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The U.S. Court of Appeals for the Ninth Circuit's ruling in *Rocky Mountain Farmers Union v. Corey* has important implications for the manner in which states seek to regulate what is a global air pollutant. In the case of such pollutants, any individual jurisdiction cannot fully address the environmental impact on its own in-state citizens. In such circumstances, each jurisdiction cares about out-of-state emissions as much as in-state emissions, and in fact may be concerned that its own efforts to regulate in-state may be undermined by higher emissions in other places. Due to these concerns, several jurisdictions have considered or implemented regulatory schemes in an attempt to encourage out-of-state emissions reductions with impacts on national commerce, leading to commerce clause litigation. These cases have important consequences for the future of state regulation of greenhouse gases.

Regulating the Regional Impact of Greenhouse Gas Emissions

By Jonathan Martel, Christopher Jaros and Allison Rumsey

I. Introduction

On Sept. 18, 2013, in *Rocky Mountain Farmers Union v. Corey*,[1] the U.S. Court of Appeals for the Ninth Circuit ruled that California's Low Carbon Fuel Standard (LCFS), which mandates the increased use of low-carbon transportation fuels throughout the state, does not violate the dormant commerce clause of the U.S. Constitution. The LCFS is one of several regulatory strategies California has implemented to reduce greenhouse gas emissions nationwide, a strategy that is rooted in the understanding that greenhouse gases emitted anywhere in the world ultimately will impact people in California equally. The Ninth Circuit reversed the district court's finding that the regulation was unconstitutional and removed the district court's injunction against implementation of the program by the California Air Resources Board (CARB). The court's analysis has important implications for the manner in which states seek to regulate what is a global air pollutant. In the case of such pollutants, any individual jurisdiction cannot fully address the environmental impact on its

[1] *Rocky Mountain Farmers Union v. Corey*, 77 ERC 1077, 2013 BL 250093 (9th Cir. 2013). *See also,* 182 DEN A-20, 9/19/13).

own in-state citizens. In such circumstances, each jurisdiction cares about out-of-state emissions as much as in-state emisions, and in fact may be concerned that its own efforts to regulate in-state may be undermined by higher emissions in other places. Due to these concerns, several jurisdictions have considered or implemented regulatory schemes in an attempt to limit such out-of-state emissions with impacts on national commerce, leading to commerce clause litigation. This litigation has important consequences for the future of such state regulation of greenhouse gases.

Environmentalists generally have lauded the *Rocky Mountain* decision as confirming the authority of California to consider greenhouse gas emissions that occur in other states as part of its own regulatory framework. There is merit to this view, as the court of appeals' analysis supports the legitimacy of state efforts to regulate the production, sale and consumption of products in a manner that takes account of and addresses lifecycle emissions and thus the potential for ''leakage.'' Leakage occurs when parties respond to regulatory requirements, not by reducing greenhouse gas-emitting activities that are subject to the requirements, but simply by moving those activities to different locations where those activities are less onerous obligations, thereby undermining the efforts of the regulating state. In addition, the opinion does not appear to present obstacles regarding the legitimacy of interstate ''trading'' programs, in which two or more states might agree that a party's regulatory compliance on a regional basis also satisfies its individual requirements in each state. As discussed below, however, the Ninth Circuit's analysis of extraterritoriality under the dormant commerce clause leaves serious questions about the legitimacy of a third type of regulatory scheme, known as ''offsets.'' California and other states use an offset regime specifically to encourage, or if the in-state requirements are stringent enough, to coerce as a practical matter conduct that occurs entirely out of state as a condition of access to the in-state market. Such a challenge, if successful, could eliminate or constrain such offset schemes at least in some circumstances, and limit states' attempts to reduce greenhouse gas emissions outside of their borders.

II. Background of the LCFS and Decision

A. The Low Carbon Fuel Standard

To create regulatory conformity for the automobile industry throughout the U.S., Section 209(a) of the Clean Air Act generally prohibits states from regulating emissions from motor vehicles and fuels.[2]However, in light of the special air quality problems in California, the existence of state regulation prior to enactment of the Clean Air Act, and California's economic size, the Clean Air allows the Environmental Protection Agency to waive federal preemption of vehicle regulation for California, allowing the state to adopt its own motor vehicle and fuel standards if the state determines that those ''standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards,'' and allows California to regulate fuels without a waiver.[3] Under Section 177 of the Clean Air Act, other states are permitted to opt into the California vehicle standards as long as they are identical to the California standards, but cannot adopt standards of their own.[4] In this regard, California frequently serves as a laboratory with respect to air emissions regulations for motor vehicles and fuels.

In 2006, the California Legislature enacted the Global Warming Solutions Act of 2006 (A.B. 32). In the bill, the Legislature declared that ''global warming poses a serious threat to the economic well-being'' of the state, and that climate change would cause ''detrimental effects on some of California's largest industries, including agriculture, wine, tourism, skiing, recreational and commercial fishing and forestry.''[5] Based upon that finding, the Legislature required that the state reduce its greenhouse gas emissions[6] to their 1990 level by the year 2020 and empowered CARB to design emissions reductions to meet that goal.[7] Because transportation is the largest source of the state's greenhouse gas emissions, accounting for more than 40 percent of greenhouse gases emitted in California,[8] CARB adopted a three-pronged approach to lower greenhouse gases throughout the transportation industry. The first two prongs seek to reduce emissions on the back end by increasing the carbon efficiency of cars and requiring a land-use plan with the goal to reduce the number of vehicle miles traveled each year. The third prong, the LCFS, seeks to reduce greenhouse gas emissions on the front end by lowering the volume of gases emitted in the production of transportation fuel.[9]

Beginning in 2011, the LCFS imposed a declining annual cap on the average carbon intensity of California's transportation fuel market.[10] To comply with the LCFS, a fuel blender must keep the average carbon intensity of its total volume of fuel under that annual limit.[11] Fuels that are above or below those capped levels generate credits or debits, and those credits may be used as offsets, sold to other producers with deficits or carried forward to comply with the carbon intensity cap for following years.[12] The LCFS creates a marketplace for efficient trading and banking of LCFS credits.

Pursuant to the regulations, a fuel's carbon intensity is measured as the amount of carbon dioxide equivalent that is generated in the production of the fuel. The amount of carbon generated by the combustion of the fuel in motor vehicle is the same regardless of the process to produce the fuel and deliver it to the vehicle fu-

[2] 42 U.S.C. § 7543(a) (motor vehicles); 42 U.S.C. § 7545(c)(4) (fuels).

[3] 42 U.S.C. § 7543(b) (motor vehicles).

[4] 42 U.S.C. § 7507.

[5] Cal. Health & Safety Code § 38501.

[6] Greenhouse gas emissions refers to a variety of gases that trap heat in the atmosphere and includes not only carbon dioxide but also other gases such as methane. A fuel's ''carbon dioxide equivalent'' refers to the total potency of all the greenhouse gas emissions attributable to a fuel, expressed in the terms of the amount of carbon dioxide that would exert the same greenhouse gas effect in the atmosphere. *See* CARB's Initial Statement of Reasons for the Fuel Standard (ISOR) IV-1 (2009).

[7] *Id.* § 38501(e), (g).

[8] *Rocky Mountain Farmers Union v. Corey*, (9th Cir. Sept. 18, 2013), Slip Op. at 15.

[9] Cal. Code Regs. tit. 17, §§ 95480-90.

[10] *Id.* § 95482(b).

[11] *Id.* § 95482(a).

[12] *Id.* § 95485.

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eling station. The carbon intensity analysis requires that all greenhouse gas emissions or reductions throughout the entire life cycle of production and delivery to the retail station for a fuel be considered in determining the fuel's carbon intensity. For example, the carbon intensity of corn-based ethanol takes into account both the greenhouse gases emitted during the creation and transportation of the fuel, as well as greenhouse gas fixation from the atmosphere by the corn that is grown, and the greenhouse gas emissions from the tractors and fertilizers used to grow and harvest the corn. As of June 2011, CARB concluded a life-cycle analysis for a variety of fuels made from petroleum, natural gas, hydrogen, electricity, corn, sugar cane, used cooking oil, and tallow to be used in this assessment.[13] Based upon that analysis, CARB calculated default carbon intensity values for a variety of fuels anticipated to appear in the California market.

In its analysis, CARB assumed that ethanol in the California market originated from three primary regions—the Midwest, Brazil and California.[14] CARB calculated average or default carbon intensity values for different groups of potential ethanol products to be sold in California, based upon a number of additional location specific factors, including the choice of feedstock (corn or sugar cane), source of electricity, and source of thermal energy. Because many Midwest ethanol producers are located near coal-based electricity sources, whereas California electricity producers use a greater amount of natural gas to produce electricity, the default values for some Midwestern ethanol processes are higher than those using otherwise similar processes in California. Ethanol produced from sugar cane in Brazil and transported via ocean vessel to California has a lower carbon intensity than ethanol produced from corn and transported via rail or truck from the Midwest to California. When computing a carbon intensity for any given fuel, a party can either rely upon CARB default values based upon factors like those discussed above, or register with the ARB an individualized pathway that takes into account the specific carbon intensity of any individual fuel producing operation, depending on which approach the fuel producer finds to be most advantageous.

B. Dormant Commerce Clause Challenge

In December 2009, two industry groups challenged the LCFS, arguing that the ethanol provisions violated the dormant commerce clause by ''(1) facially discriminat[ing] against out-of-state ethanol; [and] (2) impermissibly engag[ing] in the extraterritorial regulation of ethanol production.''[15] In three rulings in December 2011, the district court agreed with the challengers, granting a request for a preliminary injunction halting implementation of the rule.[16]

Regarding facial discrimination, the Ninth Circuit explained that, although the commerce clause prohibits regulations that ''distinguish between in-state and out-of-state products [where] no non-discriminatory reason for the distinction [is] shown,'' such distinction is permissible where a non-discriminatory basis is made clear.[17] The Ninth Circuit reasoned that the LCFS was not discriminatory, because it ''does not base its treatment on a fuel's origin but on its carbon intensity.''[18] The court of appeals relied primarily on the Supreme Court's decision in *Oregon Waste*, 5111 U.S. 93; 38 ERC 1249 (1994). In *Oregon Waste*, the Supreme Court considered the commerce clause implications of a state law that attached a surcharge on waste disposed of within Oregon that was from out of state.[19] There, the court explained that ''if out-of-state waste did impose higher costs on Oregon than in-state waste, Oregon could recover the increased cost through a differential charge on out-of-state waste.''[20] There, because no such basis was provided for charging a higher value, the court held that the statute was facially discriminatory. In *Rocky Mountain*, the court of appeals explained that the CARB's rules are different: Where ''producers of out-of-state ethanol actually cause more GHG emissions for each unit produced, because they use dirtier electricity or less efficient plants, CARB can base its regulatory treatment on those emissions.'' [21] Moreover, the Ninth Circuit emphasized that, because certain ethanol produced in Brazil or the Midwest actually has a lower default carbon intensity compared to ethanol produced in California, it could not be considered facially discriminatory. In sum, the appeals court concluded that ''the [LCFS]'s regional categories for the default pathways show every sign that they were chosen to accurately measure and control GHGs and were not an attempt to protect California ethanol producers.''[22]

Regarding extraterritorial regulation, the Ninth Circuit similarly rejected the district court's conclusion that the LCFS violates the dormant commerce clause. As set forth in the case *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989), the Supreme Court has held that where a regulation ''directly controls commerce occurring wholly outside the boundaries of a State, [that regulation] exceeds the inherent limits of the enacting State's authority'' and violates the dormant commerce clause. In *Healy*, the court considered a Connecticut statute that required out-of-state shippers of beer to affirm that their prices in Connecticut were no higher than the lowest prices at which those products were being sold in the bordering states of Massachusetts, New York and Rhode Island.[23] Because each of the bordering states permitted distributors to provide volume discounts, whereas Connecticut did not, the court determined the statute's ''effect [was] to deter volume discounts in each of these other States, because the lowest of the volume discounted prices would have to be offered as the regular price'' in Connecticut.[24] The court concluded that the statute constituted extraterritorial regulation and

[13] *Id.* § 95486(b)(1).

[14] Whereas ethanol produced in California and the Midwest is generally made using corn, ethanol produced in Brazil is generally made using sugar cane, which is a less energy and carbon intensive process.

[15] Slip Op. at 11.

[16] The challengers also alleged, and the district court and Ninth Circuit considered, whether the LCFS violated the dormant commerce clause because it discriminated against out-of-state crude in purpose and effect. Those arguments are similar to the arguments raised regarding ethanol and are not discussed separately here.

[17] Slip Op. at 35.

[18] *Id.* at 35-36.

[19] 511 U.S. at 96.

[20] Slip Op. at 35 (citing *Oregon Waste*, at 101 n.5).

[21] *Id.*

[22] *Id.* at 48.

[23] *Id.* at 326.

[24] *Id.* at 339.

thus violated the dormant commerce clause.[25] Applying the *Healy* standard, the district court determined that the LCFS was unconstitutional, because, among other things, it ''attempts to control'' out-of-state conduct.[26] Specifically, the district court concluded that, through its use of the life-cycle analysis, ''California is attempting to account for and reduce emissions from the entire pathway'' and that the ''practical effect of the regulation would be to control [conduct] occurring wholly outside of California.''[27] In reaching this conclusion, the district court identified a number of factors considered as part of the CARB's life-cycle analysis that encourage ethanol producers to adopt less carbon-intensive policies for activities occurring in other states, including with respect to the transportation of ethanol, farming practices, and land-use factors.[28]

The Ninth Circuit rejected the district court's analysis, holding that the regulation does not constitute extraterritorial regulation.[29] The Ninth Circuit explained that, based upon *Healy* and the Supreme Court's holding in *Pharmaceutical Research*,[30] although states ''may not mandate compliance with their preferred polices in wholly-out-of-state transactions,'' they are permitted to ''regulate commerce and contracts within their boundaries with the goal of influencing the out-of-state choices of market participants.''[31] Applying that holding, the Ninth Circuit concluded that the fuel standard does not violate the dormant commerce clause, because it ''*says nothing at all about ethanol produced, sold, and used outside California*, it does not require other jurisdictions to adopt reciprocal standards before their ethanol can be sold in California, it makes no effort to ensure the price of ethanol is lower in California than in other states, and it imposes no civil or criminal penalties on non-compliant transactions completed wholly out of state.''[32] The court of appeals emphasized that California is regulating the sale and consumption of fuel in California, not ''control[ling] the production or sale of ethanol wholly outside California.''[33] Finally, the Ninth Circuit rejected arguments that California was wrongly exerting its police power outside the state. The Ninth Circuit concluded that under the regulation, ''no firm must meet a particular carbon intensity standard, and no jurisdiction need adopt a particular regulatory standard for its producers to gain access to California.''[34]

III. Implications

Environmentalists have generally praised the Ninth Circuit's opinion, finding the court's reasoning helpful to pave the way for state regulation aimed at reducing greenhouse gases without running afoul of the dormant commerce clause.[35]

A. Leakage

In particular, the appeals court's opinion affirms the ability of states to regulate the consumption of products in state with consideration given to greenhouse gases emitted out of state during the production and delivery of those products to consumers in state. Such regulatory authority may be particularly important to address a problem of local greenhouse gas regulation known as ''leakage,'' in which regulation of production activity inside of one jurisdiction simply causes the production activity to relocate to another jurisdiction without similar regulations. Where the relocation of greenhouse gas emitting activities from one jurisdiction to another results in no net change in emissions, due to the global impact of greenhouse gas emission when such leakage occurs, the regulations in one jurisdiction do not result in benefits.[36] For example, regulation aimed at reducing greenhouse gases from electricity production inside of a state (such as by shifting fuels or adding renewable sources of electricity) could result in shifting of generation to meet the needs of consumers through sources in other nearby states that do not impose such requirements. Prohibition against such regulation under the dormant commerce clause would be a major impediment to such state initiatives.[37]

Indeed, legislation in Minnesota seeking to reduce the state's reliance on electricity generated from carbon intensive sources is currently subject to a dormant commerce clause challenge in the District of Minnesota.[38] In that litigation, North Dakota and a number of electricity generators challenged portions of the Next Generation Energy Act,[39] which seeks to reduce the use of electricity generated from coal by barring not only the construction of new coal-fired power plants in state, but also barring in-state energy providers from ''import[ing] or commit[ting] to import from outside the state'' power from new coal-fired sources, unless certain offsets are be obtained by the in-state regulated entity. North Dakota, a key supplier of coal-based energy to the region and Minnesota, has asserted that the effect of the statute is to regulate electricity generators oper-

[25] *Id*.
[26] Slip Op. at 58.
[27] *Rocky Mountain Farmers Union v. Goldstene*, 843 F. Supp. 2d. 1071, 1091; 2011 BL 331238 (E.D. Cal. 2011). *See also*, 250 DEN A-10, 12/30/11.
[28] *Id*.
[29] Slip Op. at 58.
[30] *Pharm. Research & Mfrs. Of Am. v. Walsh*, 538 U.S. 644, 669 (2003) (holding Maine statute that encouraged drug companies to enter into rebate agreements favorable to Maine consumers did not constitute extraterritorial regulation because it ''d[id] not regulate the price of any out of state transaction'' or ''t[ie] the price of its in-state products to out-of-state prices.'').
[31] Slip Op. at 63.
[32] *Id*. at 61 (emphasis added).
[33] *Id*. at 64.
[34] *Id*. at 59.
[35] *See, e.g.*, NRDC Press Release, Court Rules In Favor of Cleaner Fuel in California (Sept. 18, 2013) (''Today's victory ensures Californians are given better, cleaner choices at the fuel pump, which is something everyone can support. This policy will spur American ingenuity to produce cleaner fuels with fewer impacts to our environment.''), available at http://www.nrdc.org/media/2013/130918a.asp. *See also* 182 DEN A-20, 9/19/13.
[36] The issue of leakage with respect to greenhouse gases is different than other air pollutants that have only a local or regional effect, because relocation of pollution emitting activities to another jurisdiction may improve the air quality in the regulating jurisdiction.
[37] *See, e.g.*, Eric Parlar, Michael Babakitis and Shelley Welton, Legal Issues in Regulating Imports in State and Regional Cap and Trade Programs, Columbia Law School Center for Climate Change, available at http://web.law.columbia.edu/sites/default/files/microsites/climate-change/files/Publications/Students/Legal%20Issues%20in%20Regulating%20Imports%20OCT2012.pdf.
[38] *See North Dakota v. Heydinger*, Case No. 11-cv-3232 (D. Minn.).
[39] Minn. Stat. § 216H.03.

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ating wholly outside of Minnesota. Oral arguments on the parties' cross-motions for summary judgment regarding plaintiffs' dormant commerce clause claims were heard Oct. 17, 2013, and the court is expected to rule soon. The Minnesota law bears some similarities to the LCFS, in that Minnesota seeks to regulate electricity consumed in Minnesota, taking into account the greenhouse gases associated with its production out of state. The Minnesota focus of the prohibition on *new* coal-fired power plants (which have similar or even lower emissions per unit production than older plants), however, raises yet another question about the state's intention to impact construction of sources outside of the state. The Minnesota case will provide another opportunity to consider the Ninth Circuit's analysis regarding such regulation aimed at addressing ''leakage.''

B. Interstate Trading

The Ninth Circuit's LCFS opinion also ought not to present a conceptual barrier to a second type of regulatory scheme designed to address the global nature of greenhouse gas emissions—interstate trading programs. Such schemes exist where two or more states might pursue a common regulatory program and agree that a party's compliance on a cumulative, multistate basis satisfies the individual requirements in each state, regardless of whether the party may have undercomplied in one of the jurisdictions. Such a program affords bilateral flexibility to regulated industry. No single state in such a circumstance seeks to coerce wholly separate conduct in another state where it has no regulatory authority.

One example of such regulation is sales mandates for zero emission vehicles (ZEV) in California, another of the signature greenhouse gas reduction programs of CARB.[40] Under this program, automobile manufacturers must ensure that a certain percentage of their sales in California are ZEVs.[41] The percentage increases from 4.5 percent of total sales in 2018 to 22 percent for 2025 and subsequent years.[42] In addition to the California-specific requirements, the regulations include an interstate trading program, which provide that where other states have adopted the California ZEV requirements, a party that sells cars in two ZEV states can credit any over-compliance in one ZEV state to compensate for under-compliance in another ZEV state.[43] The regulation requires other ZEV states to opt in (*i.e.*, adopt ZEV standards identical to California's, as allowed under Section 177 of the Clean Air Act). The participating states pool their requirements. In the case of a global pollutant such as greenhouse gases, no individual jurisdiction has a real environmental interest in where the emissions reductions take place across the pooled region. Such regulations do not appear to present a dormant commerce clause issue, as there is no requirement imposed out of state, no effort of one state to influence out-of-state conduct, and no particular advantage gained or lost through conduct in any particular state.

[40] *See* Cal. Code. Regs. tit. 13 § 1962.2.

[41] *See* ZEV Standards for 2018 and later model years, as codified at Cal. Code of Regs. tit. 13 § 1962.2.

[42] Cal. Code. Regs. tit. 13 § 1962.2(b)(1)(A).

[43] Cal. Code. Regs. tit. 13 § 1962.2(d)(5)(E).

C. Offsets

Less attention has been given to the Ninth Circuit's reasoning and distinctions drawn in its analysis of extraterritorial regulation in relation to ''offsets'' programs. That analysis leaves serious questions about whether this third type of state regulation aimed at reducing greenhouse gas emissions runs afoul of the dormant commerce clause. Such regulations unilaterally tie the stringency of regulation of in-state sales to completely separate conduct outside of the state. More specifically, state regulation aimed at products entirely ''produced, sold and used'' outside the jurisdiction and conditioning or limiting access to the state's market based on conformance to the state's preferences for such products, could be the subject of further attack. In the context of greenhouse gas regulation, states are tempted to project their market power to influence out-of-state emissions. They might have reason to do this based on the same understanding discussed above that greenhouse gases emitted anywhere in the world ultimately will impact people in states, such as California, equally. Where there might be opportunities to achieve emissions reductions more efficiently out of state, the state could impose stringent requirements in state but allow the goal to be met through out-of-state conduct, thereby practically to require such out-of-state conduct (because there is no real rational choice to comply only in state where the out-of-state offset options are significantly less costly). Indeed, the in-state option might even be infeasible (either technically, economically or competitively), further reinforcing the notion that the state is seeking to coerce conduct outside of the state where it has no regulatory authority.

One example of such a provision is included in the most recent amendments to the program. Specifically, a GHG-ZEV Over Compliance Credits provision ''allows'' a manufacturer to satisfy up to half of its ZEV obligations in California in Model Years 2018 and 2019 by selling lower greenhouse gas vehicles *outside* of California, determined based on the manufacturer's over-compliance with entirely separate federal greenhouse gas standards.[44] Said another way, a manufacturer who does *not* over-comply outside of California *must* meet a more stringent standard in California. Thus, under this regime, two competing manufacturers who both sell the exact same fleets in California could have vastly different ZEV obligations in California, based solely on the greenhouse gas emissions of cars those manufacturers sell and that are used entirely outside of California. This approach is arguably no different than other ''offsets'' options, such as by tying the percentage of ZEVs manufacturers are required to sell in California to the greenhouse gas emissions of the fleets of cars those manufacturers sell in Europe or China. The proposed GHG-ZEV Over Compliance Credit provision seeks to condition participation in the California market based on conduct somewhere outside of California that has nothing whatsoever to do with products sold in California, other than that they are sold by the same party. In this regard, California might similarly condition the percentage of ZEVs required to be sold in California based on achieving other greenhouse gas emissions offsets, such as from energy efficiency at the company's facilities in Detroit or Tokyo, or the company's planting of trees in Brazil.

[44] Cal. Code. Regs. tit. 13 § 1962.2(g)(6)(C)(3).

In the Minnesota case discussed above, the statute also includes a significant offset provision. There, although the statute flatly prohibits importation of electricity generated at new coal-fired power plants, the statute allows in-state energy providers to import such energy if the provider can demonstrate that it has obtained offsets achieved through unrelated conduct (including outside of the state) that reduce emissions by an increment equal to the increased carbon intensity of the coal-fired source. The provision allows such offsets to be obtained through a variety of sources, including by purchasing CO_2 allowances from out-of-state cap-and-trade systems.[45]This provision effectively forces those selling new coal-fired power to acquire offsets, since they are otherwise barred from participating in the Minnesota market.

Under the dormant commerce clause and the *Rocky Mountain* decision, at issue in this type of regulation is whether the state is regulating conduct outside of the state. Of course, there are no penalties that apply directly to conduct undertaken outside of the state. On the other hand, penalties arguably could be said to apply *based on* such out-of-state conduct. For example, under California's program (and no other state's program), of two manufacturers who sell the exact same cars in California, one might be subject to penalties based solely on that manufacturer's conduct outside of California. The manufacturer that sells low greenhouse gas-emitting (*i.e.*, high fuel economy) cars in Maine and over-complies with federal standards would not be penalized under California law, even if the cars sold in Maine are not produced or used in California. But the second manufacturer, which does not (or cannot) overcomply in Maine but sells the same cars in California would be considered out of compliance and subject to penalty. Likewise in Minnesota, only the seller of the coal-fired power that lacks offsets would be in violation.

Moreover, by setting very stringent (or even infeasible) standards in California or Minnesota, the state acting alone effectively could force manufacturers to undertake desired conduct outside of the state as a condition of access to the state's market. Such a requirement arguably would be outside the scope of conduct deemed permissible by the Supreme Court in *Healy*, where the court explained that the ''critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundary of the state.''[46] In *Healy*, the court held that Connecticut's statute constituted extraterritorial regulation, because its effect was to prevent beer distributors operating in Connecticut from offering volume discounts in other states, even though such discounts were permitted by law in those states. In effect, Connecticut used its market power to forego volume discounts in neighboring states, even though such discounts were allowed in those states (but not allowed in Connecticut). Similarly, in the GHG-ZEV Over-Compliance provision example, California's regulation could in effect ''mandate compliance with [the state's] preferred policies in wholly out-of-state transactions'' even where other conduct (namely volume discounts on beer) is completely lawful in the neighboring states.[47] A similar argument might be made about Minnesota, where the North Dakota generators must obtain offsets as a practical matter outside of Minnesota in order to access the Minnesota market.

Programs that set stringent or even infeasible requirements in state, but offer ''offsets'' to enable compliance through out-of-state conduct, arguably are limiting access to the state's market by forcing desired conduct outside of the state. Still, if a state such as Minnesota may flatly bar use or sale or importation in state of certain kinds of power based on its ''life-cycle'' emissions, the question arises whether the addition of an offset option then converts the state's scheme into extraterritorial regulation. It is unclear whether this offsets issue will be addressed by the district court in *North Dakota v. Heydinger* or whether the Ninth Circuit's extraterritoriality analysis in the *Rocky Mountain* case will be raised. The outcome of such dormant commerce clause cases could have substantial implications for states' flexibility to fashion greenhouse gas regulations that seek to encourage out-of-state conduct through offsets and similar designs.

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The opinions expressed here do not represent those of Bloomberg BNA, which welcomes other points of view.

[45] *See* Minn. Stat. § 216H.03.

[46] *Healy*, 491 U.S. at 336.

[47] Slip Op. at 63.

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