

State of Oregon  
Department of Environmental Quality

Memorandum

**Date:** Nov. 18, 2014

**To:** Environmental Quality Commission

**From:** Dick Pedersen, Director 

**Subject:** Update on litigation regarding California's low carbon fuel standard

During the public hearing on Clean Fuels at the Nov. 6, 2014, EQC meeting, commissioners requested an update on the legal challenge to California's low carbon fuel standards. The following information has been prepared by DEQ staff after consultation with the Oregon Department of Justice.

**Status of the case**

In December 2011, the federal district court in California ruled that the low carbon fuel standard violated the Commerce Clause on several grounds. The Ninth Circuit reversed the district court and sent the case back to the district court to conduct additional review on Commerce Clause issues that the district court had not yet reached in its original decision. While the 9th Circuit's decision does not permanently foreclose an ultimate conclusion that the standards violate the Commerce Clause, it did overrule all of the district court's current holdings to that effect. Specifically, the court held that the low carbon fuel standard does not on its face violate the Commerce Clause of the U.S. Constitution and, as a result, it does not discriminate against out-of-state fuel producers nor does it act as extraterritorial regulation.

Plaintiffs' attempts to appeal the Ninth Circuit's decision have failed. The Ninth Circuit denied a request for review of the panel's decision by all of the appellate judges and the Supreme Court denied a petition for it to hear the case. So the case is now back at the district court for it to consider whether or not the California low carbon fuel standard discriminates against out-of-state ethanol producers based on the record of actual facts and evidence.

The parties have restarted the litigation at the district court, beginning with plaintiffs' attempt to change some of the allegations it has made in its complaint to strengthen its case. The district court likely will not begin making significant substantive rulings until summer 2015, with final resolution not until late 2015 at the earliest.

**Federal preemption of low carbon fuel standards**

One minor aspect of the Ninth Circuit's decision has apparently caused considerable confusion, leading to the incorrect belief that Oregon is preempted from adopting its own low carbon fuel standard. The Clean Air Act gives California special authority to regulate fuel components or additives even if EPA has set national standards. That same statutory

section also provides that other states are preempted from regulating fuel components or additives *when national standards exist*. But the EPA has not adopted national standards limiting the carbon content of fuels, so that provision is not applicable to Oregon and nowhere did the Ninth Circuit hold that Oregon was preempted from adopting low carbon fuel standards. The court merely made reference to this section of law when it ruled that California's unique status under Clean Air Act does not shield the state's low carbon fuel standard from an interstate commerce challenge. A clear and balanced reading of the decision shows that the court did not even consider whether the Clean Air Act prevents other states from adopting a low carbon fuel standard.