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David Conroy
Air Quality Planning
Office of Ecosystem Protection (MC CAQ)
EPA-New England
One Congress Street
Suite 1100
Boston, MA 02114-2023

Re: Proposed Rulemaking RO1-OAR-2004-NH-001—EPA’S PROPOSED APPROVAL OF FEDERAL RFG OPT-OUT AND OXYGEN-FLEXIBLE REFORMULATED GASOLINE IN NEW HAMPSHIRE

Dear Mr. Conroy:

The following submission represents the comments of NPRA, the National Petrochemical & Refiners Association, on the subject rulemaking. NPRA is a national trade association whose members include virtually all U.S. refiners and petrochemical manufacturers. NPRA believes that the nation’s energy and environmental policies must reflect the importance of efficient energy markets and the nation’s need for a secure supply of affordable fossil fuels, including gasoline and other refined products.

If formally adopted by the Environmental Protection Agency (EPA or the Agency), this rule would allow the state of New Hampshire (NH) to “opt-out” of the federal reformulated gasoline program in the designated four county area and, in its place, substitute an oxygen flexible reformulated gasoline (OFRFG) designed by the state. While NPRA agrees with NH in its desire to eliminate the minimum 2% oxygenate requirement for federal RFG in the four counties, we remain concerned that this effort falls short of their stated purpose and in fact can not be legally justified.

To support our beliefs and concerns, NPRA will, through these comments, discuss the following points in detail:

- *The 2% oxygen (by weight) requirement for federal RFG is unnecessary and inflexible, and should be eliminated either through a Clean Air Act (CAA) amendment or through administrative action.*
- *EPA cannot legally approve NH’s OFRFG request due to the federal “preemption” provisions of the CAA. These comments include a comparison of federal RFG and NH OFRFG summer VOC and summer NO_x standards, and*
- *NH can and should consider other available mean of reducing (non-fuel) emissions.*



Oxygen Content Requirement for Federal RFG

NPRA has long supported elimination of the 2 wt% oxygen content requirement for RFG in § 211(k) of the Clean Air Act. Removing the federal oxygen content requirement would provide refiners greater flexibility to meet supply and air quality requirements and changing market conditions more efficiently and economically. It would render actions such as those undertaken by NH unnecessary, with no impairment of air quality benefits.

The conference report for H.R. 6, the Energy Policy Act of 2003, includes the elimination of the 2 wt% oxygen content requirement for federal RFG in the Clean Air Act immediately in California and 270 days after enactment elsewhere. This would accomplish NH's objectives for an Oxygen-Flexible RFG and, in effect, convert all federal RFG nationally to this Oxygen-Flexible RFG. Unfortunately if NH goes forward with its own OFRFG regulations, NH's fuel will continue to be a specialty fuel even if the fuel provisions of the energy bill are enacted.

Federal Preemption

1. Overview

The federal preemption provisions in the Clean Air Act preserve a rational motor fuel supply, since states are precluded from unilateral adoption of unique specifications unless granted a waiver from EPA. This waiver request and review process provides an opportunity to carefully evaluate a State initiative against the statutory limits on local motor fuel controls. In this area, Congress has assigned the primary responsibility to the federal government, and EPA in particular.

NPRA believes that states are preempted from setting benzene, toxics and NO_x standards for gasoline, and have been so preempted at least since 1994 when the federal RFG and anti-dumping standards were promulgated (59 FR 7716; February 16, 1994). EPA made this point very clear in 1994 in the preamble for the final RFG and anti-dumping standards:

“EPA, therefore, is issuing today’s final rule under the authority of sections 211 (k) and (c), and promulgate under section 211(c)(4) that dissimilar State controls be preempted unless either of the exceptions to federal preemption specified by section 211(c)(4) applies.” 59 FR 7809.

In similar fashion, EPA affirmed NO_x preemption in the preamble for the final Tier 2/gasoline sulfur rule:

“We are adopting the sulfur standards pursuant to our authority under section 211(c)(1). Thus, we believe that today’s action results in the clear preemption of future state actions to prescribe or enforce fuel sulfur controls.⁹¹ . . . Section 211(c)(4)(A) preempts state fuel controls if EPA has “prescribed” federal controls. We read this language to



preempt non-identical state standards on the date of promulgation of the standards, as opposed to the date the standards become enforceable. Thus, today's action preempts state action as of December 21, 1999, even though the standards will not require sulfur reductions until 2004."

⁹¹ In addition, EPA notes that there are existing federal NO_x performance standards which apply to RFG and conventional gasoline and that state controls respecting NO_x performance are also preempted under 211(c)(4)(A). 65 FR 6765

Furthermore, the federal Mobile Source Air Toxics (MSAT) standards adopted in 2001 (66 FR 17230) preempt states from initiating non-identical toxics requirements.

EPA explains the merits of federal preemption in the preamble for the federal RFG and anti-dumping final rules, which includes the following statements:

"The regulations proposed here will affect virtually all of the gasoline in the United States. As opposed to commodities that are produced and sold in the same area of the country, gasoline produced in one area is often distributed to other areas. The national scope of gasoline production and distribution suggests that federal rules should preempt State action to avoid an inefficient patchwork of potentially conflicting regulations." 59 FR 7809.

Thus, NPRA believes the Agency must address preemption on the entire NH OFRFG regulation, since NH did not submit the benzene, toxics and winter NO_x standards to EPA for approval. EPA cannot ignore the issue and selectively evaluate only part of a proposed state gasoline regulation.

EPA's narrow interpretation of federal preemption and the NH OFRFG is inconsistent with Clean Air Act section 211(c)(4)(C):

"A state may prescribe and enforce, for purposes of motor vehicle emission control, a control or prohibition respecting the use of a fuel or fuel additive in a motor vehicle or motor vehicle engine if an applicable implementation plan for such State under section 110 so provides." Therefore, a state may not prescribe and enforce OFRFG rules for benzene, toxics and winter NO_x unless they have been approved by EPA in a SIP.

2. The NH OFRFG standards are not identical to the federal regulations for conventional gasoline.

Because NH has requested to opt-out of the federal RFG program, it is necessary to compare the NH OFRFG standards with federal regulations for conventional gasoline. Federal anti-dumping NO_x and exhaust toxics, and Mobile Source Air Toxics (MSAT)



standards are refinery and importer-specific, and they are not applicable to terminals and retail stations. The NH OFRFG NO_x and total toxics standards are not identical to these federal regulations because they are uniform and apply to terminals and retail stations. Furthermore, the federal anti-dumping toxics standards and MSAT conventional gasoline regulations are for exhaust toxics only and the NH OFRFG toxics rule is for total toxics. Moreover, the federal anti-dumping toxics standards and MSAT conventional gasoline regulations are in terms of milligrams/mile, whereas the NH OFRFG toxics standard's unit is based upon percent reduction. As a result, NPRA believes that the NH OFRFG regulations for benzene, summer and winter NO_x, and toxics fail the test of whether they are identical to federal regulations.

3. The benzene, toxics and winter NO_x standards in the NH OFRFG rules do not qualify for a waiver.

A State or political subdivision, other than California, may not adopt benzene content, VOC, NO_x, exhaust toxics or total toxics standards for gasoline that are different from the federal standard without requesting a waiver. NPRA believes that NH must request a waiver for OFRFG from federal preemption. However, NPRA believes EPA cannot grant such a waiver because parts of the NH OFRFG regulations do not meet the necessary Clean Air Act criteria.

EPA recognizes the consequences of this situation:

. . . section 211(c)(4)(C) of the Act allows for a waiver of preemption of state standards only where necessary to achieve a NAAQS. A similar mechanism is not clearly provided for States seeking to control ambient concentrations of toxics in their areas. Thus, without some regulatory mechanism, this proposal could have the effect of preventing States from addressing local toxics concerns under all circumstances because a waiver may not be available. 65 FR 48079.

The Agency has acknowledged that a waiver is not available. "Second, state fuel measures can only be justified by the need to achieve a NAAQS, so state fuel measures directed at achieving public health or welfare benefits other than a NAAQS, e.g., toxic exposure from other pollutants, may not be approvable into a SIP."¹ "Additional federal controls on air toxics, particularly benzene emissions, have been very important to the States, since under current CAA authority they cannot obtain a waiver of preemption to control air toxics emissions unrelated to achieving a NAAQS."²

¹ U.S. EPA, Study of Unique Gasoline Fuel Blends ("Boutique Fuels"), Effects on Fuel Supply and Distribution and Potential Improvements, EPA420-P-01-004, October 2001, page 13.

² Ibid., page 22.



NPRA also believes that States are preempted from benzene, toxics and winter NO_x standards for gasoline; a waiver for state benzene, toxics and winter NO_x standards is not available because state benzene, toxics, and winter NO_x rules are not necessary to achieve a NAAQS.

Furthermore, EPA can approve a state fuel control provision that is not identical to a federal requirement only if the Administrator finds that "no other measures that would bring about timely attainment exist" or that "other measures exist and are technically possible to implement, but are unreasonable or impracticable." CAA § 211(c)(4)(C). A current bill before the NH Senate (Senate Bill 397) would require the substitution of just such a set of non-fuel control measures to allow NH to opt-out of federal RFG without requiring a state fuel control measure such as OFRFG. The bill calls for area source controls on mobile equipment repair and refinishing, solvent cleaning operations, portable fuel containers, and regulation of air emissions from architectural and industrial coatings and certain consumer products. The existence of such an initiative certainly suggests that EPA can not make a finding that "no other measures that would bring about timely attainment exist", nor that "other measures exist and are technically possible to implement, but are unreasonable or impracticable."

4. Federal RFG and NH OFRFG Summer VOC and Summer NO_x Standards

EPA appears to believe that there is no difference between federal RFG and NH OFRFG summer NO_x and summer VOC standards: "The specific standards being approved here, summertime VOC and NO_x controls, are identified in 40 CFR 80.41." (69 FR 4906) In fact, because EPA deleted the per gallon minimum NO_x emissions reduction requirements for federal Phase II RFG in 1997 (62 FR 68196; 12/31/97), the current federal RFG summer NO_x standards are not identical to the NH OFRFG summer NO_x standards. Furthermore, the NH OFRFG summer NO_x standard is less stringent than the federal standards (3.0 percent reduction v. 5.5 or 6.8 percent reduction). In addition, the NH OFRFG summer VOC standard does not include the federal 27.4 percent reduction average regulation.

Other Potential Options Available

In an attempt to extricate the state from the inflexible 2% oxygen mandate as soon as possible, the NH DES unfortunately failed to consider a wider range of potentially available (non-fuel) options/control measures. Since these other measures could not be reasonably expected to be in place by the summer of 2004, state officials deemed them (we believe mistakenly) to be unreasonable or impractical. Conversely, NH regulators incorrectly suggest that adequate supplies of OFRFG will be readily available—and if not, federal RFG will be acceptable. This response, in essence, defeats the very purpose of NH's submission, namely to opt-out of RFG requirements.

NPRA suggests that the NH DES should consider delaying its petition until such time (Summer 2005) as every promising and available non-fuel option is analyzed. In support of this course of action, NPRA references NH Senate Bill 397 which is now under consideration



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in the NH State Legislature. SB 397 states that NH DES can only opt out of federal RFG once all options are considered and reductions for the summertime ozone season are in place. The bill requires the NH DES to perform all studies and rulemakings on an expedited basis.

Conclusion

NPRA sympathizes with NH's desire to eliminate the rigid 2% oxygenation requirement in reformulated gasoline. Unfortunately, however, we believe that EPA cannot approve this revised SIP because the NH OFRFG rules are preempted and do not qualify for a waiver. As a consequence, the Agency should not promulgate opt-out from the federal RFG program for four counties in NH at this time.

NPRA appreciates the opportunity to comment on this vital rulemaking. The association and its members stand ready to assist the Agency and the State of New Hampshire in efforts to maintain an adequate supply of gasoline with appropriate performance characteristics.

Sincerely,

A handwritten signature in black ink that reads "Bob Slaughter". The signature is fluid and cursive, with a long horizontal line extending from the end of the name.

Bob Slaughter

c: John Hannon (EPA OGC)
Robert Judge (EPA-New England)
Kurt Gustafson (EPA OTAQ)
EPA Regional Material EDocket R01-OAR-2004-NH-0001
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