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AN ANALYSIS OF FEDERAL PREEMPTION AND A CLEAN FUEL STANDARD IN WASHINGTON STATE

Kirsten Nelsen

Abstract: Transportation fuel is the greatest contributor to greenhouse gas emissions in Washington State. To curb emissions, Governor Jay Inslee has charged the Washington State Department of Ecology with developing a Clean Fuel Standard (“CFS”) proposal, which may be proposed in future legislative sessions. The goal of a CFS is to reduce the overall carbon intensity of transportation fuel. California enacted a similar program in 2010—the low carbon fuel standard—which was challenged in federal court. One issue that remains open is whether a state low carbon fuel standard would be preempted by the federal Clean Air Act. This Essay considers whether the Clean Air Act would preempt a CFS in Washington. It concludes that a Washington CFS is unlikely to conflict with the purpose of any portion of the Clean Air Act and is therefore unlikely to be preempted.

INTRODUCTION

The Washington State Legislature enacted a bill in 2008 that pledges to reduce state greenhouse gas (“GHG”) emissions to 1990 levels by 2020.¹ The bill requires further reductions in GHG emissions in 2035 and 2050.² Although it does not target specific industries, the bill will likely impact the transportation sector, the greatest contributor to GHG emissions in the state.³ For this reason, Governor Jay Inslee has announced that he will propose several strategies to decrease carbon pollution from transportation.⁴ One of the governor’s potential policies is a Clean Fuel Standard (“CFS”),⁵ a regulatory scheme that would

1. Act effective June 12, 2008, ch. 14, § 3, 2008 Wash. Sess. Laws 172 (regarding Greenhouse Gas Emissions) (codified at WASH. REV. CODE. § 70.235.020(1)(a)(i)) (2014).

2. WASH. REV. CODE § 70.235.020(1)(a)(ii)–(iii) (2014).

3. GAIL SANDLIN, WASHINGTON STATE GREENHOUSE GAS EMISSIONS INVENTORY 2009–2010 7–8 (2012), *available at* <https://fortress.wa.gov/ecy/publications/publications/1202034.pdf> (last visited Feb. 18, 2015).

4. JAY INSLEE, POLICY BRIEF: WASHINGTON CARBON POLLUTION REDUCTION AND CLEAN ENERGY LEADERSHIP 1–2 (Dec. 14, 2014), *available at* http://www.governor.wa.gov/documents/Carbon_package_overview_2015.pdf (last visited Feb. 14, 2015).

5. *Id.*

reduce the carbon intensity of transportation fuels.⁶

Opponents to a CFS in Washington will likely challenge it on the basis of federal preemption under the Clean Air Act. California enacted a similar low carbon regulatory scheme,⁷ which was the topic of over five years of litigation challenging the authority of the state to enact the standard.⁸ In part, the plaintiffs claimed the California regulations were preempted by the federal Clean Air Act.⁹ Under the Clean Air Act, states cannot adopt fuel regulations that conflict with federal standards.¹⁰ However, California is explicitly exempt from the fuel preemption provision of the statute.¹¹ The Court of Appeals for the Ninth Circuit briefly considered California's exemption from federal preemption under the Clean Air Act in *Rocky Mountain Farmers Union v. Corey*,¹² but it did not analyze whether a low carbon fuel standard would have been preempted if enacted by a state that did not have the same exemption as California.¹³ Further, the court declined to answer whether the California regulations were preempted by another subsection of the Clean Air Act, namely Section 211(o) codifying the Energy Independence and Security Act ("EISA").¹⁴ These are two issues that would likely affect implementation of a CFS in Washington State.

This Essay considers whether a Washington CFS, if enacted, would be in danger of federal preemption under the Clean Air Act. Part I explains what a CFS in Washington would look like and how it compares to the California standard, which is likely to form the basis for the Washington CFS. Part II details the applicable federal preemption

6. JENNIFER PONT & STEFAN UNNASCH, A CLEAN FUEL STANDARD IN WASHINGTON STATE: REVISED ANALYSIS WITH UPDATED ASSUMPTIONS 39 (2014).

7. California adopted the Low Carbon Fuel Standard ("LCFS"), a set of regulations very similar to a CFS in Washington.

8. *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1107 (9th Cir. 2013); *Rocky Mountain Farmers Union v. Goldstene*, 843 F. Supp. 2d 1071, 1086 (E.D. Cal. 2011); *Rocky Mountain Farmers Union v. Goldstene*, Nos. 1:09-cv-2234-LJO-BAM, 1:10-cv-163-LJO-BAM, 2014 WL 7004725, at *15 (E.D. Cal. Dec. 11, 2014).

9. *Rocky Mountain Farmers Union*, 843 F. Supp. 2d at 1078.

10. Clean Air Act of 1970 § 211(c)(4), 42 U.S.C. § 7545(c)(4) (2012); see also Arnold W. Reitze Jr., *The Regulation of Fuels and Fuel Additives Under Section 211 of the Clean Air Act*, 29 TULSA L.J. 485, 486 (1994) (detailing the development of federal preemption of fuel regulation throughout the Clean Air Act amendments).

11. 42 U.S.C. § 7545(c)(4)(B) (2012).

12. See *Corey*, 730 F.3d at 1106 (finding that although California is exempt from the express fuel preemption provision, it was not excused from compliance with the dormant commerce clause, which was the deciding issue in the case).

13. *Id.*

14. *Id.*

doctrine and the history of preemption provisions in the Clean Air Act. Part III discusses the litigation arising out of the California standard, which clarifies the challenges and potential resolutions to these challenges in Washington. Finally, Part IV analyzes the open federal preemption issues, considering likely challenges to a CFS in Washington. This Essay concludes that it is unlikely that a court would find that the federal Clean Air Act would preempt a Washington CFS regulatory scheme. This Essay aims to inform those in Washington, as well as those in other states attempting to enact similar fuel standards.

I. A CLEAN FUEL STANDARD IN WASHINGTON

Governor Inslee has taken steps toward proposing a CFS in Washington as a strategy to reduce carbon emissions. In February 2015, the Governor directed the Washington State Department of Ecology (“DOE”) to engage in public outreach and discussion surrounding the potential passage of a CFS.¹⁵ He did this before official legislation was proposed and prior to any rulemaking by DOE.¹⁶ Governor Inslee also commissioned an updated report analyzing the impacts of a CFS in Washington¹⁷ and listed it as a potential proposal to decrease carbon emissions in the state.¹⁸ These actions indicate that the Governor is seriously considering a CFS in Washington. Although there has been no official proposal for a CFS in Washington, this section will briefly outline the potential policy based on reports commissioned by the Governor and information released by the DOE, which suggest the standard will be similar to the low carbon fuel standard in California.

California is the only state that has adopted a regulatory scheme that is substantially similar to one that may be proposed in Washington.¹⁹

15. News Release, Wash. Dep’t of Ecology, Washingtonians Can Join Discussion on Clean Fuel Standard (Feb. 4, 2015), *available at* <http://www.ecy.wa.gov/news/2015/013.html>.

16. *Id.*

17. PONT & UNNASCH, *supra* note 6, at 1.

18. JAY INSLEE, POLICY BRIEF: WASHINGTON CARBON POLLUTION REDUCTION AND CLEAN ENERGY LEADERSHIP 1–2 (Dec. 14, 2014) *available at* http://www.governor.wa.gov/documents/Carbon_package_overview_2015.pdf (last visited Feb. 14, 2015).

19. *See* JENNIFER PONT & JEFF ROSENFELD, A LOW CARBON FUEL STANDARD IN WASHINGTON: INFORMING THE DECISION 9, 48 (Feb. 18, 2011); *see also* PONT & UNNASCH, *supra* note 6, at 9 (drawing on the experience of California’s CFS—also known as California’s low carbon fuel standard—to analyze market impacts of a CFS in Washington); James M. Van Nostrand & Anne Marie Hirschberger, *Biofuels*, in *THE LAW OF CLEAN ENERGY: EFFICIENCY AND RENEWABLES* 445, 447 (Michael B. Gerrard ed., 2011); CAL. CODE REGS. tit. 17 §§ 95480–95490 (2015) (California’s Low Carbon Fuel Standard).

California's standard aims to reduce GHG emissions by lowering the carbon intensity of transportation fuels.²⁰ The "carbon intensity" of a transportation fuel is "the amount of lifecycle [GHG] emissions per unit of energy of fuel."²¹ The lifecycle GHG emissions analysis takes into account the direct emissions—emissions from producing and burning the fuel—as well as any indirect emissions, which include land use changes.²² Emissions related to the full fuel lifecycle are part of the calculation, including "all stages of fuel and feedstock production and distribution, from feedstock generation or extraction through the distribution and delivery and ultimate consumer, where the mass values for all greenhouse gases are adjusted to account for their relative global warming potential."²³ By employing a lifecycle analysis, the California standard attempts to consider all carbon emissions that are released from the production and use of transportation fuels.

It is likely that Washington's CFS would mimic many of the features of California's standard because two reports commissioned by the Washington State Department of Ecology to analyze the impacts of a CFS draw on California's low carbon fuel standard for several assumptions.²⁴ Like California's standard, the CFS would require regulated fuel providers to reduce the average carbon intensity of fuels by a certain amount over a given period of time.²⁵ A regulated fuel provider will receive credits for fuel sold with a carbon intensity measurement below the standard, and debits for fuel with a carbon intensity value above the standard.²⁶ Surplus credits may be sold or traded to other regulated parties for use in compliance.²⁷

A calculation of the carbon intensity of each type of fuel requires an analysis of direct and indirect emissions from the entire lifecycle of the fuel, not just vehicle emissions.²⁸ As an illustration, direct emissions can be broken into two parts: "well-to-tank" and "tank-to-wheel" emissions.²⁹ "Well-to-tank" emissions are produced during fuel

20. CAL CODE REGS. tit. 7 § 95480 (2015).

21. *Id.* § 95481(16).

22. *See id.* § 95481(a)(28) (defining of "lifecycle greenhouse gas emissions").

23. *Id.*

24. PONT & UNNASCH, *supra* note 6, at 9; PONT & ROSENFELD, *supra* note 19, at 48.

25. PONT & UNNASCH, *supra* note 6, at 39.

26. *Id.*

27. *Id.*

28. *Id.* at 20.

29. *Id.*

production and transportation.³⁰ For example, corn ethanol production requires tractor fuel, fertilizer production, transport to the ethanol plant, fuel production emissions, and transport to refueling stations.³¹ “Tank to wheel” emissions, on the other hand, are simply vehicle tailpipe emissions from individual vehicles.³²

II. THE FEDERAL CLEAN AIR ACT AND PREEMPTION

A CFS in Washington will likely be challenged under two preemption doctrines: express and implied preemption.³³ First, opponents would likely argue that the Clean Air Act express fuel preemption provision, codified at Section 211(c)(4), expressly preempts the ability of Washington State to enact a CFS. Further, a CFS would likely be challenged under implied preemption using the federal renewable fuel standard, codified at Section 211(o) of the Clean Air Act. This section provides necessary background information regarding: (a) federal preemption doctrine, and (b) the two provisions in the Clean Air Act that could trigger federal preemption.

A. Federal Preemption Doctrine

Federal preemption is based on the Supremacy Clause in Article IV of the United States Constitution.³⁴ Federal law may preempt state and local law either by express terms in statutory language, or by implication based on a statute’s purpose and structure.³⁵ State law may be preempted by explicit language in a statute that makes it clear that Congress intended federal law to foreclose state action.³⁶ “Express” preemption language often requires additional analysis of Congress’ intent.³⁷

30. *Id.*

31. *Id.*

32. *Id.*

33. Opponents to California’s low carbon fuel standard challenged it on implied preemption, but the issue remains open. *See Rocky Mountain Farmers Union v. Goldstene*, 843 F. Supp. 2d 1042, 1048–49 (E.D. Cal. 2011). Opponents to a CFS in Washington are likely to also argue express preemption, however, because unlike California, Washington does not have a waiver from the express fuel preemption provision in the Clean Air Act. *See Clean Air Act of 1970 § 211(c)(B)*, 42 U.S.C. § 7545(c)(4)(B) (2012).

34. U.S. CONST. art. VI (“This Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made under the Authority of the United States, shall be the Supreme Law of the Land. . . .”).

35. *See Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 98 (1992).

36. *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 516 (1992).

37. *See id.* at 517 (considering the broader language of the federal act before concluding that the

Like express preemption, implied preemption requires examination of more than the text of the statute. There are two types of implied preemption: field preemption and conflict preemption.³⁸ Field preemption occurs when a federal regulatory scheme is “so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.”³⁹ Immigration, for example, is an area exclusively controlled by the federal government.⁴⁰ Conflict preemption, on the other hand, occurs on a smaller scale.⁴¹ Instead of federal preemption over an entire area of law, as in field preemption, conflict preemption occurs when a particular state law conflicts with a particular federal law.⁴² A conflict may occur in two ways. First, state and federal law can create a situation in which it is literally impossible to comply with both laws.⁴³ Impossibility preemption is not at issue here because a CFS would not be in direct conflict with any federal regulation. Second, even if it is possible to comply with both state and federal law, a state law may be preempted if it “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”⁴⁴

“Obstacle” preemption requires a court to make two distinct determinations: (1) what the original Congressional purpose was in enacting the federal law, and (2) whether that purpose is impeded by the state law.⁴⁵ Making those determinations often requires a look at the text

express preemption provision did preempt state tort claims); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001) (considering the history of federal regulation in addition to the express preemption language in finding that the state law was preempted).

38. *Gade*, 505 U.S. at 98 (“Absent explicit pre-emptive language, we have recognized at least two types of implied pre-emption: field pre-emption . . . and conflict preemption. . .”).

39. *Id.*

40. Karl Manheim, *State Immigration Laws and Federal Supremacy*, 22 HASTINGS CONSTIT. L.Q. 939, 958 (1995) (discussing the “dormant immigration clause” and noting that “immigration is unquestionably exclusively a federal power”) (internal quotations omitted) (citing *De Canas v. Bica*, 424 U.S. 351, 354 (1976)).

41. Gregory M. Dickinson, *An Empirical Study of Obstacle Preemption in the Supreme Court*, 89 NEB. L. REV. 682, 684 (2011).

42. *Id.* at 684–85.

43. See *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–43 (1963) (noting that “federal exclusion of state law is inescapable . . . where compliance with both federal and state regulations is a physical impossibility”).

44. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

45. See, e.g., *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 98–104 (1992) (concluding that the federal worker safety regulations preempted state regulations because Congress sought to promote occupational safety “while at the same time avoiding duplicative, and possibly counterproductive, regulation”); *Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190, 222–23 (1986) (finding that a California law regulating nuclear power development was not preempted because although the primary federal objective was promotion of

of the statute itself, the legislative history, and the legislative intent.⁴⁶

In *Geier v. American Honda Motor Co.*,⁴⁷ the U.S. Supreme Court considered the preemptive authority of federal standards that required auto manufacturers to install passive restraints on some, but not all, 1987 vehicles.⁴⁸ The issue was whether a lawsuit based on an injury from a car that was not required to have such restraints was preempted by the federal standards.⁴⁹ The Court found that the federal objective was to give the manufacturer a range of choices for passive restraint systems that would be gradually introduced.⁵⁰ The Court considered the federal regulations in light of the agency rulemaking history and the agency's explanation in the *Federal Register*.⁵¹ Ultimately, the Court held that the plaintiff's lawsuit, which imposed a duty on the manufacturers to install specific passive restraint systems, such as airbags, "would stand as an 'obstacle' to the accomplishment" of the federal objectives.⁵²

Courts are generally reluctant to find a conflict between state and federal law. A finding of preemption requires a "high threshold" to be met "if a state law is to be pre-empted for conflicting with the purposes of a federal Act."⁵³ "[H]ypothetical or potential conflict[s]" do not meet this threshold,⁵⁴ and courts are heavily discouraged from "seeking out conflicts between state and federal regulation where none clearly exists."⁵⁵ Therefore, although it can be difficult to determine how a court will rule in an obstacle preemption case, there is a tendency to find against federal preemption.⁵⁶

nuclear power, a secondary objective was safety, which did not conflict with the state's goal, which was economic in nature).

46. Dickinson, *supra* note 41, at 704.

47. 529 U.S. 861 (2000).

48. *Id.* at 864–65.

49. *Id.* at 886.

50. *Id.*

51. *Id.* at 877–81.

52. *Id.* at 886.

53. Chamber of Commerce of U.S. v. Whiting, ___ U.S. ___, 131 S. Ct. 1968, 1985 (2011) (citing *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 110 (1992) (Kennedy, J., concurring)).

54. *Roce v. Norman Williams Co.*, 458 U.S. 654, 659 (1982).

55. *English v. Gen. Elec. Co.*, 496 U.S. 72, 90 (1990) (citing *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 446 (1960)).

56. Dickinson, *supra* note 41, at 682–83.

B. The Clean Air Act and Its Preemption Provisions

Congress enacted the Clean Air Act in 1963⁵⁷ after Congress in 1955 declared that air pollution was an issue that should be addressed by state and local governments.⁵⁸ The first iteration of the act charged the Department of Health, Education and Welfare (“HEW”) with developing a national research and development program to reduce air pollution from motor vehicles.⁵⁹ HEW was required to “encourage cooperative activities by the States and local governments for the prevention and control of air pollution. . . .”⁶⁰ Because of this emphasis on cooperation between a federal agency and state government, the Clean Air Act has long been known as one of several comprehensive and cooperative federal environmental statutory schemes.⁶¹

Subsequent amendments continued to encourage the “cooperative federalism” relationship between states and the federal government. The first amendment to the Clean Air Act occurred in 1967 and directed each state to adopt state-specific ambient air standards to reduce various federally recognized pollutants and to create a plan to achieve those standards.⁶² The standards became known as State Implementation Plans (“SIPs”).⁶³ Congress again amended the Clean Air Act in 1970⁶⁴ to “provide for a more effective program to improve the quality of the Nation’s air.”⁶⁵ To speed progress, it developed the National Ambient Air Quality Standards, which placed limits on the allowed levels of certain pollutants per cubic meter of air.⁶⁶ States were required to

57. Clean Air Act of 1963, Pub. L. No. 88-206, 77 Stat. 393 (1963).

58. David Schoenbrod, *Goals Statutes or Rule Statutes: The Case of the Clean Air Act*, 30 U.C.L.A. L. REV. 740, 744–45 (1983).

59. § 3, 77 Stat. at 394.

60. *Id.* In 1970, President Nixon created the U.S. Environmental Protection Agency (EPA) by executive order and gave the new Administrator control over Clean Air Act implementation. Reorganization Plan No. 3 of 1970, 84 Stat. 2086, 2087 (1970).

61. See Christopher T. Giovinazzo, *California’s Global Warming Bill: Will Fuel Economy Preemption Curb California’s Air Pollution Leadership?* 30 ECOLOGY L.Q. 893, 899–900 (2003) (discussing the Clean Air Act’s significant dependence on state cooperation for success).

62. See Air Quality Act of 1967, Pub. L. No. 90-148, 81 Stat. 485, 485–86 (1967) (section titled “Cooperative Activities and Uniform Laws”); see also Schoenbrod, *supra* note 58, at 744–45 (discussing Congress’ intent in amending the Clean Air Act in 1967).

63. See Catharine V. Greco, *State Implementation Plans Under the 1990 Clean Air Act: Can New York Conform?*, 11 PACE ENVTL. L. REV. 869, 870 (1994).

64. Clean Air Act Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (1970).

65. *Id.*; see also Greco, *supra* note 63, at 870.

66. § 107, 84 Stat. at 1678; see also Greco, *supra* note 63, at 873 (explaining the development of federal air quality standards).

implement plans to meet these new national air quality standards, which were generally stricter than the original state standards.

Although the Clean Air Act imposes specific requirements for state implementation of air quality standards, states are free to adopt air quality standards more stringent than those provided by federal law.⁶⁷ This freedom stems from the section of the Act calling for “Retention of State Authority.”⁶⁸ That section provides that “nothing in this chapter shall preclude or deny the right of any State . . . to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any applicable implementation plan [not less stringent than the federal standard].”⁶⁹ The Clean Air Act was intended to join the “States and the Federal Government [as] partners against air pollution.”⁷⁰ However, the cooperative nature of the Clean Air Act is undermined by the express preemption provisions on fuel regulations and motor vehicle emissions. Federal preemption may also be implied when a federal law conflicts with or stands as an obstacle to the goals of Congress in enacting such a law.⁷¹ The following discussion details sections of the Clean Air Act that may result in express or implied preemption of a CFS in Washington.

1. Express Preemption in the Clean Air Act

Despite the substantial history of cooperative federalism at the heart of the original Clean Air Act, Congress included language in the 1970 amendments that expressly preempted states from regulating in certain areas. Specifically, the Clean Air Act preempts state regulation of motor vehicle emissions⁷² and state regulation of fuel⁷³ in certain

67. *See Connecticut v. EPA*, 656 F.2d 902, 909 (2d Cir. 1981) (holding that states are “free to adopt air quality standards more stringent than required by the [National Ambient Air Quality Standards],” but that a state is not required to comply with neighboring states’ more stringent standards); *Her Majesty the Queen in Right of the Province of Ontario v. City of Detroit*, 874 F.2d 332, 345 (6th Cir. 1989) (“The federal statutory scheme clearly contemplates that Michigan can make its air pollution rules as stringent as it likes, and may enforce those rules”).

68. *See, e.g.*, Clean Air Act of 1970 § 116, 42 U.S.C. § 7416 (2012); Clean Air Act Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676, 1679, 1689 (1970); Air Quality Act of 1967, Pub. L. No. 90-148 § 2, 81 Stat. 485, 497 (1967); *see also* *Oxygenated Fuels Ass’n, Inc. v. Davis*, 331 F.3d 665, 670 (9th Cir. 2003) (finding that the Clean Air Act “generally seeks to preserve state authority in the area of pollution”).

69. 42 U.S.C. § 7416 (2012).

70. *Gen. Motors Corp. v. United States*, 496 U.S. 530, 532 (1990).

71. *See Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–43 (1963) (noting that “federal exclusion of state law is inescapable . . . where compliance with both federal and state regulations is a physical impossibility”); *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

72. Clean Air Act of 1970 § 209(a), 42 U.S.C. § 7543(a) (2012).

73. *Id.* at § 7545(c)(4).

circumstances. Both preemption provisions have a special exception for California.⁷⁴

The preemption provision for motor vehicle emissions standards was born out of Congress' desire to lighten the compliance burden on the automobile manufacturing industry.⁷⁵ There were two major problems with states regulating automobile emissions independently from the federal government.⁷⁶ First, states with automobile factories faced political pressure from the automobile industry to keep regulations lax.⁷⁷ These states generally enacted less burdensome standards for fear that industry would move to other states.⁷⁸ Second, some states, such as California, wanted to enact more stringent automobile emissions standards.⁷⁹ California's desire for stricter standards came from its problems with smog and air pollution.⁸⁰ The regulatory inconsistency was a problem for the automobile industry and also had the potential to cause enforcement problems for states and the federal government.⁸¹

As a result of inconsistent state standards, the automobile industry lobbied for the creation of federal emissions standards.⁸² Pressure from the automobile industry resulted in passage of an express preemption provision barring state regulation of motor vehicle emissions in the Clean Air Act.⁸³ The provision did, however, include a waiver California, which traditionally set more stringent standards than the federal government.⁸⁴ The waiver allowed California to continue to set its own emissions standards as long as they were more stringent than the federal standards.⁸⁵ Later, Congress again amended the Clean Air Act to allow other states to adopt standards identical to California.⁸⁶ Today,

74. *Id.* at § 7543(b), 7545(c)(4)(B).

75. Sarah E. Leatherwood, *States Take the Wheel—Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie Gives States a Chance to Choose the Direction of Their Automobile Emissions Regulation*, 61 OKLA. L. REV. 669, 673–74 (2008).

76. *Id.* at 673.

77. *Id.* at 674.

78. *Id.*

79. *Id.*

80. *Id.*

81. *See id.* (explaining that varying state standards caused two major problems for automobile manufacturers: the challenge of complying with various regulatory inconsistencies along with the legal burden and expense).

82. *Id.*

83. *Id.*; *see also* Clean Air Act of 1970 § 209(a), 42 U.S.C. § 7543(a) (2012).

84. Leatherwood, *supra* note 75, at 675.

85. 42 U.S.C. § 7543(b) (2012).

86. Clean Air Act of 1970 § 177, 42 U.S.C. § 7507 (2012).

there are only two vehicle emissions standards that individual states can adopt: the federal standards or the more stringent California standards.⁸⁷

Similar to federal preemption of motor vehicle emissions regulations, the 1970 Clean Air Act amendments expressly preempted state regulation of fuel in certain circumstances.⁸⁸ State regulation of fuel or fuel additives was preempted when the Environmental Protection Agency (“EPA”) prescribed standards regarding the same fuel or fuel additive.⁸⁹ Like the preemption provision for motor vehicle emissions, California was again granted a waiver to enact standards more stringent than those prescribed by the federal government.⁹⁰

Notably, when the Clean Air Act was amended in 1990, the new amendments significantly changed the fuel preemption provision. Instead of directly regulating a “fuel or fuel additive,” the new amendments preempted state law that controlled the same “characteristic or component of a fuel or fuel additive.”⁹¹ This new provision actually broadened state authority to enact regulations⁹² because the pre-1990 provision prevented states from enacting any regulation “respecting use of a fuel or fuel additive in a motor vehicle” that was regulated by the EPA.⁹³ The Ninth Circuit Court of Appeals repeatedly held that the legislative history of the 1990 Clean Air Act amendments indicated that Congress was attempting to give more control over fuel regulation to the states.⁹⁴ Furthermore, the EPA regulations were amended to make it clear that state regulations were only preempted if there was a federal rule regarding that specific characteristic or component of fuel.⁹⁵ The change provided states with more latitude to enact regulations on fuel.⁹⁶

87. The two standard approach (federal and California) alleviated some of the problems with the motor vehicle industry. Instead of needing to comply with different standards for each state, there are just two standards requiring compliance.

88. Clean Air Act Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676, 1698 (1970).

89. Reitze, *supra* note 10, at 486.

90. Clean Air Act of 1970 § 211(c)(4)(B), 42 U.S.C. § 7545(c)(4)(B) (2012).

91. *Id.*

92. *Id.* at 487.

93. See Clean Air Act Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676, 1699 (1970) (Section 211(c)(4)(A) of the section titled “Regulation of Fuels”).

94. See *Oxygenated Fuels Ass’n, Inc. v. Davis*, 331 F.3d 665, 670–71 (9th Cir. 2003) (“The Clean Air Act generally seeks to preserve state authority.”); *Exxon Mobil Corp. v. United States Envtl. Prot. Agency*, 217 F.3d 1246, 1253 (9th Cir. 2000) (“A number of Senators explained that the 1990 amendments preserved the authority of the states to regulate air pollution.”).

95. See Clean Air Act Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676, 1699 (1970) (Section 211(c)(4)(A)(ii) of the section titled “Regulation of Fuels”).

96. See, e.g., *Davis*, 331 F.3d at 669–70 (holding that California’s ban on methyl tertiary-butyl ether (“MTBE”) in gasoline was not preempted by the Clean Air Act because it was enacted for the

Today, Section 211 of the Clean Air Act expressly preempts states from enacting fuel legislation in certain circumstances.⁹⁷ State legislation is preempted if it encompasses “any control or prohibition respecting any characteristic or component of a fuel or fuel additive in a motor vehicle or motor vehicle engine” “for purposes of motor vehicle emission control.”⁹⁸ Controls and prohibitions are only preempted if the EPA Administrator has prescribed “a control or prohibition applicable to such characteristic or component of a fuel or fuel additive” and the state prohibition is not identical to the EPA regulation.⁹⁹ Thus, there must be some federal law that conflicts with the state regulation for the fuel preemption provision to take effect.

2. *The Renewable Fuel Standard and Potential Implied Preemption in the Clean Air Act*

The renewable fuel standard, which is a separate provision of the Clean Air Act, may impliedly preempt a CFS in Washington. The Energy Policy Act of 2005 authorized the EPA to adopt regulations to ensure that “gasoline sold or introduced into commerce in the United States . . . contains that applicable volume of renewable fuel. . . .”¹⁰⁰ With authority from this mandate, the EPA developed the renewable fuel standard program, which was designed to increase the quantity of renewable fuel used in the United States.¹⁰¹ The original standard required an increasing percentage of renewable fuel to be blended with gasoline, with four million gallons of renewable fuel to be incorporated into the nation’s gasoline supply in 2006 and mandating an increase to seven and a half billion gallons by 2012.¹⁰² This led to a significant

purpose of protecting groundwater and not for the purpose of emissions control); *Exxon Mobil Corp.*, 217 F.3d at 1256 (holding that a county requirement in Nevada that gasoline sold during the winter contain at least 3.5 percent oxygen content by weight did not conflict with, and was not preempted by, any provision of the Clean Air Act, including provision restricting state power to regulate and prohibit fuel additives) (citing Clean Air Act of 1970 § 211(c)(4)(A), 42 U.S.C. § 7545(c)(4)(A) (2012)).

97. 42 U.S.C. § 7545(c)(4) (2012).

98. *Id.* § 7545(c)(4)(A).

99. *Id.* § 7545(c)(4)(A)(ii).

100. Energy Policy Act of 2005, Pub. L. No. 109-58, § 1501(a)(2)(A)(i), 119 Stat. 594, 1068 (2005).

101. RANDY SCHNEPF & BRENT D. YACOBUCCI, CONG. RESEARCH SERV., R40155, RENEWABLE FUEL STANDARD (RFS): OVERVIEW AND ISSUES 2–4 (2013), available at <http://www.fas.org/sgp/crs/misc/R40155.pdf>.

102. *Id.* at 1.

increase in corn ethanol production.¹⁰³

Two years later, the Energy Independence and Security Act of 2007 was enacted to increase energy efficiency and availability of renewable energy, while requiring more renewable fuels to be mixed with gasoline.¹⁰⁴ The stated purpose of the Act was to

move the United States toward greater energy independence and security, to increase the production of clean renewable fuels, to protect consumers, to increase the efficiency of products, buildings, and vehicles, to promote research on and deploy greenhouse gas capture and storage options and to improve the energy performance of the Federal Government and for other purposes.¹⁰⁵

The new renewable fuel standard increased the volume of renewable fuel required to be blended, expanded application to other transportation fuels, and required EPA to develop a lifecycle greenhouse gas performance threshold to ensure that renewable fuels emit fewer greenhouse gases than the petroleum fuels they replace.¹⁰⁶ It was incorporated into the Clean Air Act at Section 211(o).¹⁰⁷ The EPA updated and issued its final rule to implement the new renewable fuel standard program on February 3, 2010.¹⁰⁸

The federal renewable fuel standard mandates that renewable fuels be derived from one of four specific sources: total renewable fuels (produced from “renewable biomass” including planted crops), advanced biofuels (biofuels other than ethanol derived from corn starch), cellulosic and agricultural waste-based biofuel (fuel from cellulose), and biomass-based biodiesel (diesel from biomass feed stocks).¹⁰⁹ Under EPA’s regulations, renewable fuels mixed with gasoline must meet certain

103. Melissa Powers, *King Corn: Will the Renewable Fuel Standard Eventually End Corn Ethanol’s Reign?*, 11 VT. J. ENVTL. L. 667, 668 (2010).

104. Energy Independence and Security Act of 2007, Pub. L. 110-140, tit. II § 201, 121 Stat. 1492 (2007) (codified at 42 U.S.C. § 7545(o) (2012)).

105. *Id.*

106. SCHNEPF & YACOBUCCI, *supra* note 101, at 4.

107. Note that the renewable fuel standard (Section 211(o)) is codified in the same section of the Clean Air Act as the express fuel preemption provision (codified at Section 211(c)) discussed in Part II.B.2. The fuel preemption provision at Section 211(c) applies only if the EPA has regulated the same “characteristic or component” of fuel as the state regulation. One could argue that the renewable fuel standard regulates the same characteristic or component of fuel as a CFS in Washington. Therefore, the renewable fuel standard is relevant to the express preemption analysis and is also relevant independently under an implied preemption analysis.

108. Regulations of Fuel and Fuel Additives: Changes to Renewable Fuel Standard Program, 40 C.F.R. § 80 (2010).

109. SCHNEPF & YACOBUCCI, *supra* note 101, at 4.

lifecycle GHG emissions thresholds for a given category.¹¹⁰ A lifecycle analysis under the federal renewable fuel standard is a way to measure the environmental impact of fuel, which considers direct and significant indirect emissions from production and transportation.¹¹¹ “Total renewable fuel,” for example, is generally ethanol from corn or sorghum.¹¹² The statute mandates that the GHG emissions for total renewable fuel from new facilities (constructed after the bill was enacted), as calculated by a lifecycle analysis, must be twenty percent below that of conventional fuels to qualify.¹¹³ However, the federal standard exempts existing corn facilities from the GHG lifecycle requirements.¹¹⁴ “Advanced biofuels” are derived from non-corn feed stocks and are required to reduce lifecycle GHG emissions by fifty percent to qualify.¹¹⁵

The EPA regulations require a specific proportion of renewable fuels from each of the four categories.¹¹⁶ For example, the EPA required 0.004 percent of total renewable fuel volume to be cellulosic biofuel in 2013.¹¹⁷ Total renewable fuel, generally from corn ethanol, was required to comprise 9.74 percent of renewable fuel.¹¹⁸ The requisite proportion of renewable fuel increases each year, capping at thirty-six billion gallons by 2022.¹¹⁹ Fuel refiners, importers, and blenders must meet the federal standards either by purchasing and blending renewable fuel into gasoline or by buying credits from other parties.¹²⁰

The tension between state and federal power to regulate fuel and automobile emissions is a constant struggle for courts attempting to interpret preemption under the Clean Air Act. For example, the Act itself requires state enforcement of federal air quality standards through State Implementation Plans. State autonomy is also highlighted in the section

110. *Id.*; DAVID R. WOOLEY & ELIZABETH M. MORSS, CLEAN AIR ACT HANDBOOK § 5:60 (2013).

111. 42 U.S.C. § 7545(o)(1)(H) (2012).

112. SCHNEPF & YACOBUCCI, *supra* note 101, at 4.

113. *Id.* at 8.

114. 42 U.S.C. § 7545(o)(2)(A)(i) (2012).

115. SCHNEPF & YACOBUCCI, *supra* note 101, at 4.

116. *Id.*

117. Regulation of Fuels and Fuels Additives: 2013 Renewable Fuel Standards, 78 Fed. Reg. 49,794, 49,798 (Aug. 15, 2013) (codified at 40 C.F.R. § 80 (2014)).

118. *Id.*

119. U.S. EPA, REGULATORY ANNOUNCEMENT, EPA FINALIZES REGULATIONS FOR THE NATIONAL RENEWABLE FUEL STANDARD PROGRAM FOR 2010 AND BEYOND 2 (2010), available at <http://www.epa.gov/otaq/renewablefuels/420f10007.pdf>.

120. *Id.* at 3–4.

titled “Retention of State Authority.”¹²¹ This section entitles states to adopt air quality standards more stringent than those provided by federal law in many circumstances.¹²² The seemingly strong history of state regulation is undermined by explicit federal preemption over regulation of fuel and motor vehicle emissions. These preemption provisions have impeded state efforts to combat climate change and air pollution on several occasions.¹²³ Further, because California is often exempt from preemption, much of the case law allowing state regulation may not apply to states other than California. It is against this background of federalism issues that this Essay addresses whether a CFS in Washington will face preemption under the Clean Air Act.

III. CHALLENGES TO CALIFORNIA’S STANDARD: *ROCKY MOUNTAIN FARMERS UNION V. COREY*

A recent line of cases in the Eastern District of California and the Ninth Circuit that challenged California’s low carbon fuel standard provides insight into whether a CFS in Washington would be preempted by the Clean Air Act. The California low carbon fuel standard was authorized by the California Global Warming Solutions Act of 2006,¹²⁴ followed by an Executive Order issued by California’s Governor in January 2007.¹²⁵ The act charged the California Air Resources Board (“CARB”) with developing regulations that would achieve the goal of reducing GHG emissions from California to 1990 levels by the year 2020.¹²⁶ The Executive Order then directed CARB to initiate “a regulatory proceeding to establish and implement the [low carbon fuel

121. *See, e.g.*, Clean Air Act of 1970 § 116, 42 U.S.C. § 7416 (2012); Clean Air Act Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676, 1689 (1970); Air Quality Act of 1967, Pub. L. No. 90-148 § 2, 81 Stat. 485, 497 (1967).

122. *See Connecticut v. Env’tl. Prot. Agency*, 656 F.2d 902, 909 (2d Cir. 1981) (holding that states are “free to adopt air quality standards more stringent than required by the [National Ambient Air Quality Standards],” but that a state is not required to comply with neighboring states’ more stringent standards); *Her Majesty the Queen in Right of the Province of Ontario v. City of Detroit*, 874 F.2d 332, 345 (6th Cir. 1989) (“The federal statutory scheme clearly contemplates that Michigan can make its air pollution rules as stringent as it likes, and may enforce those rules.”).

123. *See, e.g.*, *Exxon Corp. v. City of New York*, 548 F.2d 1088, 1089, 1095 (2d Cir. 1977) (holding that a city regulation setting lead content and volatility standards for gasoline was preempted); *Am. Petroleum Inst. v. Jorling*, 710 F. Supp. 421, 429 (N.D.N.Y. 1989) (holding that a state regulation limiting volatility of gasoline was preempted).

124. California Global Warming Solutions Act of 2006, CAL. HEALTH & SAFETY CODE §§ 38500–38599 (West 2006).

125. Cal. Exec. Order No. S-01-07 (Jan. 18, 2007), *available at* <http://www.arb.ca.gov/fuels/lcfs/eos0107.pdf>.

126. CAL. HEALTH & SAFETY CODE §§ 38501(h), 38550 (2006).

standard].”¹²⁷ CARB obliged, resulting in final adoption of the low carbon fuel standard in April of 2010.¹²⁸ The stated purpose of the new regulation was to “reduce [GHG] emissions by reducing the full fuel-cycle, carbon intensity of the transportation fuel pool used in California, pursuant to the California Global Warming Solutions Act of 2006.”¹²⁹

To fulfill this stated purpose, the California regulations require fuel providers to reduce the average carbon intensity of fuels by a certain amount each year.¹³⁰ The carbon intensity of fuel is calculated using a lifecycle analysis, which considers the direct and indirect emissions from fuel production.¹³¹ Regulated parties receive credits for fuel that has a carbon intensity below the standard, and debits for fuel with a carbon intensity above the standard.¹³² Unlike the federal renewable fuel standard, which exempts existing corn facilities from the GHG lifecycle requirements,¹³³ the California standard imposes the same lifecycle GHG requirements on all renewable fuels.¹³⁴

In *Rocky Mountain Farmers Union v. Goldstene*,¹³⁵ the plaintiffs were Midwest-based farm associations with an interest in increased regulation of the corn and soybean ethanol industry. Plaintiffs challenged California’s low carbon fuel standard on the basis of federal preemption.¹³⁶ Plaintiffs argued that the standard conflicted with the goals of Congress in enacting the renewable fuel standard, as authorized by the Energy Independence and Security Act of 2007.¹³⁷ The Court found that although California was exempt from the express fuel preemption provision under Section 211(c)(4) of the Clean Air Act, this did not insulate it from a possible implied preemption challenge under some other section of the Clean Air Act, specifically the renewable fuel standard at Section 211(o).¹³⁸ However, the Court declined to decide

127. Cal. Exec. Order No. S-01-07 (Jan. 18, 2007), available at <http://www.arb.ca.gov/fuels/lcfs/eos0107.pdf>.

128. CAL. CODE REGS. tit. 17 §§ 95480–95490 (2010) (California’s Low Carbon Fuel Standard).

129. *Id.* § 95480.

130. *Id.* § 95482(b).

131. *Id.* § 95481(a)(28) (defining “lifecycle greenhouse gas emissions”).

132. *Id.* § 95485.

133. Clean Air Act of 1970 § 211(o)(2)(A)(i), 42 U.S.C. § 7545(o)(2)(A)(i) (2012).

134. CAL. CODE REGS. tit. 17 § 95484(b) (2012).

135. 843 F. Supp. 2d 1071 (E.D. Cal. 2011).

136. See *Rocky Mountain Farmers Union*, 843 F. Supp. 2d at 1078, 1096 (discussing plaintiffs’ interest in protecting the corn ethanol industry).

137. *Id.* at 1101.

138. *Rocky Mountain Farmers Union v. Goldstene*, 843 F. Supp. 2d 1042, 1048–49, 1063 (E.D. Cal. 2011).

whether California's low carbon fuel standard was actually preempted by the renewable fuel standard because it found that the parties failed to argue the correct standard of review. Thus, the implied federal preemption question remains open and will likely be instrumental in any challenge to a CFS in Washington.

The Court's analysis and discussion of the federal preemption claim in *Rocky Mountain Farmers Union* provides insight into how a court may analyze a federal preemption challenge to a CFS in Washington. This section gives a brief explanation of the Court's reasoning and conclusions at the District Court level and in the appeal to the Ninth Circuit.

A. *District Court Proceedings*

Plaintiffs at the District Court level in *Rocky Mountain Farmers Union* argued that the California low carbon fuel standard was preempted by the Energy Independence and Security Act of 2005 and the subsequent 2007 amendments, codified at Section 211(o) of the Clean Air Act.¹³⁹ The plaintiffs argued that California's law was invalid under obstacle preemption.¹⁴⁰ The Act authorized the EPA to set a national renewable fuel standard, which requires renewable fuels to be blended with gasoline.¹⁴¹ The standard excludes corn ethanol made from plants constructed before December 19, 2007 from the carbon intensity requirements imposed on other types of renewable fuels.¹⁴² Plaintiffs argued that the California standard frustrated the purpose of the amended federal renewable fuel standard.¹⁴³ Unlike the national standard, plaintiffs argued, the California standard did not provide an exception for "first generation" corn ethanol producers.¹⁴⁴ Instead, the California standard assessed carbon intensity in the same way for all fuels. Plaintiffs argued that the purpose of the amended federal standard was to preserve the United States corn ethanol industry, and that the California standard "interfere[d] with the methods by which the federal statute was designed to reach [its] goal."¹⁴⁵

Defendant CARB denied the contention that the California standard

139. *Id.*

140. *Id.* at 1052.

141. *See supra* Part II.B.2 and notes 100–20.

142. Clean Air Act of 1970 § 211(o)(2)(A)(i), 42 U.S.C. § 7545(o)(2)(A)(i) (2012).

143. *Rocky Mountain Farmers Union*, 843 F. Supp. 2d at 1065–66.

144. *Id.*

145. *Id.* (citing *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 103 (1992)).

was preempted by the renewable fuel standard.¹⁴⁶ CARB pointed to California's preemption waiver in the Clean Air Act,¹⁴⁷ which, CARB argued, insulated California from all preemption challenges under the Clean Air Act.¹⁴⁸ CARB maintained that because it was exempt from the express fuel preemption provision under Section 211(c)(4), it was also exempt from implied preemption under other parts of the Clean Air Act, specifically the renewable fuel standard, codified at Section 211(o). The court addressed this argument in two parts. First, it asked whether the express fuel preemption provision applied to the California standard. Second, it asked whether California was exempt from all types of preemption.¹⁴⁹

The court first analyzed whether the Clean Air Act preemption waiver for California applied to California's low carbon fuel standard.¹⁵⁰ The court split this analysis into three parts based on the text of the fuel preemption provision: (1) whether the California standard was a control or regulation "for the purpose of motor vehicle emissions"¹⁵¹; (2) whether the standard was a control or prohibition respecting any "characteristic or component of a fuel or fuel additive"¹⁵²; and (3) whether the standard was a "control respecting any fuel or fuel additive."¹⁵³ The court answered "yes" to all three questions and found that the preemption exemption authorized the California standard with respect to the federal fuels regulations set forth in Section 211(c) of the Clean Air Act.¹⁵⁴ Concluding that California's standard fit within the express fuel preemption waiver under Section 211(c)(4), the court considered whether California's standard was exempt from preemption by other portions of the Clean Air Act, namely the renewable fuel standard, codified at Section 211(o), where there was no express preemption provision.¹⁵⁵

146. *Id.* at 1054.

147. 42 U.S.C. § 7545(c)(4)(A) ("[N]o State . . . may prescribe or attempt to enforce, for purposes of motor vehicle emission control, any control or prohibition respecting any characteristic or component of a fuel or fuel additive in a motor vehicle or motor vehicle engine . . . (ii) if the Administrator has prescribed . . . a control or prohibition applicable to such characteristic or component of a fuel or fuel additive.").

148. *Rocky Mountain Farmers Union*, 843 F. Supp. 2d at 1054.

149. *Id.*

150. *Id.* at 1055.

151. *Id.*

152. *Id.* at 1057.

153. *Id.* at 1061.

154. *Id.* at 1061–62.

155. *Id.* at 1062.

The court did not, however, find that California's preemption waiver exempted the California standard from preemption analysis under other federal laws, including other provisions of the Clean Air Act.¹⁵⁶ Instead, it found that “[f]ederal preemption, and California’s preemption exceptions, differ under each Section 211 subsection.”¹⁵⁷ The court cited to *Davis v. Environmental Protection Agency*,¹⁵⁸ which found that California’s preemption waiver did not exempt California from preemption analysis under a different subsection of the Clean Air Act, namely Section 211(k).¹⁵⁹ Therefore, the court found, California’s exemption from the fuel preemption provision did “not grant California the authority to enact a regulation that conflicts with the [renewable fuel standard], as set forth in section 211(o).”¹⁶⁰

Although the court found that California’s exemption from the express fuel preemption provision under Section 211(c)(4) did not preclude preemption by the renewable fuel standard in Section 211(o), the court declined consideration of the implied preemption claim on the merits because neither party addressed the appropriate standard of review.¹⁶¹ Because the court did not decide whether the federal renewable fuel standard preempted the California low carbon fuel standard, the parties did not appeal the decision to the Ninth Circuit. This obstacle preemption issue remains open.

B. The Ninth Circuit Briefly Addressed Preemption

Rocky Mountain Farmers Union was appealed to the Court of Appeals for the Ninth Circuit.¹⁶² However, because the District Court did not address whether the renewable fuel standard¹⁶³ preempted California’s low carbon fuel standard,¹⁶⁴ the issue was not brought

156. *Id.* at 1062 (“Section 211(c)(4)(B) does not authorize California to enact and enforce fuel standards that conflict with federal laws, including other provisions of the Clean Air Act such as [the Energy Independence and Security Act], Section 211(o).”).

157. *Id.*

158. 348 F.3d 772 (9th Cir. 2003).

159. *Rocky Mountain Farmers Union*, 843 F. Supp. 2d at 1057 (citing *Davis*, 348 F.3d at 786).

160. *Id.* at 1063.

161. *Id.* at 1071.

162. *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070 (9th Cir. 2013).

163. Clean Air Act of 1970 § 211(o), 42 U.S.C. § 7545(o) (2012).

164. *Rocky Mountain Farmers Union*, 843 F. Supp. 2d at 1071 (refusing to address whether California’s low carbon fuel standard was preempted by the Energy Independence and Security Act because neither party argued the correct standard of review).

before the Ninth Circuit.¹⁶⁵ The court did note California's fuel preemption waiver in the Clean Air Act briefly in its opinion.¹⁶⁶ CARB argued that Section 211(c)(4)(B)—California's exemption from the Clean Air Act preemption provision—authorized the low carbon fuel standard under the Commerce Clause.¹⁶⁷ In rejecting this argument, the court noted that the California standard fell within the fuel preemption exemption because it was “a control respecting a fuel or fuel additive and was enacted for the purpose of emissions control.”¹⁶⁸ The Court did not address whether there was any federal regulation that would actually preempt the California standard.

IV. THE CLEAN AIR ACT IS UNLIKELY TO PREEMPT A CLEAN FUEL STANDARD IN WASHINGTON

The Clean Air Act's express declaration of federal preemption for state regulation of fuel additives,¹⁶⁹ combined with the Clean Air Act's renewable fuel standard¹⁷⁰ may be used to challenge a CFS in Washington.¹⁷¹ State regulation of fuel additives is only preempted if it conflicts with a federal regulation.¹⁷² The federal renewable fuel standard has the potential to preempt a CFS in Washington.¹⁷³ First, this section will analyze whether a CFS in Washington would be preempted by the Clean Air Act express fuel preemption provision, Section 211(c)(4). Second, this section analyzes whether the national renewable fuel standard—codified at Section 211(o) in the Clean Air Act—would preempt a CFS in Washington. It concludes that federal preemption of a CFS in Washington—under both express and implied preemption—is unlikely.

165. *Corey*, 730 F.3d at 1107 (“We express no opinion on Plaintiffs’ claim that the Fuel Standard is preempted by the [renewable fuel standard].”).

166. *Id.* at 1106.

167. *Id.*

168. *Id.* (citing *Rocky Mountain Farmers Union*, 843 F. Supp. 2d at 1061).

169. Clean Air Act of 1970 § 211(c)(4)(C), 42 U.S.C. § 7545(c)(4)(C) (2012).

170. Clean Air Act of 1970 § 211(o), 42 U.S.C. § 7545(o) (2012).

171. *See Rocky Mountain Farmers Union*, 843 F. Supp. 2d at 1065–68. Plaintiffs challenged California's low carbon fuel standard based on implied preemption under the federal renewable fuel standard. *Id.* The issue was not decided and remains open. *Id.* Therefore, opponents to a CFS in Washington will likely attempt preemption based on the renewable fuel standard.

172. 42 U.S.C. § 7545(c)(4)(A)(ii).

173. *See Rocky Mountain Farmers Union*, 843 F. Supp. 2d at 1065 (plaintiffs argued that the California low carbon fuel standard stood as an obstacle to Congress' intent when it enacted section 211(o) of the Clean Air Act—the renewable fuel standard).

A. *Clean Air Act Express Preemption: Section 211(c)(4)*

The Clean Air Act would not expressly preempt a CFS in Washington because the EPA has not regulated the carbon intensity of fuel. Section 211(c)(4) is the express fuel preemption provision in the Clean Air Act, but it is merely procedural and not substantive.¹⁷⁴ Under Section 211(c)(4), the EPA must have regulated the same “characteristic or component” of fuel as the state regulation for express preemption to apply.¹⁷⁵ Therefore, the test for express preemption under the statute is twofold. First, the state law must regulate a “characteristic or component” of fuel. Here, a court would likely determine that a Washington CFS would regulate a “characteristic or component” of fuel.¹⁷⁶ Second, the state law must regulate the *same* “characteristic or component” of fuel as federal law. This analysis requires consideration of a separate, substantive federal regulation to arrive at express preemption.¹⁷⁷ Opponents of a CFS in Washington will likely point to the federal renewable fuel standard, codified at Section 211(o). The pertinent question for this analysis is whether the federal renewable fuel standard regulates the *same* “characteristic or component” of fuel as would be regulated by a CFS in Washington.

Express preemption analysis under Section 211(c)(4) requires more than a simple look at the plain language of the statute. Courts often consider the legislative history, purpose, and the broader context of the statute when interpreting the scope of express preemption language.¹⁷⁸ Here, the analysis requires comparison between the scope of the federal renewable fuel standard and a CFS in Washington. This section will compare the two standards by considering the content, along with the congressional purpose in enacting the two standards. It finds that the federal standard regulates the source of fuel, focusing on renewables, and a Washington CFS would regulate the carbon intensity of fuel. It

174. 42 U.S.C. § 7545(c)(4).

175. *Id.* at § 7545(c)(4)(A)(ii).

176. *See Rocky Mountain Farmers Union*, 843 F. Supp. 2d at 1057 (finding that California’s low carbon fuel standard regulated a “characteristic or component” of fuel for purposes of the Clean Air Act.) Because a CFS in Washington would likely mimic California’s standard, a court would also likely find that a CFS regulates a “characteristic or component” of fuel.

177. *Id.*

178. *See Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 548 (2001) (considering the history of federal regulation in addition to the express preemption language in finding that the state law was preempted); *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 522 (1992) (considering the broader language of the federal act before concluding that the express preemption provision did preempt state tort claims).

concludes that the state standard does not regulate the same “characteristic or component” of fuel as the federal standard and should not be preempted.

As discussed above, the Ninth Circuit noted that the California low carbon fuel standard fell within the Clean Air Act fuel preemption provision. It explained that the California standard was “a control respecting a fuel or fuel additive and was enacted for the purpose of emissions control.”¹⁷⁹ However, California’s preemption waiver exempted the California standard from analysis under the Clean Air Act’s express fuel preemption provision.¹⁸⁰ The Court simply decided that California would be exempt from express preemption and therefore avoided engaging in a full analysis under the preemption provision. Specifically, the Court did not consider whether the EPA had prescribed a “control or prohibition respecting any characteristic or component of a fuel or fuel additive,” as required by the preemption provision.¹⁸¹ Unlike California, however, Washington is not exempt from the fuel preemption provision expressly written in the Clean Air Act.¹⁸² Therefore, an attempt to enact a CFS in Washington will likely result in a challenge based on express preemption.

As explained in Part II.B.1,¹⁸³ express federal preemption of state regulation of fuel only occurs when the EPA has “prescribed . . . a control or prohibition applicable to such characteristic or component of a fuel or fuel additive.”¹⁸⁴ Such a federal regulation is required for the fuel preemption provision to come into play.¹⁸⁵ If there is no federal regulation on point, there is no preemption.¹⁸⁶ Therefore, states may enact regulations that would fall under the express preemption provision as long as there is no federal regulation that concerns the same

179. *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1077, 1106 (9th Cir. 2013) (internal quotation omitted) (citing *Rocky Mountain Farmers Union*, 843 F. Supp. 2d at 1061).

180. *Corey*, 730 F.3d at 1106 (citing *Davis v. United States Envtl. Prot. Agency*, 348 F.3d 772, 786 (9th Cir. 2003)).

181. *Id.*

182. *See* 42 U.S.C. §§ 7543(b); 7545(c)(4)(B) (California is the only state exempt from preemption).

183. *See supra* notes 72–99.

184. 42 U.S.C. § 7545(c)(4)(A)(ii).

185. *Id.*; *see also Exxon Mobil Corp. v. Envtl. Prot. Agency*, 217 F.3d 1246, 1256 (9th Cir. 2000) (holding that a county requirement in Nevada that gasoline sold during the winter contain at least 3.5 percent oxygen content by weight did not conflict with, and was not preempted by, any provision of the Clean Air Act, including provision restricting state power to regulate and prohibit fuel additives) (citing Clean Air Act § 211(c)(4)(A), 42 U.S.C. § 7545(c)(4)(A) (2012)).

186. *Id.* at 1253–56.

“characteristic or component” of that particular fuel or fuel additive.¹⁸⁷ This is particularly important to the present analysis. Application of the express preemption provision to a CFS in Washington requires consideration of other federal laws regulating carbon intensity of fuel.

The most obvious federal law that may result in express preemption is the renewable fuel standard.¹⁸⁸ As explained in Part II.B.2,¹⁸⁹ the renewable fuel standard requires that a certain amount of renewable fuel be blended into transportation fuels each year.¹⁹⁰ The renewable fuel standard focuses on the source of renewables, requiring fuel vendors to blend certain volumes of each of the four recognized categories of renewable fuel into gasoline.¹⁹¹ The EPA sets volumes for each category of renewable based on percentage of total renewable fuels.¹⁹²

By setting volume requirements for each category of renewable fuel, the renewable fuel standard targets the source of fuel. In large part, the renewable fuel standard focuses on whether the sources of transportation fuels are adequately diversified. Congress’ purpose in passing the Energy Independence and Security Act of 2007 was to “move the United States toward greater energy independence and security.”¹⁹³ When considered in light of the purpose of the Act, source diversification is a logical approach to achieve the stated goals. It requires a specific percentage of fuel from planted crops, a certain percentage from biofuels derived from cornstarch, a percentage from cellulose, and a percentage of diesel from biomass feed stocks.¹⁹⁴ Thus, the EPA is meeting the stated purpose of the act by requiring specified volumes of diverse renewable fuels.¹⁹⁵

In contrast, emphasis on the specific source of renewable fuels is completely absent from proposals for a Washington CFS.¹⁹⁶ Unlike the federal standard, Washington would not require certain percentages of

187. Clean Air Act of 1970 § 211(c)(4)(A)(ii), 42 U.S.C. § 7545(c)(4)(A)(ii) (2012).

188. *Id.* § 7545(o).

189. *See supra* notes 100–20.

190. 42 U.S.C. § 7545(o)(2) (2012).

191. *See supra* Part II.B.2.

192. *See id.*

193. Energy Independence and Security Act of 2007, Pub. L. No. 110-140, tit. II § 201, 121 Stat. 1492, 1519 (2007) (codified at 42 U.S.C. § 7545(o) (2012)).

194. SCHNEPF & YACOBUCCI, *supra* note 101, at 4.

195. *See Powers, supra* note 103, at 668–69 (explaining that EISA has been “wildly successful” at reducing United States dependence on foreign oil, but not successful at reducing carbon emissions).

196. *See supra* Part I.

fuel from cellulosic biofuels or planted crops.¹⁹⁷ Instead, a Washington CFS would focus entirely on the carbon intensity of fuel. As explained in Part I, the “carbon intensity” of a transportation fuel is the amount of lifecycle GHG emissions per unit of energy of fuel.¹⁹⁸ Regulated fuel providers will receive credits for fuel with a carbon intensity value below the standard, and debits if the carbon intensity value is above the standard.¹⁹⁹ In other words, the source of renewables is irrelevant to a CFS. The crux of the policy is its focus on the carbon intensity of fuel. Thus, the “characteristic or component” that would be regulated by Washington’s CFS is not the same “characteristic or component” as regulated by the renewable fuel standard.

The focus on regulating carbon intensity under a CFS is a logical means to fulfill Washington’s legislatively mandated reductions in state GHG emissions.²⁰⁰ Governor Inslee highlighted a CFS as a method to achieve these reductions.²⁰¹ Requiring a reduction in the carbon intensity of fuel would likely result in statewide GHG emissions reductions. Therefore, the policy would be designed to achieve statewide goals.

On the other hand, Congress’ stated goal in enacting the renewable fuel standard was to “move the United States toward greater energy independence and security.”²⁰² One major critique of the federal standard is that it has not effectively reduced GHG emissions from transportation fuels.²⁰³ For example, the federal standard requires high volumes of traditional renewable fuels, mainly corn ethanol, to be blended into fuel. However, corn ethanol may actually emit more GHG emissions than traditional petroleum-based fuels.²⁰⁴

Like a CFS, the federal renewable fuel standard does require some renewable fuels to meet specific GHG emissions thresholds, which are

197. PONT & UNNASCH, *supra* note 6, at 9.

198. *See supra* Part I.

199. PONT & UNNASCH, *supra* note 6, at 39 (analysis commissioned by the Washington State Department of Ecology to determine impacts associated with a CFS in Washington draws on California’s low carbon fuel standard for several assumptions).

200. H. B. 2815 60th Legis., Reg. Sess (Wash. 2008) (regarding Greenhouse Gas Emissions) (codified at WASH. REV. CODE. § 70.235.020(1)(a)(i) (2014)).

201. JAY INSLEE, POLICY BRIEF: WASHINGTON CARBON POLLUTION REDUCTION AND CLEAN ENERGY LEADERSHIP 1–2 (Dec. 17, 2014), *available at* http://www.governor.wa.gov/sites/default/files/policy_briefs/pb_Carbon_pollution_reduction_2014.pdf.

202. *See* Energy Independence and Security Act of 2007, Pub. L. No. 110-140, tit. II § 201, 121 Stat. 1492, 1519 (2007) (codified at 42 U.S.C. § 7545(o) (2012)).

203. Powers, *supra* note 103, at 668–69.

204. *Id.*

calculated using a lifecycle analysis.²⁰⁵ However, certain fuels—many corn-based ethanols, for example—are exempt from the emissions thresholds.²⁰⁶ The exemption for corn-based ethanol from the GHG emission requirements further demonstrates that Congress’ goal was to reduce dependency on foreign oil by strengthening domestic renewable fuel sources, rather than to limit GHG emissions. Furthermore, the GHG emissions threshold is a preliminary step in the regulation. Renewable fuels in each category are first assessed according to the GHG emissions threshold. Fuels that meet the required thresholds are then blended with gasoline based on required volumes of each renewable fuel. Therefore, the focus of the federal standard is centered on increasing the use of fuel from non-petroleum-based sources and not on GHG emissions thresholds.²⁰⁷

The fuel preemption provision in the Clean Air Act only applies if the EPA has regulated the same “characteristic or component of a fuel or fuel additive” as is targeted by the state regulation.²⁰⁸ The federal renewable fuel standard does not regulate the same characteristic of fuel as would be regulated by a Washington CFS. The federal standard regulates the source of renewable fuels, requiring certain volumes to be derived from each of four different categories. In contrast, a Washington CFS would regulate the carbon intensity of renewable fuels. It would not require percentages from specific sources. This conclusion is further validated by a look at legislative purpose: Washington’s purpose was to reduce GHG emissions, while the federal purpose was to move the United States toward greater energy independence. Therefore, a CFS in Washington would not be preempted by the federal renewable fuel standard because they do not regulate the same “characteristic or component” of fuel, as required by the Clean Air Act.

B. Clean Air Act Implied Preemption

A CFS in Washington does not “stand as an obstacle to Congress’ objectives” under the federal renewable fuel standard, authorized by the Energy Independence and Security Act of 2007, and should not be preempted. Whether a CFS in Washington would be preempted by the federal renewable fuel standard is an open question following the Ninth

205. 42 U.S.C. § 7545(o)(1)(B)(i) (2012).

206. *Id.*

207. Powers, *supra* note 103, at 668.

208. Clean Air Act of 1970 § 211(o), 42 U.S.C. § 7545(c)(4)(A)(ii) (2012).

Circuit's decision in *Rocky Mountain Farmers Union*.²⁰⁹ Opponents to a CFS in Washington will likely use the renewable fuel standard, Section 211(o) of the Clean Air Act, to argue implied obstacle preemption. This section analyzes the merits of such an argument and concludes that the CFS would not be preempted.

Plaintiffs in *Rocky Mountain Farmers Union* argued that California's low carbon fuel standard interfered with "the methods by which the federal statute was designed to reach [its] goal."²¹⁰ This argument is one of implied preemption under the federal renewable fuel standard²¹¹ and is an argument that is likely to be included in a challenge to a CFS in Washington. Specifically, the question is whether the state law "stands as an obstacle to the accomplishment and execution of the full purposes or objectives of Congress."²¹² Obstacle preemption was never analyzed in *Rocky Mountain Farmers Union* because the court found that neither party addressed the appropriate standard of review.²¹³

A challenge to a CFS in Washington will likely hinge on obstacle preemption by the federal renewable fuel standard, authorized by the Energy Independence and Security Act of 2007.²¹⁴ In analyzing whether a Washington CFS would be preempted by the federal renewable fuel standard, the question is whether it would "stand[] as an obstacle to the accomplishment and execution of the full purposes or objectives of Congress."²¹⁵ As noted earlier, Congress' stated objective in enacting the renewable fuel standard was to "move the United States toward greater energy independence and security."²¹⁶ The question in an obstacle preemption analysis is whether a CFS in Washington conflicts with Congress' purpose in enacting the federal law.²¹⁷

A significant difference between California's standard and the federal renewable fuel standard in *Rocky Mountain Farmers Union* was in the treatment of corn ethanol. This would likely be the most controversial

209. 730 F.3d 1070, 1107 (9th Cir. 2013).

210. *Rocky Mountain Farmers Union v. Goldstene*, 843 F. Supp. 2d 1042, 1066 (E.D. Cal. 2011) (citing *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 103 (1992)).

211. *Id.*

212. *See Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (setting the standard for obstacle preemption).

213. *Rocky Mountain Farmers Union*, 843 F. Supp. 2d at 1071.

214. *See supra* Part II.B.2.

215. *Hines*, 312 U.S. at 67.

216. Energy Independence and Security Act of 2007, Pub. L. No. 110-140, tit. II § 201, 121 Stat. 1492, 1519 (2007) (codified at 42 U.S.C. § 7545(o) (2012)).

217. *Hines*, 312 U.S. at 67.

part of the Washington CFS, as well. While the federal standard favors all renewable fuels, the Washington CFS would only favor renewables with a low carbon impact. The production of corn ethanol, although renewable, can actually produce more carbon dioxide than it absorbs in the atmosphere.²¹⁸ Although this may theoretically work to fulfill the federal purpose by decreasing the United States' dependence on foreign oil, it hardly advances Washington's goal to reduce carbon emissions from transportation fuel.²¹⁹

The issue is one of Congressional purpose. In *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission*,²²⁰ for example, the Court found that a California law that put a moratorium on nuclear power development was not preempted by a federal law. Although it found that the primary purpose of the federal law was promotion of nuclear power, it found that a secondary objective was safety. The Court found that the California objective was economic in nature. It therefore concluded that the state law's purpose did not obstruct the federal purpose to enhance safety.²²¹

Here, the analysis seems even clearer. The purpose of the Energy Independence and Security Act of 2007, which authorized the renewable fuel standard, was plainly stated as moving the United States toward greater energy independence.²²² As explained in Part IV.A,²²³ EPA requires that fuel providers blend escalating volumes of certain categories of renewable fuels to achieve this goal. A CFS in Washington would require an increase in the amount of renewable transportation fuels used in Washington. A CFS would not require that renewables be derived from a specific source; it would instead preference renewables

218. See Leah Stiegler, Comment, *Avoiding the Catch-22: Reforming the Renewable Fuel Standard to Protect Freshwater Resources and Promote Energy Independence*, 48 U. RICH. L. REV. 1063, 1091 (2014) (arguing that the federal renewable fuel standard favors corn ethanol and that this has significant environmental impacts); Morgan Brubaker, Comment, *Dream of Californication: Constitutional Questions Put the Brakes on the Nation's First Low Carbon Fuel Standard*, 22 VILL. ENVTL. L.J. 57, 65 (2011) (discussing the impact of land conversion from forest or grassland to corn fields, which generally increases the amount of carbon dioxide in the atmosphere).

219. See U.S. ENVTL. PROT. AGENCY, RENEWABLE FUEL STANDARD PROGRAM (RFS2) REGULATORY IMPACT ANALYSIS 483 (Feb. 2010), available at <http://www.epa.gov/oms/renewablefuels/420r10006.pdf> (analyzing corn ethanol production and noting that "unless we analyze the lifecycle GHG emissions of corn ethanol over more than 14 years, corn ethanol from this pathway will not achieve a reduction compared to gasoline.").

220. 461 U.S. 190 (1983).

221. *Id.* at 220–23.

222. See Energy Independence and Security Act of 2007, Pub. L. No. 110-140, tit. II § 201, 121 Stat. 1492, 1519 (2007) (codified at 42 U.S.C. § 7545(o) (2012)).

223. See *supra* notes 174–208.

with a lower carbon intensity. Rather than stand as an obstacle to the purpose of the federal standard, a CFS in Washington would serve as a complement. Increased renewable fuels would likely result in greater energy independence nationwide. At the very least, it does nothing to impede the federal objectives.

Plaintiffs in *Rocky Mountain Farmers Union* argued that Congress intended to ensure a continued nationwide market for corn ethanol by exempting existing corn ethanol producers from the GHG emissions threshold requirement.²²⁴ However, this alleged intent appears nowhere in the legislation, and plaintiffs did not cite to anywhere that it appeared in the legislative history. For a court to speculate that Congress intended to bolster nationwide sales of corn ethanol by enacting the renewable fuel standard is likely a stretch. It also requires that a court ignore the stated purpose of the Act: to move the United States toward energy independence.

Far from conflicting with the stated objectives of the federal renewable fuel standard, a CFS would likely further federal goals. Based on Supreme Court precedent and consideration of the doctrine's reluctance to find preemption of state law,²²⁵ it is unlikely that a court would find a CFS in Washington preempted.

CONCLUSION

A CFS enacted in Washington State will likely meet resistance from parties with a financial stake in the current fuel economy. Based on challenges to the California standard, federal preemption under the Clean Air Act is likely to be raised to challenge a Washington CFS. Although the federal renewable fuel standard may appear similar to a CFS on its face, a court is unlikely to find a Washington CFS preempted. Under the express preemption standard, a court is unlikely to find that a Washington CFS would regulate the same characteristic of fuel as the federal renewable fuel standard, as required by the Clean Air Act fuel preemption provision, Section 211(c). Unlike the federal standard's focus on the source of renewables, a CFS in Washington would regulate the carbon intensity of fuel. A CFS in Washington would likely also survive an obstacle preemption analysis under the renewable fuel

224. Compl. for Declaratory & Injunctive Relief & Jury Demand, *Rocky Mountain Farmers Union v. Goldstene*, No. 1:10-cv-00163-LJO-DLB, 2010 WL 412389, at *13 (E.D. Cal. Feb. 2, 2010).

225. *Chamber of Commerce of U.S. v. Whiting*, ___ U.S. ___, 131 S. Ct. 1968, 1985 (2011) (citing *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 110 (1992) (Kennedy, J., concurring)).

standard, Section 211(o) because it does not obstruct Congress' purpose. The stated purpose of the federal standard is to move the United States toward greater energy independence; the stated purpose of the Washington CFS would be to reduce GHG emissions from transportation fuels. Far from inhibiting the federal standard, the Washington CFS actually serves as a complement. Therefore, it is unlikely that a CFS in Washington would be preempted by the Clean Air Act.