

NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION
FACT-FINDING HEARING ON THE AVAILABILITY
OF ULTRA-LOW SULFUR DIESEL

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I am Tim Hogan representing the National Petrochemical & Refiners Association (NPRA). NPRA is a national trade association with over 450 members, including those who own or operate virtually all U.S. refining capacity, as well as most of the nation's petrochemical manufacturers with processes similar to those of refiners. We appreciate the opportunity to provide testimony at this hearing.

My objective today is to highlight the restrictions on state motor fuel controls implemented by section 1541(b) of the Energy Policy Act of 2005 (Public Law 109-58) and the recent boutique fuels list published by the U.S. Environmental Protection Agency (71 FR 78192, 12/28/06). This is relevant because EPA can approve a SIP with a new motor fuel control only if it is on EPA's official list for that specific Petroleum Administration for Defense District (PADD).

The federal preemption provisions in the Clean Air Act preserve a rational motor fuel supply by precluding states from unilateral adoption of unique specifications unless EPA grants a waiver. EPA has recently explained the situation:

Under the Clean Air Act (CAA), state fuel programs respecting a fuel characteristic or component that we have regulated under section 211(c)(1) are preempted. EPA may waive preemption through approval of the fuel program into a State Implementation Plan (SIP). . . . The Energy Policy Act of 2005 (EPAct) amends the CAA by placing additional restrictions on our authority to waive preemption by approving a state fuel into the SIP. . . . We cannot approve a state fuel into a SIP unless the fuel is already in an existing SIP within that PADD, with the exception of a 7.0 psi RVP fuel.

71 FR 78192, 78193.

EPA has regulated highway diesel sulfur (66 FR 5134, 1/18/01) and nonroad diesel sulfur (69 FR 39164, 6/29/04) under the authority of section 211(c) of the CAA. Therefore, state controls on highway diesel sulfur content are preempted. EPA is precluded from waiving

preemption on highway diesel sulfur controls in New Jersey because diesel sulfur controls are not on the recent official boutique fuels list for PADD I (71 FR 78192, 12/28/06).

However, EPA's nonroad diesel sulfur rule may or may not preempt state controls. The preamble for EPA's nonroad diesel sulfur rule includes the following:

Thus, today's action does not preempt state controls or prohibitions respecting characteristics or components of fuel or fuel additives used in nonroad, locomotive, or marine engines or nonroad, locomotive, or marine vehicles under the provisions of section 211(c)(4)(A). At the same time, a state control that regulates both highway fuel and nonroad fuel is preempted to the extent that the state control respects a characteristic or component of highway fuel regulated under section 211(c)(1).

A court may consider whether a state control for fuels or fuel additives used in nonroad engines or nonroad vehicles is implicitly preempted under the supremacy clause of the U.S. constitution. Courts have determined that a state law is preempted by federal law where the state requirement actually conflicts with federal law by preventing compliance with the federal requirement, or by standing as an obstacle to accomplishment of congressional objectives. A court could thus consider whether a given state standard for sulfur in nonroad, locomotive or marine diesel fuel is preempted if it places such significant cost and investment burdens on refiners that refiners cannot meet both state and federal requirements in time, or if the state control would otherwise meet the criteria for conflict preemption.

69 FR 39072, 39073.

EPA's boutique fuels list is silent on a highway/nonroad distinction. However, CAA section 211(c)(4)(C), as amended by section 1541(b) of the Energy Policy Act of 2005, restricts what the Agency can approve in a SIP. EPA cannot approve a SIP if it would 1) increase the total number of fuels in the official boutique fuels list or 2) unless that fuel is already approved in a SIP in the same PADD. Since these conditions have not been met, state sulfur controls on nonroad diesel fuel are not a current option for New Jersey's SIP.

It is clear that New Jersey cannot impose sulfur controls on highway diesel fuel because it is preempted and New Jersey does not qualify for a waiver of preemption. It is also evident that there are issues with state sulfur controls on nonroad diesel.

Again, NPRA appreciates the opportunity to provide comments at this fact-finding hearing.