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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PORTLAND DIVISION

AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS, et al., Plaintiffs, v. **JANE O'KEEFFE,** et al., Defendants, and **CALIFORNIA AIR RESOURCES BOARD,** et al, Defendant-Intervenors.	Case No. 3:15-cv-00467-AA **DEFENDANT-INTERVENORS CALIFORNIA AIR RESOURCES BOARD'S AND STATE OF WASHINGTON'S MOTION TO DISMISS** *ORAL ARGUMENT REQUESTED*

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LR-7-1 CERTIFICATION

The undersigned counsel for the California Air Resources Board certifies that she conferred with counsel for Plaintiffs. Plaintiffs' counsel indicated that Plaintiffs oppose this motion.

MOTION

The California Air Resources Board ("ARB") and the State of Washington hereby move this Court to dismiss Plaintiffs' complaint, in its entirety and with prejudice, under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). As demonstrated in the accompanying memorandum, Plaintiffs have failed to state any claim upon which relief could be granted and some of Plaintiffs' claims are non-justiciable.

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

The regulation challenged in this case, Oregon's Clean Fuels Program, is modeled on and very similar to the Low Carbon Fuel Standard ("LCFS") regulation adopted for California by ARB in 2009. The Plaintiffs here—American Fuels & Petrochemical Manufacturers, American Trucking Associations, Inc., and Consumer Energy Alliance (collectively "AFPM" or "Plaintiffs")—challenged California's LCFS in federal court in the Eastern District of California in early 2010, raising claims very similar, and in some cases identical, to the claims they raise in this case. The Ninth Circuit rejected the subset of those claims presented to it on cross-motions for partial summary judgment, holding that the LCFS does not regulate extraterritorially, does not discriminate (on its face, in its purpose, or in its effects) against out-of-state petroleum fuels, and does not facially discriminate against out-of-state ethanols. *Rocky Mountain Farmers Union* *v. Corey*, 730 F.3d 1070, 1077 (9th Cir. 2013) (summarizing holdings).[1] Yet, AFPM brings these same claims again here. As discussed below and in Defendants' motion to dismiss, the Ninth Circuit's decision, along with other case law, precludes AFPM's discrimination and extraterritorial regulation claims (its first and second claims), as a matter of law. Those claims should be dismissed.

AFPM's preemption claims should also be dismissed. The third claim should be dismissed because AFPM has not alleged, and cannot allege, that EPA made the finding required to preempt Oregon's Clean Fuels Program under section 211(c)(4)(A)(i) of the Clean Air Act. The fourth claim should be dismissed because Plaintiffs' claim is based on the rights of others (certain ethanol producers) and Plaintiffs lack prudential standing to assert those rights. And even if Plaintiffs were the proper parties to bring this claim, they have not alleged, and cannot allege, facts sufficient to sustain an inference that the Clean Fuels Program conflicts with or creates an obstacle to EPA's Renewable Fuel Standard ("RFS2") program. Notably, when it adopted the RFS2 program, EPA itself indicated that it designed its program to be compatible with state programs like California's LCFS and Oregon's Clean Fuels Program. *See, infra,* Sec. IV.B.2. Plaintiffs' vague and conclusory allegations of conflict between these programs do not state a plausible claim.

BACKGROUND

Defendants have described Oregon's Clean Fuels Program in their motion to dismiss, and, in accordance with the Court's order to avoid duplication, ARB and Washington do not repeat that description here. Some discussion of the similarities between California's LCFS and

[1] AFPM's challenge to the LCFS, and a similar, consolidated case brought by ethanol interests, are now back in the Eastern District for resolution of the remaining claims.

Oregon's Clean Fuels Program is warranted, however, to aid the Court in understanding the relationship between the Ninth Circuit's decision concerning California's LCFS and the claims raised here concerning Oregon's Program.[2]

Both regulations use lifecycle analysis to determine a fuel's carbon intensity, and both regulations make a fuel's carbon intensity relevant in their respective State markets. Cal. Code Regs., tit. 17 ("LCFS"), § 95482; OAR 340-253-0100(6). The two regulations define "lifecycle greenhouse gas emissions" virtually identically. *Compare* LCFS § 95481(a)(38) *with* OAR 340-253-0040(37). Both regulations set two, declining, average carbon intensity standards for each year—one for gasoline and its substitutes and one for diesel and its substitutes. LCFS § 95482(b), (c); OAR 340-253-0100(6). Both regulations have tables of pre-existing carbon intensity values that regulated parties can use for fuels similar to those described in the tables. LCFS § 95486(b) (Tables 6 & 7); OAR 340-253-8030 (Table 3); 340-253-8040 (Table 4).[3] Both regulations allow fuel producers to seek individualized carbon intensity values for their fuels, provided certain conditions are met. LCFS § 95486(b), (c); OAR 340-253-0450. Both regulations ensure compliance through a system of credits and deficits, whereby regulated parties obtain credits for fuels with carbon intensities lower than the applicable standard for the year and deficits for fuels with carbon intensities higher than the applicable standard for the year. LCFS § 95485; OAR 340-253-1000. Both regulations require regulated parties to have credits equal to or greater than their deficits in order to comply, and both regulations allow regulated parties to

[2] California's LCFS is described in a fair amount of detail in *Rocky Mountain*, 730 F.3d at 1080-86 and can be found at Cal. Code Regs., tit. 17, § 95480 et seq.

[3] Defendants have included Table 3 and 4 from Oregon's regulation as an appendix to their motion to dismiss. A PDF version of the LCFS regulation, including Tables 6 and 7 is available at http://www.arb.ca.gov/fuels/lcfs/CleanFinalRegOrder112612.pdf.

trade credits with each other and to bank credits for use in future years. LCFS §§ 95485, 95488; OAR 340-253-1050 Both regulations apply to fuels sold for use in the regulating State. Cal. Code Regs., tit. 17, § 95480.1(a); OAR 340-253-0100(1). And both regulations have similar purposes–to "reduce greenhouse gas emissions by reducing full fuel-cycle, carbon intensity of the transportation fuel pool used in [the State]." LCFS § 95480; *see also* OAR 340-253-0000(2).

Although the two regulations are not identical, these similarities are such that the Ninth Circuit's *Rocky Mountain* decision precludes Plaintiffs' first two claims, as discussed below.

ARGUMENT

I. PLAINTIFFS HAVE FAILED TO STATE A VIABLE DISCRIMINATION CLAIM BECAUSE THEIR CLAIM IS BASED ON LEGALLY ERRONEOUS PREMISES

"The modern law of what has come to be called the dormant Commerce Clause is driven by concern about economic protectionism that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 337-38 (2008) (internal quotation omitted). As Defendants discuss in their motion to dismiss, Plaintiffs have failed to state a discrimination claim upon which relief could be granted because they have failed to plausibly allege how the Clean Fuels Program protects in-state interests from out-of-state competition. All of Plaintiffs' discrimination claims suffer from this same fundamental flaw, whether they are styled as claims on behalf of petroleum fuels or ethanols and whether they are presented as claims of discrimination on the Program's face, in its purpose, or in its effects.

A. The Clean Fuels Program Does Not Discriminate Against Out-of-State Fuels, and Plaintiffs' Improper Focus on an Overly Narrow Slice of Oregon's Fuels Market Cannot Support a Viable Claim

The fundamental premise of Plaintiffs' discrimination claims is their implicit assumption that all low-carbon fuels that may benefit from the Clean Fuels Program originate in Oregon.

Thus, Plaintiffs allege that "in-state producers of ethanol or biodiesel" benefit from the ability to generate credits under the Program, while the burdens of the Program "fall almost entirely on" petroleum fuel providers that happen to be located outside the State. Complaint for Declaratory and Injunctive Relief ("Compl.") at ¶ 62-64. Similarly, Plaintiffs allege that Oregon's Program discriminates "[b]y assigning lower carbon intensities to ethanol and other fuels produced within Oregon and higher carbon intensities to petroleum-based fuels (which are produced in other states and countries but are not produced in Oregon)." Compl. at ¶ 109; *see also id.* at ¶ 66 ("The Oregon Program benefits in-state [fuel and feedstock producers] at the expense of petroleum refiners because it assigns gasoline and diesel fuel higher state-wide carbon intensity values than in-state transportation fuels."). These allegations seem designed to encourage the inference that "biofuels produced in Oregon" are the only fuels that "already meet the proposed average carbon intensity [standard]" and are therefore eligible for credits or other benefits under the Program. *See id.* at ¶ 58.

But this inference—the fundamental premise of Plaintiffs' discrimination claims—is entirely unreasonable and is, in fact, directly contradicted by Plaintiffs' own allegations and the face of the regulation. Accordingly, while, for purposes of this motion to dismiss, the Court may accept as true Plaintiffs' allegations that Oregon-produced ethanol is a low-carbon fuel that would generate credits under the Program, the Court need not, and should not, make the unreasonable inference that Oregon-produced fuels are the only low-carbon fuels that so qualify. *See In re Gilead Sciences Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008).

In fact, Plaintiffs themselves allege that ethanol produced in California will obtain the same benefits under the Program as ethanol produced in Oregon. Compl. at ¶ 70. Thus, Plaintiffs' own allegations undermine the inference they ask this Court to make—that Oregon-produced ethanol obtains benefits unavailable to out-of-state competitors.

Plaintiffs' allegations also entirely disregard the plain face of the Program's table of carbon intensity values. That table contains 12 ethanol pathways with carbon intensity values lower than the 50.70 value that Plaintiffs allege confers discriminatory benefits on Oregon-produced ethanol. OAR 340-253-8030 (Table 3); *see also* Compl. at ¶ 70. These 12 *lower* pathways—the most favorable ethanol pathways currently available under Oregon's program—must represent ethanol from outside Oregon, given Plaintiffs' allegation that Oregon's sole ethanol plant would be assigned the 50.70 value. In fact, 7 of these 12 pathways are expressly identified as out-of-state ethanols from California and Brazil. OAR 340-253-8030 (pathways ETHC013 and ETHS001-006). The other five correspond to ethanols from the Midwest.[4]

Once it is clear, as it is from the face of the regulation, that out-of-state ethanols from California, Brazil and the Midwest have *more favorable* carbon intensity values than their Oregon competitor, Plaintiffs' claim that the Program "discriminates against out-of-state petroleum fuels in favor of in-state fuels" because only "Oregon's producers … may sell credits" becomes transparently implausible. Out-of-state fuels are also eligible for credits, and in fact some out-of-state ethanols have values that would generate *more* credits than any Oregon ethanol. There can be no discrimination in a regulation that confers an advantage on out-of-state competitors.

[4] California's LCFS identifies these five pathways (ETCH030 and ETHC032-35) as individualized values obtained by Midwest producer POET through California's "Method 2A" process. LCFS § 95486(b)(1)(T); *see also Rocky Mountain*, 730 F.3d at 1084 ("The individualized pathway with the lowest carbon intensity was achieved by a Midwest producer through Method 2A.")

Indeed, Plaintiffs' allegations on this point are not meaningfully different from the ones they offered in the *Rocky Mountain* litigation over California's LCFS. There, as here, Plaintiffs urged the district court to consider a limited set of fuel pathways (a set selected to support their discrimination claim) and to disregard all other fuel pathways (especially those that contradicted that claim). The California district court did so, with respect to both petroleum fuels and ethanols, and the Ninth Circuit held that "this selective comparison, which excludes relevant [competing] fuel pathways" was reversible error. *Rocky Mountain*, 730 F.3d at 1088 (ethanol), 1099 (petroleum).

Discrimination claims must be "[s]een in context of the full market." *Id.* at 1099. This is because State laws are not protectionist unless they protect in-state interests from out-of-state competition and that cannot be determined by looking at a fraction of the competitors in a given market. *See Exxon Corp. v. Maryland*, 437 U.S. 117, 127 (1978). Plaintiffs' discrimination theories are premised on ignoring much of Oregon's market (and much of Oregon's regulation), and such a premise cannot, as a matter of law, support a claim upon which relief could be granted. This fundamental problem with Plaintiffs' claim fatally infects their claims concerning the treatment of both petroleum fuels and ethanols.

Because Oregon does not produce petroleum fuels and, therefore, there are no in-state petroleum producers that can be favored relative to out-of-state competitors, Plaintiffs' petroleum claim rests on the inference that out-of-state petroleum fuels will be displaced exclusively by in-state biofuels.[5] *See* Compl. at ¶ 58. But this inference is unreasonable, and

[5] As Defendants note in their motion to dismiss, Plaintiffs have not alleged that petroleum fuels and biofuels compete in a single market, such that differential treatment of them could even arguably constitute discrimination. *General Motors Corp. v. Tracy*, 519 U.S. 278, 298-99 (1997). Indeed, Plaintiffs allege that their members *are* the market for ethanol and

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Plaintiffs' claim accordingly implausible, given that out-of-state ethanols have obtained the most favorable carbon intensity values. *See Exxon Corp.*, 437 U.S. at 125-26. All discrimination claims concerning petroleum fuels should be dismissed with prejudice.

Plaintiffs' ethanol claims similarly rest on the inference that Oregon ethanol has some advantage over out-of-state ethanol and will displace the latter. That inference is entirely unreasonable for the same reason discussed above: on the face of the regulation, ethanols from Brazil, California and the Midwest, not Oregon, have obtained the most favorable carbon intensity values.[6] Remarkably, to support their unreasonable premise, Plaintiffs rely on the precise narrow comparison that the Ninth Circuit rejected in *Rocky Mountain*—the one limited to plants Plaintiffs claim "us[e] the same procedure" to produce ethanol. *See* Compl. at ¶ 70. In *Rocky Mountain*, the district court adopted this overly narrow view and compared only those plants with purportedly similar production processes, holding that "'comparing pathways with different production processes or feedstocks is a red herring.'" *See Rocky Mountain*, 730 F.3d at 1088 (quoting district court opinion). The Ninth Circuit reversed, holding both that "this selective comparison" was erroneous as a matter of law and that "what the [district] court called the 'production process'" was far too narrowly defined. *Id.* All of Plaintiffs' discrimination

(…continued)
therefore do not compete in the same market as ethanol. *E.g.*, Compl. at ¶ 55 (alleging gasoline importers will need to change "sources of ethanol"). This failure to identify *competing* interests that are treated differently is also fatal to Plaintiffs' attempt to allege discrimination in favor of "alternative fuel fleets and dispensing infrastructure," such as those operated by local governments and school districts. *See* Compl. at ¶ 65.

[6] Indeed, Plaintiffs implicitly acknowledge the flaw in their inference when they allege that "buying credits from credit generators in Oregon" is but one "example" of a compliance path for their members. Compl. at ¶ 67. Another example would be buying credits (or low-carbon fuels) from out-of-state producers. Plaintiffs never mention this example, presumably because it is fatal to their claim. Nonetheless, the existence of this option is evident from the regulation itself.

claims concerning ethanols should be dismissed with prejudice because they are premised on an erroneous and overly narrow comparison of ethanols that the Ninth Circuit has rejected as a matter of law.

Oregon's Clean Fuels Program "does not isolate [Oregon] and protect its producers from competition." *Rocky Mountain*, 730 F.3d at 1090; *see also Davis*, 553 U.S. at 338 ("The point is to effectuat[e] the Framers' purpose to prevent a State from retreating into … economic isolation") (internal quotation omitted). There simply is no discrimination here as to either petroleum or ethanol.

B. None of Plaintiffs' Attempts to State a Particularized Form of Discrimination Succeed

As discussed above, and in Defendants' motion, Plaintiffs have failed to plead, and cannot plead, the essential elements of a discrimination claim under the dormant Commerce Clause. This is true regardless of *how* Plaintiffs allege the discrimination occurs—on the regulation's face, in its purpose, or in its effects. *See Nat'l Ass'n of Optometrists & Opticians LensCrafters, Inc. v. Brown*, 567 F.3d 521, 525 (9th Cir. 2009) (noting "three different" forms of discrimination). When a regulation does not protect in-state interests from out-of-state competitors, there is no economic protectionism to be found in any form. The basic definition of discrimination under the Clause—"differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter"—does not change based on the form the discrimination allegedly takes. *See Or. Waste Sys., Inc. v. Dep't of Envtl. Quality of State of Or.*, 511 U.S. 93, 99 (1994). Thus, because Plaintiffs have not alleged, and cannot allege, sufficient facts to support a plausible claim that Oregon's Program gives in-state businesses an advantage over their out-of-state competitors, *all* of their discrimination claims fail. But Plaintiffs' allegations of particular forms of discrimination also fail to state a claim for additional reasons specific to those claims. Defendants thoroughly address these reasons in their motion; ARB and Washington add only a few additional points here.

First, Plaintiffs' selected quotations from the former Governor and a few legislators do not state a claim for purposeful discrimination. The point of Oregon's Program, and the point of California's LCFS, is to "encourage producers, wherever they are located, to develop fuels with lower carbon intensities for use within the California [and Oregon] market[s]." *Rocky Mountain*, 730 F.3d at 1080. If a few Oregon politicians anticipated that some of this alternative-fuel development might occur in Oregon (or even hoped for or promoted this outcome), that would not transform those *effects* into the *purpose* of the regulation. *See id.* at 1100 (holding that such comments "are easily understood, in context, as economic defense of a [regulation] genuinely proposed for environmental reasons") (internal quotation omitted). Indeed, any claim of a protectionist purpose is belied by the fact that, on its face, the regulation provides advantages, in terms of low carbon intensity values, to numerous out-of-state fuels. *See Valley Bank of Nev. v. Plus Sys., Inc.*, 914 F.2d 1186, 1196 (9th Cir. 1990) ("[P]redictable concern" from State politicians for their own residents "does not rebut the evenhandedness of the legislation's plain language.").

Second, Plaintiffs' claim of facial discrimination against out-of-state ethanol is identical to the one rejected by the Ninth Circuit.[7] Indeed, Oregon's Table 3 (containing the allegedly discriminatory ethanol values) is virtually identical to the California table (Table 6) found to be

[7] Plaintiffs do not make a facial claim as to petroleum and, if they did, it would fail as well. Plaintiffs allege that the Program assigns all petroleum fuels the same carbon intensity, and that is not facial discrimination. *See* Compl. at ¶ 66; *see Or. Waste*, 511 U.S. at 99. Notably, all four judges who considered the LCFS concluded that it was not facially discriminatory as to petroleum fuels. *See Rocky Mountain*, 730 F.3d at 1107 (affirming district court on this claim).

non-discriminatory in *Rocky Mountain*. The two tables even share the same "Pathway Identifier" codes. *Compare* OAR 340-253-8030 (Table 3) *with* LCFS § 95486(b) (Table 6).[8]

Third, as Defendants establish in their motion, Plaintiffs fail to state a ripe discriminatory effects claim upon which relief could be granted.

Oregon's Clean Fuels Program does not "impose[] commercial barriers or discriminate[] against an article of commerce by reason of its origin or destination out of State." *See Pharmaceutical Research & Mfrs. of Amer. v. Cnty of Alameda*, 768 F.3d 1037, 1041 (9th Cir. 2014) (internal quotation omitted). It is not discriminatory in any form or as to any fuel. *See id.* Plaintiffs' discrimination claim (their first claim) should be dismissed in its entirety and with prejudice.

II. PLAINTIFFS HAVE FAILED TO STATE A VIABLE EXTRATERRITORIAL REGULATION CLAIM, AND, IN FACT, THE NINTH CIRCUIT HAS ALREADY REJECTED THIS IDENTICAL CLAIM

As Defendants correctly note, Plaintiffs' extraterritorial regulation claim rests on premises that conflict directly with the Ninth Circuit's decision in *Rocky Mountain.* The Ninth Circuit held that the use of lifecycle analysis to generate carbon intensity values for fuels "does not control [the lifecycle] factors—directly or in practical effect." *Rocky Mountain*, 730 F.3d at 1103. Thus, neither the LCFS nor the Clean Fuels Program "regulat[es] the 'fuel pathway'," contrary to Plaintiffs' allegations. Compl. at ¶ 90. In fact, Oregon's Program, which is modeled on California's LCFS, "regulates only the [Oregon] market." *Rocky Mountain*, 730 F.3d. at 1101. Plaintiffs essentially concede as much, alleging that "[t]he Oregon Program regulates the average 'carbon intensity' of transportation fuels *sold in Oregon*." Compl. at ¶ 39 (emphasis

[8] The main difference between the two tables is that California's Table 6 includes "Land Use or Other Indirect Effect." Indirect land use is not relevant to this litigation.

added); *see also id.* at ¶ 45 (alleging "regulated part[ies]" are "[a]ll persons that produce in Oregon or import into Oregon any regulated fuel"); ¶ 47 (alleging obligations for fuel produced in Oregon or imported into Oregon); ¶ 48 (same). It should go without saying that States may regulate their own markets, even when that regulation has effects on interstate commerce. *See, e.g., Pharmaceutical Research & Mfrs. of Amer. v. Walsh*, 538 U.S. 644, 669 (2003) (rejecting extraterritoriality claim where state law did not "regulate the price of any out-of-state transaction" despite effects on "transactions that occur elsewhere"); *Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Harris*, 729 F.3d 937, 948-49 (9th Cir. 2013).

The conclusion that programs like Oregon's Clean Fuels Program and California's LCFS regulate only their own markets is fatal to Plaintiffs' extraterritoriality claim. This is true even though Plaintiffs now assert this claim under both the dormant Commerce Clause and "principles of interstate federalism." Compl. at ¶ 127. Although Plaintiffs' complaint does not identify these principles (or the constitutional provision(s) or case law under which they assert this claim), Plaintiffs have raised these same "principles of interstate federalism" in the federal court litigation over California's LCFS. There, Plaintiffs have conceded, that "the elements of plaintiffs' federalism claim would be similar to those underlying the claim of extraterritoriality under the Commerce Clause." Defendant-Intevenors' Request for Judicial Notice ("RJN") Exh. B at 5. Indeed, Plaintiffs asserted that "[t]he basic principle" underlying this purportedly expanded extraterritoriality claim is that "[a] State may not apply its laws to commerce that takes place wholly outside of the State's borders." *Id.* (internal quotation omitted).[9]

[9] Invited by the district court to distinguish extraterritoriality under the dormant Commerce Clause and extraterritoriality under "principles of interstate federalism," the only "difference" Plaintiffs could identify is that "[a] number of Justices on the Supreme Court have expressed a more-limited view of the scope of the dormant Commerce Clause." RJN Exh. B at (continued…)

Notably, the district court in California denied Plaintiffs leave to amend their already-resolved extraterritoriality claim against the LCFS in order to add the "principles of interstate federalism" to the dormant Commerce Clause as the basis of that claim. RJN Exh. C at 20-21. Specifically, that court held that for Plaintiffs "to succeed on their extraterritorial regulation claim, the Court necessarily would have to find that the LCFS regulates conduct outside of California. *Id.* at 20. But the Ninth Circuit explicitly held that the LCFS 'regulates *only* the California market' … and 'does not control conduct wholly outside the state.'" *Id.* (quoting *Rocky Mountain*, 730 F.3d at 1101). Thus, the Ninth Circuit decision "forecloses any claim that the LCFS is an impermissible extraterritorial regulation, *regardless of the basis for the claim*." *Id.* at 20-21 (emphasis added).

Plaintiffs' allegations provide no basis to deviate from the conclusions of the Ninth Circuit or the district court in California. In fact, Plaintiffs' extraterritoriality allegations here are virtually identical to those operative when the Ninth Circuit held that the LCFS is not an extraterritorial regulation. For example, paragraph 122 of the complaint in this case reads:

> By regulating the "fuel pathway" of transportation fuels – *i.e.*, the manner in which transportation fuels are produced and ultimately reach the Oregon market – the Oregon Program impermissibly penalizes producers and importers based upon the manner in which their transportation fuels are produced in other States and countries and the manner in which they move in interstate and foreign commerce.

Paragraph 87 of Plaintiffs' complaint in *Rocky Mountain* at the time of the Ninth Circuit's decision read:

> By regulating the "fuel pathway" of transportation fuels – *i.e.*, the manner in which transportation fuels are produced and ultimately reach

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(…continued)
6. This "difference," if it is one, provides no basis to conclude that a State law which regulates only the State's market is an extraterritorial regulation.

> the California market – LCFS impermissibly penalizes producers and importers based upon the manner in which their transportation fuels are produced and the manner in which they move in interstate and foreign commerce.

RJN Exh. D at ¶ 87. Similarly, Paragraph 124 of the complaint in this case reads:

> By design and in practical effect, the Oregon Program impermissibly regulates conduct occurring wholly outside of Oregon by making it more difficult to market and sell transportation fuels based upon where the fuels are produced, the manner in which they are produced, and the manner in which they reach the Oregon market.

Paragraph 89 of Plaintiffs' *Rocky Mountain* complaint read:

> By design and in practical effect, the LCFS impermissibly regulates conduct occurring outside of California by making it more difficult to market and sell transportation fuels based upon where the fuels are produced, the manner in which they are produced, and the manner in which they reach the California market.

RJN Exh. D at ¶ 89.

As these examples demonstrate, there is nothing in Plaintiffs' extraterritorial regulation claim here that the Ninth Circuit has not already resolved against Plaintiffs. This claim should be dismissed with prejudice.

III. PLAINTIFFS HAVE FAILED TO STATE A VIABLE CLAIM THAT THE CLEAN FUELS PROGRAM IS PREEMPTED BY SECTION 211(C)(4)(A) OF THE CLEAN AIR ACT AND EPA'S 1994 REFORMULATED GASOLINE RULE

Plaintiffs also fail in their effort to shoehorn the Clean Fuels Program into the preemption provision of section 211(c)(4)(A)(i) of the Clean Air Act. That clause prohibits States from promulgating

> any control or prohibition respecting any characteristic or component of a fuel or fuel additive in a motor vehicle or motor vehicle engine – (i) if the Administrator has found that no control or prohibition of the characteristic or component of a fuel or fuel additive under paragraph (1) is necessary and has published his finding in the Federal Register….

42 U.S.C. § 7545(c). According to Plaintiffs, EPA's 1994 Reformulated Gasoline Rule preempts the Clean Fuels Program because EPA declined to include methane in its definition of ozone-forming volatile organic compounds ("VOCs"). Compl. at ¶¶ 131-36. Plaintiffs' claim fails as a matter of law. The Reformulated Gasoline Rule did not include any determination under section 211(c)(4)(A)(i) that any "control or prohibition" of *any* "characteristic or component" was unnecessary. This Rule cannot, therefore, preempt any State law under section 211(c)(4)(A)(i).

The Reformulated Gasoline Rule was EPA's attempt to implement Congress's directive, in section 211(k) of the Clean Air Act, 42 U.S.C. § 7545(k), that the agency set limits for ozone-forming VOCs in certain parts of the country. 59 Fed. Reg. 7716 (Feb. 16, 1994). As defined in the Reformulated Gasoline Rule, the term "ozone forming volatile organic compounds" does not include methane. *Id.* at 7722-23. Nothing in that definition constituted a determination by EPA that it is never necessary to control methane or any pollutants other than ozone-forming VOCs, just as nothing in that definition constituted a determination that it is unnecessary to regulate ozone-forming VOCs outside of the areas covered by the Reformulated Gasoline Rule. See 62 Fed. Reg. 10,690, 10,693 (March 10, 1997) ("[A]s a policy matter, EPA's decision to regulate fuel oxygen content in RFG areas did not encompass a determination that states should not or need not regulate that characteristic outside of those areas.").

At most, the Reformulated Gasoline Rule's definition of ozone-forming VOCs implied only that EPA thought it unnecessary to regulate the ozone-forming aspect of other volatile organic compounds, e.g. methane, under section 211(k). Far from having "expressly concluded that it would not regulate methane under Section 211(c)(1)," Compl. at ¶ 98, EPA merely concluded that it would not regulate methane and other non-ozone-forming VOCs under section 211(k). According to EPA's own regulations, a characteristic has to be "explicitly regulated" under 211(c) in order for state controls to be preempted. 40 C.F.R. § 80.1. EPA knows how to make an explicit regulatory finding that no control is necessary, and it did not do so here.

In fact, when EPA considers finding that control of a characteristic or component of fuels is unnecessary, the Agency does so in an entirely separate rulemaking and makes the finding explicit. *See* "Regulation of Fuel and Fuel Additives; Administrator's Finding That No Control or Prohibition on Maximum Oxygen Content of a Winter Oxygenated Gasoline Program is Necessary Under Section 211(c)(4)(A) of the Clean Air Act as Amended by the Clean Air Act Amendments of 1990," 57 Fed. Reg. 47,849 (Oct. 20, 1992) ("propos[ing] to find under section 211(c)(4)(A)(i) that no control or prohibition on the maximum oxygen content of oxygenated gasoline at or above 2.7% by weight is necessary under section 211(c)(1) of the Act"). In contrast, the Reformulated Gasoline Rule does not even mention the "no control is necessary" standard, let alone make the "explicit[]" finding required by EPA's regulations.

The only reference to preemption EPA made in the Reformulated Gasoline Rule is that its standard for ozone-forming VOCs should preempt non-identical State regulation of those ozone-forming VOCs under section 211(c)(4)(A)(*ii*). That assertion is not at issue here because the Clean Fuels Program does not control or prohibit ozone-forming VOCs, and Plaintiffs do not allege that it does. Accordingly, as explained by Defendants, the Reformulated Gasoline Rule's reference to preemption under section 211(c)(4)(A)(*ii*) is irrelevant. In fact, EPA has repeatedly taken the position that section 211(c)(1) regulations are not implicit findings that State regulations are unnecessary. *See* 62 Fed. Reg. 10,690, 10,693 (March 10, 1997) (Reformulated Gasoline Rule's application to certain areas did not imply similar controls were unnecessary elsewhere); 55 Fed. Reg. 18,005, 18,006 (April 30, 1990) (EPA's requirements for Reid Vapor Pressure did not constitute finding that Texas's more stringent regulations were unnecessary);

see also 42 Fed. Reg. 25,731 (May 19, 1977) (EPA's control of lead in gasoline did not preempt local control of hydrocarbon vapors).[10]

Finally, as Defendants point out, even if the Reformulated Gasoline Rule did somehow include the necessary determination under section 211(c)(4)(A)(i), EPA has since found that regulation of methane emissions is necessary because they "may reasonably be anticipated both to endanger public health and to endanger public welfare." 76 Fed. Reg. 66,496, 66,497 (Dec. 15, 2009). This is essentially the same standard that triggers EPA's authority to regulate under section 211(c)(1), 42 U.S.C. § 7545(c)(1); *see also* 79 Fed. Reg. 1430, 1455 (Jan. 8, 2014) (Endangerment Finding suffices to trigger regulation for all parts of the Clean Air Act with such a standard). EPA has thus determined methane emissions meet the criterion for regulation under section 211(c)(1).

Plaintiffs have not alleged and cannot allege facts sufficient to support a plausible claim that EPA has determined that no control of those emissions under section 211(c)(1) is necessary. Accordingly, the Clean Fuels Program is not preempted by section 211(c), and Plaintiffs' third claim should be dismissed.

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[10] Courts have likewise refused to give the Reformulated Gasoline Rule broad preemptive effect. *E.g.*, *Oxygenated Fuels Ass'n v. Davis*, 331 F.3d 665 (9th Cir. 2003) (rejecting express and conflict preemption arguments against state bans on gasoline additive known as MTBE); *Exxon-Mobil Corp. v. U.S. EPA*, 217 F.3d 1246 (9th Cir. 2000) (same); *Oxygenated Fuels Ass'n v. Pataki*, 158 F. Supp. 2d 248 (N.D.N.Y. 2001) (rejecting express preemption) *aff'd on reconsideration*, No. 1:00-CV-1073 2002 WL 32329221, *3 (May 16, 2012); *see also In re: Methyl Tertiary Butyl Ether Products Liability Litigation*, 457 F. Supp. 2d 324, 339 & n.104 (S.D.N.Y. 2006) (rejecting conflict preemption claim and collecting cases).

IV. PLAINTIFFS HAVE FAILED TO STATE A VIABLE CLAIM THAT THE CLEAN FUELS PROGRAM IS PREEMPTED BY THE RENEWABLE FUEL STANDARD PROGRAM ADOPTED PURSUANT TO EISA

In their fourth claim, Plaintiffs assert that the Clean Fuels Program conflicts with, and is therefore preempted by, the Energy Independence and Security Act of 2007 ("EISA") and the Renewable Fuel Standard ("RFS2") program. Compl. at ¶ 138. EISA requires EPA to "ensure that gasoline sold or introduced into commerce in the United States …, on an annual average basis, contains the applicable volume of renewable fuel" as determined by EPA pursuant to EISA. 42 U.S.C. § 7545(o)(2)(A)(i). EPA accomplishes this through its RFS2 program which sets volume mandates for advanced biofuel, cellulosic biofuel, biomass-based diesel and total renewable fuel (as defined by EISA). *See id.* § 7545(o)(2)(B); *see also id.* § 7545(o)(1) (defining categories of fuels). These volumes are "nested" such that, for example, fuels that would help meet the cellulosic biofuel volume mandate might also help meet the advanced biofuel volume mandate, and any qualifying renewable fuel (in any category) helps to meet the total renewable fuel volume mandate. *See* 75 Fed. Reg. 14,669, 14,674-75 (March 26, 2010). A fuel qualifies for a given category largely based on how much lower its lifecycle greenhouse gas emissions are compared to baseline gasoline. *See* 42 U.S.C. § 7545(o)(1). For example, "advanced biofuel" "has lifecycle greenhouse gas emissions … that are at least 50 percent less than baseline lifecycle greenhouse gas emissions." *Id.* § 7545(o)(1)(B). Generally, a fuel must have lifecycle greenhouse gas emissions "at least 20 percent" below baseline to qualify as any form of renewable fuel under the program. *Id.* § 7545(o)(2)(A)(i). However, Congress exempted biofuel facilities that had commenced construction on or before December 19, 2007 (when EISA was passed) from this 20 percent reduction requirement. *Id.*

Although Plaintiffs' conflict preemption allegations only vaguely refer to "certain renewable fuels," it appears Plaintiffs claim that the Clean Fuels Program conflicts with EISA's exemption, from the 20 percent reduction requirement, for then-existing biofuel facilities. *See* Compl. at ¶¶ 139, 141. Plaintiffs allege that "[t]he Oregon Program is designed to close Oregon as a market for certain renewable fuels (in particular, certain forms of corn ethanol) produced in existing refineries." Compl. at ¶ 139. Plaintiffs also allege that "[t]he Oregon Program conflicts with federal standards and regulations set forth above regarding the suitability of using certain renewable fuels produced outside Oregon to meet the federal mandates within the borders of Oregon." *Id.* at ¶ 141. These appear to be claims that the facilities exempted from the 20 percent reduction requirement are, or will be, harmed by Oregon's Program in some way that conflicts with EISA and RFS2. These claims should be dismissed both because Plaintiffs lack prudential standing to bring them and because Plaintiffs have failed to state a claim.

A. Plaintiffs Attempt to Assert the Rights of Others And Do Not Have Prudential Standing to Do So

Plaintiffs do not allege that they or any of their members are exempted biofuel facilities—facilities that produce biofuel that can qualify as "renewable" under RFS2 without meeting the general requirement of a 20 percent reduction in lifecycle greenhouse gas emissions. *See* Compl. at ¶¶ 7-21. Indeed, Plaintiffs fail to identify any particular exempted facilities, and instead describe the apparent products of these facilities vaguely as "certain renewable fuels." Compl. at ¶¶ 139, 141. Nonetheless, Plaintiffs assert the purported injuries to these facilities as the sole basis for their preemption claim, claiming Oregon is closing its market to these facilities and that Oregon is "frustrat[ing] … the congressional purpose of ensuring a continued market nationwide for *this* corn ethanol." Compl. at ¶ 139 (emphasis added).

These interests should be asserted by the exempted biofuel facilities and not by these Plaintiffs who do not purport to represent those facilities. "A party 'generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.'" *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004) (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975)).

None of the limited exceptions to this basic rule applies here. These petroleum trade association Plaintiffs do not have a "'close' relationship with" the biofuel facilities and do not allege otherwise. *See id.* at 130. In fact, according to its own website, "AFPM opposes the mandated use of alternative fuels." RJN Exh. E. In other words, AFPM *opposes* the very type of mandate Plaintiffs claim Congress created and with which Plaintiffs allege Oregon's Program conflicts. Further, in its comments on EPA's RFS2 proposal, AFPM supported numerous limitations, including an expiration date and volume restrictions, on the very exemption at issue here, arguing that these limitations would be "consistent with congressional intent [that RFS2] result in greenhouse gas emission reductions." RJN Exh. F at 22. AFPM's "interests are [not] aligned with those of the party whose rights are at issue," and AFPM lacks third-party, prudential standing. *See Pony v. Cnty of Los Angeles*, 433 F.3d 1138, 1147 (9th Cir. 2006). Further, there is no hindrance to the biofuel facilities' "ability to protect [their] own interests." *See id.* Ethanol interests have their own trade associations that are perfectly capable of representing the interests of their members in court. Indeed, several such associations are plaintiffs in one of the consolidated *Rocky Mountain* cases. Absent an exception not present here, courts "have not looked favorably upon third-party standing." *See Kowalski*, 543 U.S. at 130.

"Federal courts must hesitate before resolving a controversy, even one within their constitutional power to resolve, on the basis of the rights of third persons not parties to the litigation." *Singleton v. Wulff*, 428 U.S. 106, 113 (1976). This is because "the courts should not adjudicate such rights unnecessarily, and it may be that in fact the holders of those rights either do not wish to assert them, or will be able to enjoy them regardless of whether the in-court litigant is successful or not." *Id.* at 113-14. In addition, "third parties themselves usually will be the best proponents of their own rights." *Id.* at 114. Indeed, "the holders of the rights may have a like preference, to the extent they will be bound by the courts' decisions under the doctrine of *stare decisis*." *Id.*

Both of the concerns underlying the general rule against third-party standing are present here. Without the exempted ethanol plants as parties to the litigation, it is unclear whether they would prefer not to assert these interests or whether they will be able to "enjoy" whatever protection Congress afforded them regardless of the outcome of this suit. Is is, therefore, unnecessary to adjudicate this claim for the Plaintiffs present here. Further, the exempted ethanol plants would be the best proponents of their own rights and may very well not want the issue of their "protection" under EISA litigated by trade associations who would prefer EISA's volume mandates be eliminated. Indeed, as the bareness of Plaintiffs' allegations here underscore, it is not clear how an appropriate factual record would be easily developed in this case since the exempted ethanol plants—the businesses in a position to know how Oregon's Program is affecting them—are absent.

Plaintiffs' EISA/RFS2 preemption claim should be dismissed for want of prudential standing. As discussed below, this claim should also be dismissed for failure to state a claim.

B. Plaintiffs Allegations Are Insufficient to Overcome EPA's View that Its RFS2 Program Does Not Conflict with State Regulations Like the Clean Fuels Program

1. EPA, the Agency Tasked with Designing and Implementing, the RFS2 Program, Does Not View State Regulation of Greenhouse Gas Emissions From Fuels As Conflicting with Its Program

Even if the Court concludes Plaintiffs have prudential standing here, their fourth claim fails for a number of reasons identified in Defendants' motion. In addition, Plaintiffs have not alleged, and cannot allege, facts sufficient to overcome the EPA's express assertion that its federal program does not conflict with state programs like the one challenged here. As part of its RFS2 rulemaking, EPA noted that one commenter had urged EPA to "preempt state programs designed to address carbon content and lifecycle analysis of fuels" including "state low carbon fuel standards." RJN Exh. G at 13-14. EPA rejected the suggestion that it should preempt state low carbon fuel standards (like Oregon's Program), noting instead that "[i]ssues associated with State LCFS programs … are not germane to the final RFS program." *Id.* at 13-15. Indeed, EPA saw no conflict between such state programs and its RFS2 program, indicating that "where possible [EPA has] attempted to structure the RFS2 program so as to be compatible with existing State LC[F]S programs, including coordination on lifecycle modeling." *Id.*

EPA's responses to comments also show that EPA fully understood the functional differences between the RFS2 program it was adopting and the low carbon fuel standards that States were considering, namely that RFS2 mandates volumes of particular categories of fuels that must be sold whereas low carbon fuel standards establish carbon-intensity standards that apply across whatever volumes of fuel are sold or consumed. RJN Exh. G at 7-1. ("While these [RFS2] thresholds do not constitute a specific control on greenhouse gases for transportation fuels (such as a low carbon fuel standard), they do require that the volume mandates be met …."). Given this understanding and EPA's own assertion that it was coordinating with States on lifecycle modeling, EPA would have been well aware that state low carbon fuel standards would apply lifecycle analysis to *all* fuels sold for use in the State, including to those fuels produced by exempted biofuel facilities.

Given EPA's assertion that it "attempted to structure the RFS2 program so as to be compatible" with state regulations like Oregon's Clean Fuels Program, Plaintiffs would need to establish that EPA failed in this attempt in order to prevail on their preemption claim. Plaintiffs have not so alleged, and cannot so allege. In fact, Plaintiffs' allegations would fail to support a claim even in the absence of EPA's recognition that these types of programs are "compatible." In light of EPA's assertions, Plaintiffs' allegations are plainly insufficient, and the claim should be dismissed.

2. Plaintiffs Have Failed to Allege Any Facts That Could Support a Claim That, Contrary to EPA's Position, State Programs Like the Clean Fuels Program Conflict with RFS2

As with their other claims, Plaintiffs' fourth claim relies on unsupported conclusory assertions this Court need not accept, and unreasonable inferences this Court need not make. Specifically, Plaintiffs allege (or ask this Court to infer) that the Clean Fuels Program is designed to close Oregon's market to "certain forms of corn ethanol" (presumably referring to corn ethanol from exempted facilities). But Plaintiffs allege nothing about the carbon intensity of the ethanol produced by those exempted facilities. Given that, and in light of the low carbon-intensity values obtained by many Midwestern producers, there can be no reasonable inference that the exempted plants will be particularly burdened by Oregon's Clean Fuels Program.

In fact, Plaintiffs' failure to allege any specifics about the plants they claim will be harmed highlights that these Plaintiffs are not the right plaintiffs for this case (if there are proper plaintiffs). Plaintiffs' failure to allege any facts about the exempted plants, including their identities, the carbon intensities of their ethanols, or whether they have ever sold ethanol to Oregon, meets the standard for dismissal under Rule 12(b)(6). It also suggests that, if Plaintiffs' fourth claim somehow survives the motions to dismiss, the parties would have to engage in third-party discovery to obtain these facts, using up their resources, the resources of the allegedly impacted ethanol producers, and the resources of the judiciary, in order to resolve a claim that the allegedly impacted ethanol producers have not brought.

Plaintiffs have failed to allege non-conclusory facts that could support an inference that the Clean Fuels Program conflicts with RFS2 and EISA, particularly in light of EPA's express determination that these kinds of programs are "compatible." Plaintiffs' fourth claim should be dismissed with prejudice.

CONCLUSION

The complaint should be dismissed for the reasons described above.

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Respectfully Submitted,

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LR 11 CERTIFICATION

The undersigned counsel certifies that counsel for the State of Washington consented to inclusion of her signature, for Washington, on this document.

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