitions. (If granted, the case(s) would be argued and decided on the merits next Term; if denied, this litigation is over and the constitutionality of California's LCFS would be confirmed.) Second, the justices could ask the U.S. Solicitor General for his opinion as to whether or not the petitions should be granted, thus effectively postponing the Court's decision whether to grant certiorari until next fall. Finally, the justices could unilaterally choose to defer that decision until later this year, leaving the parties and interested observers in suspense for at least a few more months.

My own hunch is that there's at least a 50-50 chance that the Court will, sooner or later, grant one or more of the industry petitions. Several reasons: first, in recent years the justices have demonstrated keen interest in the Dormant Commerce Clause, having accepted and decided a good number of cases raising this particular constitutional principle. What's more, the vast majority of the Court's Dormant Commerce Clause decisions over the past quarter century have involved state or local environmental programs of one kind or

another.

Moreover, several individual justices have in the recent past expressed dissatisfaction with the Court's current Dormant Commerce Clause jurisprudence, in their concurring or dissenting opinions. Finally, the LCFS litigation represents a major set of cases from a policy perspective, involving as it does a key regulatory strategy to address climate change concerns, litigation that pits top Supreme Court advocates on both sides and which (as noted above) has drawn some influential amici into the fray.

If the Supreme Court does grant certiorari, *Rocky Mountain Farmers Union* immediately emerges as the most important environmental case on the justices' 2014-15 docket; another major test of the Court's views on federalism, states' rights and climate change; and an opportunity for the justices to bring some needed clarity to the Court's Dormant Commerce Clause jurisprudence, which is currently a bit muddled doctrinally. The latter point is especially important, inasmuch as the Dormant Commerce Clause has emerged of late as a favored constitutional theory—along with federal preemption and the Takings Clause—by which business interests challenge state and local government environmental regulatory programs.

Like many other environmental lawyers and Supreme Court junkies, I'll therefore be watching the final day of the Supreme Court's current Term on Monday with considerable interest.

(Full disclosure notice: the author participated in a law professors' amicus brief in the Ninth Circuit that argued the ARB's Low Carbon Fuel Standard is constitutional and does not violate the Dormant Commerce Clause.)