Dunkiel Saunders
ELLIOTT | RAUBVOGEL | HAND

91 College Street, PO Box 545
Burlington, VT 05402-0545
tel 802.860.1003 | fax 802.860.1208
www.dunkielsaunders.com

Malachi T. Brennan
Brian S. Dunkiel [+]
Eileen I. Elliott
Shawn Gordon [* °]
Geoffrey H. Hand
John B. Kassel
Drew Kervick[°*]
Andrew N. Raubvogel
Jonathan T. Rose
Zoë E. Sajor [* °]
Mark A. Saunders
Victoria M. Westgate

MEMORANDUM

To: Clean Heat Standard Working Group

From: Geoff Hand, Malachi Brennan, Vic Westgate, & Paul Quackenbush
Dunkiel Saunders Elliott Raubvogel & Hand, PLLC

Re: Clean Heat Standard Legal Assessment

Date: January 24, 2022

BACKGROUND

Dunkiel Saunders was asked by the Clean Heat Standard ("CHS") Working Group to evaluate certain aspects of its CHS proposal, particularly related to the State of Vermont's jurisdictional authority to implement this type of regulatory regime, as well as potential Constitutional questions that could be raised by this type of program under either the Dormant Commerce Clause or Preemption doctrines. This memo summarizes our research on these matters with respect to the specific proposal recommended in the Working Group's CHS White Paper ("CHS proposal").[1]

The Vermont Climate Council reviewed the CHS Proposal as part of its work and incorporated the CHS Proposal into its draft Climate Action Plan ("CAP").[2] The Climate Council recommends that the Legislature implement a program consistent with the CHS Proposal as a strategy for achieving the Greenhouse Gas ("GHG") reduction requirements for Vermont's thermal sector established in Vermont's recent Global Warming Solutions Act ("GWSA").[3] As the CHS White Paper notes, there are various potential alternative design approaches to be considered in developing legislation for such a program. Our analysis is based on the CHS proposal recommendations, and it is important to note that policy decisions on how to implement the program could impact the fact-specific discussion below.

Clean Heat Standard Proposal

The CHS proposal establishes a performance-based standard for achieving the GHG reductions required for the thermal sector in Vermont under the GWSA. The CHS Working Group likens the proposal to clean energy performance standards that have successfully been applied to electric and pipeline gas utilities—the most well-known example being electric

---

[1] *The Clean Heat Standard*, Energy Action Network Clean Heat Working Group, December 2021.
[2] *Initial Vermont Climate Action Plan*, Vermont Climate Council, p. 96 (Dec. 2021) available at: https://outside.vermont.gov/agency/anr/climatecouncil/Shared%20Documents/Initial%20Climate%20Action%20Plan%20-%20Final%20-%2012-1-21.pdf
[3] 10 V.S.A. § 578, § 590 *et seq*.

Certified B Corporation

Renewable Portfolio Standards ("RPS") in many jurisdictions, including Vermont. Generally, an RPS requires electric utilities to source an increasing percentage of their generation from renewable sources. This increase over time helps shape a transition to greater renewable generation as the corresponding market strengthens alongside the mandate.

The CHS proposal works in a similar way: suppliers of fossil-fuel heat in Vermont must provide a gradually increasing percentage of their sales to Vermont customers as low carbon heat. This percentage would be set as a performance standard by the Vermont Public Utility Commission ("PUC") based on the magnitude of carbon reductions needed to meet the GWSA's requirements for the thermal sector. As currently designed, "obligated parties"—wholesalers of fossil-fuel heat such as propane and heating oil, as well as Vermont's pipeline natural gas distribution utility, Vermont Gas Systems ("VGS")—can satisfy this performance standard through many pathways that reduce greenhouse gas emissions.

The CHS is a credit-based system, with credits reflecting a direct reduction of carbon dioxide or carbon dioxide equivalent ("CO2e") emissions in Vermont. Credits can represent reductions made by an obligated party (such as delivering low-emission fuel) or can be purchased from a third party implementing qualifying clean heat projects. The specific value of these credits and technical requirements for achieving and verifying the reductions will be established by a technical working group ("TAG") and supervised in a Public Utilities Commission ("PUC") rulemaking.

Only measures that directly reduce consumption at the point of combustion are eligible—that is measures to convert fossil-fuel heating sources to advanced wood heat, electric, or biofuels are eligible, while measures "upstream," in the production and transmission process or offsetting actions are not eligible. Likewise, biofuels with lower lifecycle emissions create credits for that reduction when delivered to a Vermont customer, but the environmental attributes for deliveries made outside of Vermont may not be "unbundled" to offset an in-state fossil fuel delivery.[4] Above all, the goal of the CHS is to directly reduce greenhouse gas emissions in the state. In developing this proposal, the Working Group was guided by lessons learned from existing low-carbon transportation fuel standards—such as California's Low Carbon Fuel Standard ("LCFS")—as well as recent clean heat proposals in Colorado, Oregon, New York, and California.

The Working Group's primary rationale for limiting credit generation to in-state fossil-fuel reductions is to align the CHS with the GWSA's emissions reductions target, which directs the state to reduce emissions within the state or those caused by the use of energy within the state, and recognizes that all states and countries will need to take action to limit emissions directly attributable to their energy use. The requirement is also designed to avoid the challenges of verifying and attributing distant reductions, the potential for double-counting, and to create regulatory and accounting predictability for obligated parties and state regulators.

[4] Similarly, as proposed, VGS may also only gain credit for "bundled" biofuels with accompanying Renewable Energy Certificates ("RECs") and have transmission capacity to actually deliver the biofuel to the Vermont market.

ANALYSIS

In our assessment of the CHS, we have reviewed recent challenges to various state RPS programs, or their equivalent, designed to encourage renewable energy development and reduce emissions for regulated electric utilities. We were also guided by the litigation surrounding California's LCFS, which set a declining cap for carbon emissions in the transportation sector and analyzed the carbon intensity of various fuels sold into the state.[5] This memo evaluates the CHS through the lens of these recent challenges throughout the U.S. and provides our assessment of the state's authority to implement a CHS.

In short summary, Vermont is well-empowered to regulate products entering the state for the health and safety of its citizens. This general jurisdiction is constrained by two legal doctrines, discussed in detail below. Both doctrines involve the balance between the state's regulatory interests and federal interests. Based on our review of relevant examples and case law noted above, we find the CHS proposal is a proper exercise of the State's authority to address issues it has determined to be important to the public's safety and well-being and can be applied to the voluntary sale of fuels in Vermont in a manner that does not run afoul of federal constitutional limits.

I. Jurisdiction over Obligated Parties

Vermont, as with all the states, exercises the authority of a sovereign entity within its borders. Chief among this sovereign power is what is known as the "police power"—the ability to make laws and regulate for the public's safety and well-being. A "state's energy policy and regulation of the [energy] industry are regarded as some of the most important functions of that power."[6]

Within this broad ambit of authority, Vermont already regulates the heating industry for health and environmental purposes—for example, limiting sulfur content in heating oil[7] and requiring licensing fees to support the state petroleum clean-up fund for retailers of bulk heating fuel.[8] Taxes are imposed on heating oil and propane to support weatherization initiatives.[9] Consumer protection is another exercise of the state's police power, and Vermont's Attorney General administers Consumer Protection Rule 111, which governs the business practices of propane dealers.

Specifically with respect to fuel wholesalers, Vermont also has the authority to create a state strategic oil set-aside from importers of liquid fossil fuels.[10] This statute applies to "prime

---

[5] *See Rocky Mountain Farmers Union v. Corey*, ["Ca. LCFS"], 730 F.3d 1070, 1080 (9th Cir. 2013)
[6] *Virginia Elec. & Power Co. v. State Corp. Comm'n*, 300 Va. 153, 167, 861 S.E.2d 47, 54 (2021) (citing *Arkansas Elec. Co-op. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983)); *Allco Fin. Ltd. v. Klee*, 861 F.3d 82, 101 (2d Cir. 2017) (citing *Arkansas Elec. Co-op*).
[7] 10 V.S.A. § 585.
[8] 10 V.S.A. § 1942.
[9] 33 V.S.A. § 2503.
[10] 9 V.S.A. § 4133.

suppliers"—defined as any entity making a "first sale" of fossil fuel into the state distribution system.

In enacting the CHS, the state would also be exercising this police power, and in ensuring the health of its citizenry—primarily by taking action against climate change, but also in reducing local emissions and creating more price-stable heating options—Vermont would be well within its authority while acting inside of its borders. As outlined in the CHS Proposal, and as discussed further below, the obligations under the program would attach to wholesale transactions of fossil fuels that are intended for use or sale in Vermont, or in the case of Vermont's only regulated natural gas distribution utility, at the distribution level. With respect to parties beyond VGS, this obligation could be defined similarly to the current definition of "prime supplier" used in the state strategic oil set aside statute.[11]

II. Federal Limitations on State Authority

While Vermont's authority within its jurisdiction is significant, the limits of state power are defined in relation to the powers of the United States. How the federal authority interacts with the states can be complicated and is best understood in this instance through two legal doctrines. The first doctrine, the Dormant Commerce Clause, ensures that states do not unduly interfere with interstate commerce, a federal concern, despite a lack of federal regulation on the subject matter. The second analysis applies when the federal government *has* acted to regulate the subject and determines the extent that federal law preempts a state law.

Both doctrines have been raised in litigation related to electric RPS's and the LCFS, and these prior cases provide guidance for the design and implementation of a CHS here in Vermont. The Dormant Commerce Clause is evaluated in in Section II.A below, and preemption is addressed in Section II.B.

A. Dormant Commerce Clause

Challenges to state clean energy policies often focus on the degree the policy regulates interstate commerce. Article 1, Section 8 of the U.S. Constitution grants the power to regulate interstate commerce to Congress—implied in this grant is a corresponding restraint on the states to refrain from interfering with national competitive markets, even when Congress has yet to regulate on a subject. The primary concern of the "Dormant Commerce Clause" doctrine is to prevent "economic protectionism—that is, regulatory mechanisms designed to benefit in-state economic interests by burdening out-of-state competitors."[12]

When evaluating a state law under the dormant Commerce Clause, courts will consider three primary questions:

---

[11] "Prime supplier" under 9 V.S.A. § 4132 is defined as "any individual, trustee, agency, partnership, association, corporation, company, municipality, political subdivision, or other legal entity that makes the first sale of any liquid fossil fuel into the State distribution system for consumption within the State."
[12] *Rocky Mountain Farmers Union v. Corey*, "Ca. LCFS" 730 F.3d 1070, 1087 (9th Cir. 2013)

(1) **Does the law discriminate between in-state and out-of-state interests?** Discrimination under the Dormant Commerce Clause means "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter."[13] Discrimination can be present in the plain text of the law ("facial" discrimination) or can appear in evidence demonstrating that the purpose or practical effect of the law is to discriminate. If a law is discriminatory, it is essentially invalid unless the state can show that the law serves a legitimate local purpose, and no nondiscriminatory alternative exists.[14]

(2) **Does the law regulate commerce occurring entirely outside of the state?** Such "extraterritorial" laws are invalid to the extent they regulate transactions wholly outside of the state. However, this requirement is not designed to prevent out-of-state "ripple effects" from transactions involving an in-state party.[15]

(3) **Does the law impose a burden on interstate commerce that "is clearly excessive in relation to the putative local benefits?"[16]** This final question is far more permissive then the previous two and involves a fact-specific balancing test. Most laws at this stage are upheld.[17]

1. Out-of-state Discrimination under the Dormant Commerce Clause

The starting point of the discrimination analysis is identifying suitable entities for comparison.[18] Vermont, like all states, is free to regulate on the basis of real differences between products—including their carbon content[19]—the Dormant Commerce Clause forbids only the differential treatment of competitive and similar products based on the state of origin. As the Supreme Court made clear in *Gen. Motors Corp. v. Tracy*, products are similarly situated for comparison when they compete against each other in a single market,[20] even if they are comprised of different materials.[21]

---

[13] *Ca. LCFS*, 730 F.3d at 1087.
[14] *Maine v. Taylor*, 477 U.S. 131, 138 (1986).
[15] *Ca. LCFS*, 730 F.3d at 1103.
[16] *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).
[17] No recent electric or renewable fuel policy we could find has been stuck down under the *Pike* test. *See*, e.g., *American Petroleum Institute v. Cooper*, 835 F.Supp.2d 63 (E.D.N.C. 2011); *PPL EnergyPlus, LLC et al. v. Nazarian*, 974 F. Supp.2d 790 (D. Md. 2013); *Energy and Environment Legal Inst. v. Epel*, 43 F.Supp.3d 1171 (D. Col. 2014); *Allco Finance Ltd. v. Klee*, 861 F.3d 82 (2nd Cir. 2017). These cases are all discussed throughout this memo.
[18] *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 298 (1997).
[19] *See Ca. LCFS*, 730 F.3d at 1092–96 (noting that assigning value to the real risk posed by carbon-content in fuel is a legitimate regulation and that Midwest ethanol producers have no entitlement to continue to compete without accounting for this externality in the California market); *A see also PPL Energyplus, LLC v. Nazarian*, 974 F. Supp. 2d 790, 852 (D. Md. 2013) (holding state may "create or sustain" new competitive entities so long as it doesn't affirmatively discriminate against interstate commerce; noting that the Commerce Clause does not protect individual market participants or a "chosen way of doing business" (citations omitted)).
[20] *Tracy*, 519 U.S. at 298.
[21] *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 268–69 (1984).

Under each of the following sections, this memo evaluates the Commerce Clause considerations of the CHS proposal based on comparisons of the relevant in- and out-of-state competitive entities.

i. Facial Discrimination

On its face, the CHS makes no distinction between in-state and out-of-state obligated parties.[22] Generally, while the CHS requires that CO2e reductions occur in-state, it does not require an in-state firm perform this work or deliver the product. Indeed, the CHS proposes to allow a wide variety of compliance methods, which can be provided by in-state or cross-border firms, or out-of-state entities. There is no preference or advantage built into the CHS for in-state products in this range of methods—any difference in the value of a compliance method should be correlated to achieving a given CO2e reduction through each method, under the TAG process implemented by the PUC under the proposal.

The only geographic distinction drawn in the current CHS proposal relates to the activities that reduce CO2e and generate credits. While the proposal does not restrict who—in-staters or out-of-staters—may receive credit for reductions, the CO2e reduction must be "delivered" in Vermont. The Second Circuit Court of Appeals[23] recently heard a challenge to a similar locational benefit requirement in Connecticut's electric RPS, determining in *Allco Finance Ltd. v. Klee* that the requirement did not discriminate under the Dormant Commerce Clause.[24]

The provision at issue in Connecticut's RPS in *Allco* required utilities to either produce renewable energy themselves or purchase RECs from a renewable source located within the New England regional grid, ISO-NE.[25] A solar developer claimed that this requirement discriminated against their Georgia solar facility's ability to compete in the sale of RECs against a similarly-situated solar facility in the ISO-NE region. [26]

---

[22] As discussed in Section II.A.3, there are facial distinctions between categories of obligated parties (VGS relative to other parties) that have the effect of differential, but not constitutionally discriminatory effects.

[23] Notably, the Second Circuit is federal appeals court that hears appeals from, and sets precedent for, the Vermont federal district court.

[24] *Allco*, 861 F.3d 82 (2d. Cir. 2018).

[25] RECs associated with power imported into the ISO-NE grid from adjacent regions could also satisfy the requirement. *Allco* brought a second Dormant Commerce Clause challenge claiming that transmission fees associated with importing energy and RECs from a New York facility into the ISO-NE grid also discriminated against renewable generation out of the region. This claim gained little traction, with the court noting that such fees appear no different than a reasonable road toll or use fee. *Id.* at 108.

[26] Of course, for interstate electric grids (or natural gas distribution), it is impossible to track delivery of power from a specific source to its ultimate consumption. Therefore, Connecticut's requirement differentiates based on the extent of the regional grid, not state lines. However, laws benefiting a region of several states are still scrutinized under the Dormant Commerce Clause because there is still a potential disparate effect on interstate commerce from outside the region. *Id.* at 103, n. 16. As described in this section, the Connecticut scheme challenged in *Allco* was upheld notwithstanding the differential treatment of in-region generators compared to out-of-region generators.

Central to the court's analysis and holding is the principle that a REC is an "invention of state property law."[27] State law defines what does and does not meet the legal requirements of its RECs, and consequently what products may compete in the credit market. Indeed, state law creates the market. Connecticut argued, and the court agreed, that its program did not discriminate, but only differentiated between two separate products that serve separate markets: RECs that meet its standards and those that do not.[28]

As the *Allco* court recognized, the U.S. Supreme Court in *General Motors v. Tracy* created a framework to analyze the comparability of products that are similar yet serve different markets.[29] This additional analysis is required—even though the products may not compete within a state-created market—if the products are similar enough to otherwise compete against each other in separate interstate markets. Any competitive support provided by the state-created market would therefore implicate interstate commerce.

Tracy, briefly, involved a challenge to an Ohio law that exempted in-state public gas utilities, selling to a residential market, from taxes levied on independent natural gas marketers who sold in bulk to commercial and industrial customers.[30] The Court recognized that the state had a powerful interest in maintaining a noncompetitive and regulated residential market, served by the public utility, to ensure adequate supply for its citizens health and safety, but also that the utilities and marketers competed within a second market for bulk sales.[31] As the Court saw it, resolving the Commerce Clause question required weighing the protection of the state-created market, in which only the utilities participate, against any competitive influence in the larger bulk market both parties competed in.[32] In *Tracy*, the balance favored the state and the public utilities:

> The continuing importance of the States' interest … is underscored by the common sense of our traditional recognition of the need to accommodate state health and safety regulation in applying dormant Commerce Clause principles. State regulation of natural gas sales to consumers serves important interests in health and safety in fairly obvious ways, in that requirements of dependable supply and extended credit assure that individual buyers of gas for domestic purposes are not frozen out of their houses in the cold months.[33]

As stated in *Allco* and modified in the context of the RPS challenge, the *Tracy* framework asks four questions:

---

[27] *Id.* at 103 (quoting *Wheelabrator Lisbon, Inc. v. Conn. Dep't of Pub. Util. Control*, 531 F.3d 183, 186 (2d Cir. 2008) (per curiam)).
[28] *Id.*
[29] *Id.* at 105 (citing *Tracy*, 519 U.S. at 300).
[30] *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 281–82 (1997).
[31] *Id.* at 303–04.
[32] *Id.*
[33] *Id.* at 306.

1) Whether the allegedly competing entities provide different products, i.e. different RECs.
2) Whether there is a market that only one of the two entities serves, and in which competition would not be increased if the differential treatment of the two entities were removed.
3) Whether there is also a separate market in which these two types of producers compete, and in which competition potentially would be served if [the state] were prohibited from treating them disparately.
4) Whether the opportunity for increased competition between REC producers in the national market necessitates treating [the] REC-producers … alike for dormant Commerce Clause purposes, or whether the needs of [the state's] local energy market permits treating the two types of REC producers differently.[34]

The *Allco* court answered the first three questions in the affirmative, requiring a balancing of Connecticut's RPS program's needs against the national REC market under the fourth question. Questions one and two are simple—only RECs produced within the ISO-NE region qualified for the RPS, and there was a national market for RECs that both New England and Georgia solar generators could participate and compete in. On the second question, the court focused on the specific needs of the Connecticut program. The locational requirement was designed to ensure that Connecticut consumers benefit from the increased reliability and reduced emissions of *local* renewable generation. The Georgia plant, if it was allowed to sell its RECs into the RPS, would not increase local generation; any potential additional competition would not serve the state's goals.

Balancing the relevant interests under the fourth question, the court was guided significantly by the outcome in *Tracy*:

> Just as the Tracy Court recognized the importance of Ohio's interest in protecting the … natural gas market from the effects of competition in order to promote public health and safety, so must we here recognize the importance of Connecticut's interest in protecting the market for RECs produced within the ISO-NE or in adjacent areas. *Connecticut's RPS program serves its legitimate interest in promoting increased production of renewable power generation in the region, thereby protecting its citizens' health, safety, and reliable access to power*.[35]

As in *Tracy*, significant weight is accorded to the state scheme when it is exercising its traditional regulatory power to promote health and safety—including here to encourage renewable generation.

For the much the same reasons in *Allco*, the CHS proposal includes a justifiable locational benefit provision under the *Tracy* framework—assuming that a larger interstate market exists for monetizing CO2e reductions.[36] Vermont, like Connecticut, is free to define a category

[34] *Allco*, 861 F.3d at 105–06 (cleaned up)
[35] *Id.* at 106 (emphasis added).
[36] If it does not, then the dormant Commerce Clause would not be implicated, as there would be no basis to compare competitive products within a single market. Although we are not aware of a current national

of credits under state law. Also like the Connecticut RPS, increasing competition by removing the locational requirement in the CHS proposal would not advance the goals of the CHS. At the most basic level, Vermonters would lose the benefits created through in-state installation of clean heat solutions, including possible emission reductions and more stably priced heating options in the face of fluctuating fossil fuel markets. At a programmatic level, in-state reductions promote accurate calculation and verification of credits while avoiding double-counting. And at a high level, tying reductions to in-state energy use advances the GWSA and supports a state policy of responsibility for climate-change mitigation.

Reaching the balancing test under the fourth question, *Allco* should continue to guide the analysis. Vermont's interest in mitigating climate change and providing reliable low-carbon heating solutions through the CHS is deserving of the same significant weight assigned to Connecticut's' interests advanced by the RPS. On the other side of the scale, the CHS proposal is even less restrictive of interstate commerce than the Connecticut RPS—biofuels and alternative clean heat equipment and fuels could be imported from anywhere, as opposed to a delivery requirement that also requires renewable generation to be located in or near the ISO-NE grid.

In sum, the CHS as proposed does not differentiate based on in-state and out-of-state actors, provides avenues for in-state and out-of-state products to generate credits, and the "deliverability" requirement can be constitutionally justified.

ii. Discriminatory Purpose

The second prong of the discrimination analysis under the Dormant Commerce Clause is whether the state program is implemented with a discriminatory purpose. Courts will find a discriminatory purpose when a statute explicitly states its protectionist purpose,[37] or hides a protectionist purpose with a sham purpose or "*post hoc* rationalization."[38] On the other hand, where the state law claims a reasonable and legitimate purpose, especially in an area where states traditionally regulate such as protecting its citizens' health and safety, courts are less likely to

market for such credits, for purposes of this analysis, we have assumed the existence of a larger competitive market for clean-heating credits in the event one does develop.

[37] *See All. for Clean Coal v. Miller*, 44 F.3d 591, 595 (7th Cir. 1995) (holding unconstitutional Illinois law designed to protect the in-state coal industry by requiring power plants to install scrubbers that mitigated the burning of high-sulfur coal rather than out-of-state low-sulfur coal. Even though no geographic discrimination was present in these technical requirements, the court had no difficulty finding a discriminatory purpose because the statute's purpose section explicitly stated its protectionist intent).

[38] *Maine v. Taylor*, 477 U.S. 131, 149, 106 S. Ct. 2440, 2453, 91 L. Ed. 2d 110 (1986).

second-guess the purpose.[39] The party challenging a law bears the burden of demonstrating a discriminatory purpose.[40]

The CHS proposal primarily seeks to take responsibility for the state's contributions to atmospheric emissions through the heating sector and asserts legitimate environmental and health purposes, including mitigating climate change and its impacts, providing affordable and reliable low-carbon heating for Vermont citizens, and significantly, supporting the state's efforts to achieve the emission reduction targets within the GWSA. The proposed scheme is designed to ensure that the program can be administered efficiently and effectively to achieve reductions that qualify for GWSA targets. The final legislation should remain clear that it is directed at these environmental, public health, and safety purposes.

iii. Discriminatory Effect

The final discrimination question under the Dormant Commerce Clause is whether the statute has a discriminatory effect. Again, it is the challenger's burden to show a discriminatory effect and "when neither facial discrimination nor an improper purpose has been shown, the evidentiary burden to show a discriminatory effect is particularly high."[41] This burden requires "substantial evidence of an actual discriminatory effect."[42] Moreover, the Dormant Commerce Clause protects interstate *markets* from undue discrimination, not particular *firms* or "structures or methods of operation in a retail market"—"that the burden of [an otherwise evenhanded law] falls on some interstate companies does not, by itself, establish a claim against interstate commerce."[43]

We understand that Vermont currently is served by a balance of in-state and out-of-state wholesalers of fossil-fuel heating products,[44] and one in-state natural gas public utility.

---

[39] *See PPL EnergyPlus, LLC v. Hanna*, 977 F. Supp. 2d 372, 412 (D.N.J. 2013) (holding that New Jersey's requirement that a generation plant be located in-state was a reasonable response to grid reliability issues, and declining to credit evidence that purpose of requirement impermissibly favored economic development in-state);
PPL Energyplus, LLC v. Nazarian, 974 F. Supp. 2d 790, 852 (D. Md. 2013) (viewing *All. for Clean Coal* narrowly as prohibition of legislating *explicitly* for protectionist purposes); *Am. Fuel & Petrochemical Manufacturers v. O'Keeffe*, 903 F.3d 903, 912 (9th Cir. 2018) ("We will assume that the objectives articulated by the legislature are actual purposes of the statute, unless an examination of the circumstances forces us to conclude that they could not have been a goal of the legislation." (quoting LCFS, 730 F.3d at 1097–98) (internal quotation marks omitted)).
[40] *CA LCFS*, 730 F.3d at 1097 (citing *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979).
[41] *Id.* at 1100.
[42] *Id.* (quoting *Black Star Farms LLC v. Oliver*, 600 F.3d 1225, 1233 (9th Cir. 2010)).
[43] *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127 (1978) (upholding Maryland statute prohibiting oil producers or refiners from operating retail gasoline stations in response to charges that these vertically-integrated companies favored their own stations during shortages; the law, despite solely restricting out-of-state companies, did not distinguish between in-state and out-of-state entities nor erect barriers against interstate dealers permitted to operate retail stations)
[44] We understand that there are several significant wholesale fuel storage/sale facilities in Vermont, delivering as much as half of the fuel sold at retail in the state. However, as discussed in this section,

Wholesalers of fossil-fuel heat are not treated any differently under the CHS proposal, whether they are organized in- or out-of-state. To the extent VGS, as an in-state entity, is treated differently under the proposal, the distinction relates only to its unique status as regulated distribution utility. And this argument only goes so far, as VGS is subject to CHS requirements. There are many real-world, non-discriminatory differences between how credits could accrue for a regulated pipeline distribution utility compared to other fuel suppliers, and therefore this distinct treatment is justified.

As discussed in Section II.A.1, the Supreme Court in *Tracy* relied on the unique market position of a public gas utility in upholding an Ohio tax on bulk natural gas marketers that exempted distribution utilities.[45] Noting that public utilities, by their nature, serve noncompetitive, highly regulated markets, the Court determined that a utility and a marketer were not entities suitable for comparison, even when they do compete in the provision of natural gas, and that the state's interest in regulating the distribution of residential natural gas overrode the Dormant Commerce Clause considerations.[46] Therefore, VGS and the other fuel wholesalers are likewise not suitable for comparison within a single market, as VGS participates primarily in a non-competitive, regulated market.

Even if VGS and the obligated parties could be considered to sell like-situated and competing products, there is no discriminatory effect, and we note that the Working Group has accounted for the real differences between VGS and the other obligated parties without any geographical criteria. For example, when delivering biogas alternatives, VGS cannot discretely track the gas within its distribution system and therefore is credited when a "bundled" purchase of gas and its REC is delivered to the distribution system, as opposed to at a customer's home. As noted in the CHS whitepaper, this may require VGS to take additional steps to secure transmission capability for biofuels onto its system.

Further, many of the compliance methods—particularly those provided by installing clean heating equipment through third parties—are available equally to all obligated parties. Most importantly, all credits are based solely on actual CO_2e reductions. The California LCFS was upheld because that standard calculated the carbon content for transportation fuel based on a number of factors—all of which reflected the real-world carbon intensity of a fuel supply.[47] Here too, there may be different pathways to receive credits between the parties, but each reduction should be credited by the TAG in a manner that "reflect(s) the reality of assessing and attempting to limit GHG emissions," and is neutral as to whether the credit is utilized, or generated, by VGS or a fuel wholesaler, or by an in-state entity or an out-of-state entity. While we must emphasize that Commerce Clause challenges are fact specific, it appears that the CHS proposal is tailored to achieving parity rather than differentiating between the obligated parties,

---

even assuming all of the obligated parties except VGS were out-of-state entities, the CHS proposal would not have a discriminatory effect.

[45] *Tracy*, 519 U.S. at 281–82

[46] *Id.* at 306–07.

[47] *LCFS*, 730 F.3d at 1093 ("The dormant Commerce Clause does not require California to ignore the real differences in carbon intensity among out-of-state ethanol pathways, giving preferential treatment to those with a higher carbon intensity. These factors are not discriminatory because they reflect the reality of assessing and attempting to limit GHG emissions from ethanol production").

and where distinctions are made those distinctions are justified by circumstances or the purpose of the proposed program.

2. Extraterritoriality

The Dormant Commerce Clause also prohibits states from regulating conduct that occurs wholly outside of their borders. This prohibition on "extraterritoriality" is rarely enforced, because while "[s]tates may not mandate compliance with their preferred policies in *wholly* out-of-state transactions, . . . they are free to regulate commerce and contracts within their boundaries with the goal of influencing the out-of-state choices of market participants."[48] In dismissing a extraterritoriality challenge to the California LCFS, the Ninth Circuit noted that to regulate extraterritoriality, a law must directly regulate out-of-state parties, rather than contractual relationships where at least one party is located in-state.[49] Because the LCFS only regulated fuel sold in California from firms affirmatively doing business with the state, it was immaterial that ethanol producers may need to change their practices to account for the harms of carbon emissions and to compete in California. Similarly, here, the CHS proposal would focus only on those affirmative voluntary business transactions of fossil heating fuels by obligated parties that are intended for use in Vermont and would attach at the first point of sale in Vermont.

The Tenth Circuit took an even narrower view of the extraterritoriality prohibition in upholding Colorado's RPS. That court held that extraterritoriality cases must fit in one of three boxes established by the very few Supreme Court cases on the doctrine: laws that establish price-controls for transactions in another state, link prices in-state with prices paid in out-of-state transactions, or discriminate against out-of-staters.[50] The court believed it wasn't even a serious question that the RPS, which required utilities to source 20% of their electricity from renewable generation regardless of location, fell into any of those categories.[51]

The only RPS or recent energy case we found where an extraterritoriality challenge was successful turned on the wording of a Minnesota law that prohibited any "person" from importing new coal energy into the state grid without purchasing emission offsets.[52] Because electricity could travel through the Minnesota grid without ever being delivered in-state, a generator could technically violate this law without ever intending to sell into Minnesota.[53] This overly technical reading of the law could likely have been solved if the statute had specified "persons freely doing business with a Minnesota utility."

---

[48] *Ca. LCFS*, 730 F.3d at 1103.
[49] *Id.*
[50] *Energy & Env't Legal Inst. v. Epel*, 793 F.3d 1169, 1173 (10th Cir. 2015).
[51] *Id.* The challengers had taken the position that the renewable requirement would result in transmission companies purchasing carbon-intensive electricity in out-of-state transactions to switch to contracts with renewable generators for electricity destined to be imported into Colorado. The court noted that it would be "beyond naïve" to believe that state regulations do not have economic ripple effects beyond their borders—simply identifying such a consequence arising from out-of-state transaction is not the same as challenging a direct state regulation of that same transaction. *Id.*
[52] *North Dakota v. Heydinger*, 15 F. Supp. 3d 891, 44 ELR 20092 (D. Minn. 2014).
[53] *Id.*

As noted above, the CHS should likewise only cover affirmative sales of heating products into the state of Vermont. So long as the standard is defined in that manner, this is in all likelihood a permissible regulation of the harms of fossil fuel based on products entering the state, consistent with the California LCFS.

3. Incidental Burdens on Interstate Commerce

The final inquiry under the Dormant Commerce Clause is far more relaxed and applies once a law is found not to be discriminatory or to regulate exteritorialy. This test was established by the Supreme Court in *Pike v. Bruce Church* and is a fact-specific test that balances any incidental burden on interstate commerce against the claimed local benefits.[54] To strike down an even-handed law under *Pike*, the burdens on interstate commerce must be "clearly excessive" relative to the benefits to the state.[55]

This balancing between local and interstate interests might feel familiar—the *Tracy* framework applied by the *Allco* court also requires balancing between these interests to determine if regulatorily-distinct markets are discriminatory. In *Allco*, the court acknowledged that having answered the balancing of the regional REC market and the interests of the state against the larger interstate REC market in favor of the state, the more permissive *Pike* test was also "clear[ly]" satisfied.[56] The *Allco* court concluded by citing the Supreme Court in *Tracy*:

> We have consistently recognized the legitimate state pursuit of such interests as compatible with the Commerce Clause, which was never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, even if that legislation might indirectly affect the commerce of the country.[57]

The analysis for the CHS should be similar. Vermont would be regulating in a traditional area of state regulation in responding to climate change and its impacts, while also ensuring reliable, affordable heat—especially for lower income communities. Further, the incidental impacts on interstate commerce should be very minor. The CHS does not require a different product to be shipped to Vermont or mandate changes to labeling, production, or supply chains. Rather, various pathways are provided for compliance, and the specific compliance mechanism is voluntary, so firms may choose what makes economic sense to them, including paying others for credits while continuing business as usual. When weighed against the substantial benefits of the proposal, the incidental burdens are minor, and very likely do not rise to the level of "clearly excessive."

In summary, the CHS as proposed does not appear to discriminate, on its face or in purpose or effect, against interstate commerce; nor does it regulate extraterritorial conduct; and further it appears that the state benefits outweigh any incidental impacts on interstate commerce.

---

[54] 397 U.S. 137, 142 (1970).
[55] *Id.*
[56] *Allco*, 861 F.3d at 107
[57] *Id.* at 108 (citing *Tracy*, 519 U.S. at 306–07 (internal quotation marks omitted)).

As a result, we believe the CHS proposal is designed and can be implemented in a manner that does not violate the Dormant Commerce Clause.

B. Preemption

The second Constitutional question for this type of state regulatory action is whether the federal government has actually legislated on the topic area, as opposed to a "dormant" restraint. Federal law preempts state law to the extent the two are in conflict, by virtue of the Supremacy Clause of the U.S. Constitution, Article VI, § 2. Federal preemption may be either express or implied.

Express preemption is found when the plain language of a federal statute indicates that Congress intended to preempt state law.[58] Many federal statutes include express provisions indicating areas of state law that are preempted or preserved through savings clauses.

Preemption may be implied through either "field" preemption or "conflict" preemption. Field preemption applies when the Congressional scheme clearly occupies "an entire field of regulation, leaving no room for the States to supplement."[59] Conflict preemption occurs when "compliance with both state and federal law is impossible, or where the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[60]

Particularly relevant to the federal statutory schemes involved here, "when coordinate state and federal efforts exist within a complementary administrative framework, and in the pursuit of common purposes, the case for federal preemption becomes a less persuasive one."[61] Moreover, where preemption is not express, there is a presumption against preemption where the state is regulating in an area where states have traditionally regulated through the exercise of their police powers to protect the public's health and safety.[62]

In this section, we evaluated the potential preemptive effect of federal laws on the CHS, broken out first by heating fuel type, and followed by generally applicable laws.

1. Federal Regulation of Natural Gas

Responsibility for regulation of natural gas markets is shared between the federal government and the states, and these responsibilities are carefully delineated by the Natural Gas Act ("NGA").[63] That Act confers upon the Federal Energy Regulatory Commission ("FERC") the power to regulate the interstate transport and wholesale sale of natural gas.[64] Exempted from the Act, and subject to state regulation are: 1) retail sales and local distribution; 2) production or

---

[58] *Coal. for Competitive Elec., Dynergy Inc. v. Zibelman* (*"CCE"*) 906 F.3d 41, 49 (2d Cir. 2018).
[59] *CCE*, 906 F.3d at 49
[60] *Id.*
[61] *Id.* at 50.
[62] *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)
[63] 15 U.S.C. § 717 *et seq*.
[64] At the time of the Act's passage, FERC was known as the Federal Power Commission. For clarity, we will refer to both as FERC.

gathering of gas; and 3) wholly "intrastate" transport of gas for wholesale, if regulated by state commissions.[65]

As the federal courts have consistently recognized, Congress clearly intended FERC to have no power to regulate the market for retail sales of gas to consumers, which had traditionally been a state regulatory activity.[66] With respect to the CHS and natural gas, the CHS would be imposed upon VGS's retail sale of natural gas—market activities that are not governed by the NGA and therefore fall exclusively within the jurisdiction of the Vermont PUC. As such, the NGA should not preempt the CHS proposal.

This conclusion is strengthened by the many state electric RPS programs, including Vermont, that direct utilities to procure renewable generation as a percentage of their portfolios. Like the natural gas industry, the electric utility and transmission industry is also cooperatively regulated by FERC and state commissions, with FERC assuming jurisdiction over interstate transmission and wholesale sales, and states over local distribution and retail markets, under the Federal Power Act ("FPA"). Indeed, the Supreme Court has recognized that the preemptive scope of the NGA and the FPA are "analogous."[67] Therefore, the many successful electric RPS programs both guide and support the implementation of the CHS proposal as a proper exercise of state regulatory power.

Furthermore, in this analogous electric regulation context, the Supreme Court in *Hughes v. Talen Energy Marketing* endorsed state measures "to encourage development of … clean generation," so long as those measures do not "disregard[] interstate wholesale rates FERC has deemed just and reasonable."[68] Other courts have confirmed that as long as the state does not interfere with FERC's rate-reviewing function, "states may, for example, order utilities to build renewable generators themselves, or order utilities to purchase renewable generation."[69] Therefore, "it is clear that the Vermont Legislature can direct retail utilities to 'purchase electricity from an environmentally friendly power producer in California or a cogeneration facility in Oklahoma,' if it so chooses."[70] It is of no legal consequence that a state regulatory

---

[65] 15 U.S.C. § 717(b), (c), which provides:

> The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas *for resale* for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale…, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

Id. § 717(b).

[66] *See Fed. Power Comm'n v. Louisiana Power & Light Co.*, 406 U.S. 621, 638 (1972); *see also Cities Serv. Gas Co. v. United States*, 500 F.2d 448, 453 (Ct. Cl. 1974).
[67] *Hughes v. Talen Energy Mktg., LLC*, 578 U.S. 150, 164, n. 10 (2016).
[68] *Id.* at 166.
[69] *Entergy Nuclear Vermont Yankee, LLC v. Shumlin*, 733 F.3d 393, 417 (2d Cir. 2013) (quoting *S. Cal. Edison Co. San Diego Gas & Elec. Co.*, 71 FERC ¶ 61,269, at *8 (June 2, 1995).
[70] *Id.* (quoting *New York v. FERC*, 535 U.S. 1, 8 (2002)).

action "incidentally" alters a FERC-regulated market, so long as the state is regulat[ing] within the domain Congress assigned to them."[71]

That is the case with respect to the CHS provisions related to natural gas. One voluntary alternative compliance pathway for VGS to generate credits under the CHS is to purchase and distribute "bundled" biogas on its system. The purchase of this gas with its "bundled" REC indirectly relates to the underlying wholesale transaction, which would remain subject to FERC's jurisdiction.[72] However, the CHS proposal does not mandate this purchase, nor does it alter how this transaction is regulated or directly impact the price paid for the underlying wholesale purchase of the biogas itself—it simply allows VGS to purchase and deliver more low-carbon gas as an optional compliance pathway, with the purchases themselves regulated by FERC. Such a requirement is well with the state's regulatory domain, recognized by both FERC and the courts.

Two recent Second Circuit decisions affirmed these principles in the context of electricity RECs. First, in *Coalition for Competitive Electricity, Dynergy Inc. v. Zibelman* ("CCE"), a group of electric generators challenged New York's Zero Emissions Credit ("ZEC") program that subsidizes nuclear generation and supplements New York's REC program until sufficient renewables are able to replace the nuclear facilities.[73] The generators claimed that in tying the ZEC subsidy to wholesale market rates, the program altered the prices that result from wholesale auctions and "distort[ed]" the FERC-regulated market for power and production capacity. The court disagreed, noting that many state programs create price signals and other indirect effects on interstate markets under FERC jurisdiction. Particularly, the court noted that FERC has sanctioned state regulation that seeks to achieve environmental policy goals, notwithstanding the incidental impacts on interstate market prices.[74]

Second, returning to the *Allco* decision, the court there closely hewed to the "bright line" rule that the Supreme Court set out in *Hughes*—that state regulation may incidentally impact wholesale and interstate power markets so long as they do not disregard or adjust FERC's regulation of that market.[75] *Allco* had alleged that Connecticut "compelled" utilities to enter into wholesale transactions with specific renewable generators at specific prices, and argued this entailed regulation of wholesale markets.[76] This claim failed for two reasons: 1) that the transactions at issue would be subject to review by FERC, and 2) that Connecticut did not "compel" transactions, but merely directs utilities to engage with a bidding process that may or may not result in a transaction.[77]

The CHS proposal finds firm footing in both the *CCE* and *Allco* cases. It neither usurps nor disregards FERC regulation of wholesale pricing—any wholesale transaction would remain

---

[71] *Hughes*, 538 U.S. at 164.
[72] *See*, *In re WSPP*, 139 FERC P 61061 (F.E.R.C.), 2012 WL 1395532 (asserting jurisdiction over RECs sold in "bundled" transactions with a jurisdictional sale of power, but not over "unbundled" transactions)
[73] *Coal. for Competitive Elec., Dynergy Inc. v. Zibelman* [CCE], 906 F.3d 41 (2d Cir. 2018).
[74] *Id.* at 56.
[75] *Allco,* 861 F.3d at 102 (citing *Hughes*, 578 U.S. at 166).
[76] *Id.* at 97.
[77] *Id.* at 98–102.

subject to FERC's reasonableness review, and no provision alters the wholesale market price. Nor does the proposal require transactions—VGS is free to enter into transactions at its discretion or choose alternative compliance paths entirely. Therefore, any implication on the wholesale gas market would almost certainly be considered purely incidental and it is unlikely a court would find NGA preempts the CHS as proposed.

2. Federal Regulation of Heating Oil and Propane

National markets for heating oil and propane are not federally regulated. A number of safety regulations do apply generally to these industries—for example—hazardous material transportation standards[78] or, as discussed below, appliance design regulations. But these regulations would not conflict or otherwise preempt a market-based environmental regulation. Instead, as discussed in Part I, the sale of these products is currently regulated by several Vermont statutes and are already overseen to a limited degree by Vermont state agencies.

3. Other Federal Regulatory Schemes

Two other federal statutes could be implicated in a preemption analysis with respect to the CHS generally. The first statute is the Clean Air Act ("CAA"),[79] by virtue of the CHS arguably indirectly regulating air pollutants—namely carbon and other greenhouse gasses. The CAA generally envisions a cooperative state and federal scheme, whereby air pollution control "is the primary responsibility of States and local government."[80] The CAA treats "stationary" sources and "moving" sources separately. For emissions controls from moving sources, such as motor vehicles and airplanes, the federal authority expressly preempts state action excepting a significant carveout for motor vehicle standards set by California.[81] For fuels regulation, fuels utilized in motor vehicles are likewise primarily regulated by the EPA, with some specified exceptions for state action.[82]

By contrast, the CAA permits states to retain vast authority over stationary sources by setting lower limits for emission standards and expressly stating that states are free to set more

---

[78] *See, e.g.*, *Sawash v. Suburban Welders Supply Co.*, 407 Mass. 311, 316 (1990) (discussing hazardous material handling laws for propane and finding that "Congress has made clear that it has no intention of preempting the entire field of regulating every aspect of commerce in propane").
[79] 42 U.S.C.A. § 7401 *et seq.*
[80] 42 U.S.C.A. § 7401(a)(3).
[81] 42 U.S.C.A. § 7543(a) ("No State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part."); § 7543(b) (EPA may waive preemptive effect with respect to California if the state standards are "at least as protective" as the federal standard); *see also* § 7543(d) (notwithstanding preemptive prohibition, states may continue to regulate emissions from vehicles once manufactured and registered, i.e. annual inspections to ensure emissions controls are in working order).
[82] 42 U.S.C.A. § 7545(c)(4)(A) (restricting state—except California—controls on "characteristics or components of a fuel *if* the EPA has formally found that such controls are not necessary or already regulated the "characteristic or component"). *See CA LCFS*, 730 F.3d at 1106, *and Am. Fuel & Petrochemical Manufacturers v. O'Keeffe*, 903 F.3d 903, 917 (9th Cir. 2018) (challenge to OR Low Carbon Fuel Standard) for a discussion of state motor vehicle fuel regulation.

stringent standards.[83] It is also important to note that the CHS does not directly establish an emissions standard, but rather simply establishes a performance-based credit system that takes overall CO2e emissions into account when setting the value of credits.

The CAA also contains the authority for the EPA's Renewable Fuel Standard ("RFS"), which primarily focuses on transportation fuels, but also covers heating fuel.[84] The RFS requires refineries, blenders, and importers to introduce into commerce a certain volume of renewable fuels each year.[85] Obligated parties meet this quota by producing, acquiring, or blending renewable fuel themselves, or by purchasing credits from other parties engaged in these activities.[86] While the CHS creates a parallel credit system that could potentially apply to some similar obligated parties and activities as the RFS, the CHS is unlikely to create a conflict because the purpose of the RFS is complimentary to the CHS—to develop and advance clean, alternative, and renewable fuels—and because the CHS would not substantively change how obligated parties meet their RFS requirements.[87]

The second statute is the Energy Policy and Conservation Act ("EPCA"), which empowers the Department of Energy ("DOE") to set appliance efficiency standards, such as EnergyStar, and prohibits states from mandating stricter standards in building codes.[88] These regulations *could* be implicated because CHS credits may be created through installation of clean heating appliances. Heat pumps, HVAC systems, furnaces, and other heating equipment are all evaluated by the DOE under EPCA.[89] However, there is again unlikely to be any conflict or tension between the CHS and DOE's authority. The CHS does not require different appliance labelling or testing, nor alter building codes, or otherwise interfere with the purpose of this statutory regime. Indeed, the CHS intent is only to encourage the adoption and installation of more of these types of equipment. And in any event, obtaining credits through energy efficiency

---

[83] 42 U.S.C.A. § 7416 ("[N]othing in this chapter shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution; except … such State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under [an approved implementation plan]."), § 7545(c)(4)(A) (restricting state regulation of motor vehicle fuels only, not fuels for use in stationary sources).
[84] 42 U.S.C.A. §§ 7545(o), 7546.
[85] *Id.* For definitions of qualifying renewable fuels with corresponding lifecycle emission requirements, *see* 80 C.F.R. § 80.1401, which include corn ethanol, cellulosic biofuel, biomass-based diesel, and advanced biofuels with less than 50% the lifecycle emissions of a baseline fuel.
[86] *Id.*
[87] *See Am. Petroleum Inst. v. Cooper*, 718 F.3d 347 (4th Cir. 2013) (dismissing preemption challenge to state law requiring suppliers to provide unblended gasoline to retailers since obligated parties retained substantial flexibility in meeting RFS requirements); *Minnesota Auto. Dealers Ass'n v. Stine*, No. CV 15-2045 (JRT/KMM), 2016 WL 5660420 (D. Minn. Sept. 29, 2016) (dismissing preemption challenge to state renewable fuel program with stricter compliance requirements because it was complimentary to RFS, and the RFS does not reveal any intent to limit cooperative state activity).
[88] 42 U.S.C.A. §§ 6201 *et seq.*, specifically § 6297 (preemptive effect).
[89] 42 U.S.C.A. § 6292 (Act coverage).

measures is a voluntary compliance option, which at least one federal circuit court has deemed permissible under EPCA.[90]

We note also that the fossil fuel products are also generally subject to regulations governing safety in transport and delivery, including odorization and equipment requirements. However, the CHS proposal clearly would not conflict with these safety regulations.

In summary, our review of the relevant case law suggests that there is no reason to anticipate a court would find the CHS preempted by other federal regulatory programs.

* * *

[90] *See Bldg. Indus. Ass'n of Washington v. Washington State Bldg. Code Council*, 683 F.3d 1144 (9th Cir. 2012) (where building code incentivizes more efficient appliances, this is a voluntary rather than compelled requirement, even if financially coercive, and therefore EPCA does not preempt code).