

Affordable Heat Act Legal Considerations



Senate Natural Resources Committee
February 2, 2023

Geoffrey H. Hand
gband@srhlaw.com



Making a difference is our practice.

Summary of Presentation

- Review State jurisdiction to regulate heating fuels & implement the Affordable Heat Act.
- Discuss Federal constitutional limitations on state jurisdiction:
 - Dormant Commerce Clause
 - Preemption under the Supremacy Clause.
- Summarize guiding principles for design of the Affordable Heat Act with these doctrines in mind.



State Authority to Implement Affordable Heat Act

- Vermont, as with all the states, exercises the authority of a sovereign entity within its borders.
- Chief among these sovereign powers is the state’s “police power”—the ability to make laws and regulate for the public’s health, safety, and well-being.
- Federal courts recognize that a state’s energy policy and regulation of the energy industry are regarded as some of the most important functions of this police power
- Similarly, it is well settled that the states have a legitimate interest in combating the adverse effects of climate change on their residents. *Massachusetts v. EPA*, 549 U.S. 497, 522–23 (2007).



Existing VT Regulations Relating to Heating Fuels

Within the heating fuel industry, Vermont already regulates for public health, environmental, and consumer protection purposes in numerous ways:

- Sulfur content in heating oil - 10 V.S.A. § 585;
- Licensing fees for petroleum clean up for bulk heating fuel - 10 V.S.A. § 1942;
- Tax on heating oil and propane for weatherization initiative - 33 V.S.A. § 2503
- AG's Consumer Protection Rule 111 for propane dealers;
- Authority for State Strategic Oil Set-Aside. 9 V.S.A. § 4133.

Like the Affordable Heat Act, these programs apply to voluntary commercial transactions for products sold into Vermont for use in the state.



Dormant Commerce Clause

- The Commerce Clause of U.S. Constitution grants Congress the power “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes.” U.S. Const. art. I, § 8, cl. 3
- Implied in this express grant is a corresponding restraint that denies States the power to unjustifiably discriminate against or burden the interstate flow of articles of commerce – commonly referred to as the Dormant Commerce Clause.
- 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.” *Dep’t. of Revenue of Ky. v. Davis*, 553 U.S. 328, 337–38 (2008).



Dormant Commerce Clause cont.

When evaluating Dormant Commerce Clause questions, courts typically consider three questions:

1. Does the law discriminate between in-state and out-of-state interests?
2. Does the law regulate commerce occurring entirely outside of the state?
3. Does the law impose a burden on interstate commerce that “is clearly excessive in relation to the putative local benefits?”



Decisions on Similar State Programs

CA Low Carbon Fuel Standard

Regulations set standards to reduce GHG emissions attributable to CA's fuel market. Fuel blenders required to keep average carbon intensity below the standard's annual limit. Fuels generate credits or deficits based on carbon intensity. Fuels evaluated on life-cycle emissions and regulation creates a system of tradeable credits.

Upheld by 9th Circuit Court of Appeals – *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1080 (9th Cir. 2013).

- Found that distinguishing between types of fuel products based on **carbon intensity** does not violate DCC and is proper exercise of state regulatory authority to address a recognized environmental concern.
- Not an extraterritorial application – “[state] cannot peacefully impose its own regulatory standards on another jurisdiction. But California may regulate with reference to local harms, **structuring its internal markets** to set incentives for firms to produce less harmful products for sale in California.”.



Decisions on Similar State Programs

Oregon Clean Fuels Program

Similar in design to CA program. Upheld on similar grounds. *Am. Fuel & Petrochemical Manufacturers v. O'Keeffe*, 903 F.3d 903 (9th Cir. 2018).

- “Oregon program distinguishes among fuels not on the basis of origin, but rather on carbon intensity.... The fact that the Program labels fuels by state of origin does not render it discriminatory, as these labels are not the basis for any differential treatment.”
- No discriminatory purpose: “purpose of the Program is simply to ‘reduce Oregon's contribution to the global levels of greenhouse gas emissions and the impacts of those emissions in Oregon’.... “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.”
- Contemporaneous statements by public officials explaining the program, “do not plausibly relate to a discriminatory design and are ‘easily understood, in context, as economic defense of a [regulation] genuinely proposed for environmental reasons.’”



Decisions on Similar State Programs

Conn. Electric Renewable Portfolio Standard

- Required Conn. utilities to have set % of electricity from renewable sources; utility could generate renewable power itself or purchase Renewable Energy Certificates (“RECs”) from facilities in set geographic region – in this case the ISO NE region.
- Solar developer with a project outside ISO-NE region challenged statute as discriminatory under DCC.

Upheld by 2nd Cir. Court of Appeals. *Allco Finance Ltd. v. Klee*, 861 F.3d 82 (2d. Cir. 2018).

- Found geographic limitation appropriate given stated goals – increased in-region renewable energy production would improve air quality for Conn citizens and protect them from price and supply shocks that could result if, for example, there was a natural gas shortage.
- Also found RECs are created by state law, and states can define differently based on state goals. Other RECs that do not meet definition are not “similarly situated” products for purposes of evaluating competitive impacts under DCC



Preemption Doctrine

- Preemption Doctrine stems from the Supremacy Clause of the U.S. Constitution:

The laws of the United States are “**the supreme Law of the Land ... any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.**” U.S. Const. art. VI cl. 2..

- Federal preemption of state laws may be either express or implied:

Express preemption occurs where plain language of a federal statute indicates that Congress intended to preempt state law.

Implied preemption takes two forms = “field” preemption or “conflict” preemption.



Preemption Doctrine Cont.

- **Natural Gas Act (NGA)** – Provides federal regulatory (FERC) authority over interstate natural gas transportation and wholesale transactions; leaving states to regulate the production and retail distribution of natural gas.
- **Clean Air Act (CAA)** – Regulates air pollution emissions from both stationary and mobile sources. The CAA, like the NGA, relies on both state and federal regulation. States have substantial flexibility to regulate stationary sources more stringently than federal baseline.
- **EPA's Renewable Fuel Standard**– A 2005 amendment to the CAA to increase domestic renewable fuels production, reduce emissions, and limit oil imports, requires fuel refiners and importers to blend a certain volume of renewable fuel. Courts have held that stricter state renewable fuel limits are complementary to the goals of this program.
- **Energy Policy and Conservation Act** - Among other programs, provides U.S. Dep't of Energy authority to regulate the efficiency of appliances and building practices, and includes the Energy Star program.



Concluding Thoughts & Guiding Principles

- **Program should not discriminate based on origin:**
 - ✓ Evaluation of each clean heat measure based on lifecycle emissions considering full fuel pathway ensures decisions are based on impacts of alternatives, not origin of the alternative.

- **Program should only apply to jurisdictional transactions occurring within the state:**
 - ✓ Definition of Obligated Party: (A) a regulated natural gas utility serving customers in Vermont; or (B) for other heating fuels, the entity that makes the first sale of the heating fuel into or in the State for consumption within the State.

- **Obligations should apply as far up the chain of delivery as possible, keeping in mind jurisdictional limitations.**

- **Obligations for regulated natural gas distribution utility should be based on sales at the distribution level.**



Questions?



Senate Natural Resources Committee
February 2, 2023

Geoffrey H. Hand
ghand@srhlaw.com



Making a difference is our practice.