



The State of New Hampshire
DEPARTMENT OF ENVIRONMENTAL SERVICES



Thomas S. Burack, Commissioner

January 29, 2013

The Honorable David Borden, Chairman
N.H. House of Representatives
Science, Technology, and Energy Committee
Legislative Office Building, Room 304
Concord, New Hampshire 03301

Re: House Bill 362, banning corn-based ethanol as an additive to gasoline sold in New Hampshire.

Dear Chairman Borden and Members of the Committee:

Thank you for the opportunity to comment on behalf of the Department of Environmental Services (DES) regarding House Bill 362, which seeks to ban the manufacture of corn-based ethanol intended for use in New Hampshire, and to ban the sale of gasoline containing corn-based ethanol in New Hampshire. While DES understands the concerns relative to increasing use of corn to produce ethanol, the department is opposed to this bill due to potential conflict with federal law and potential for this action to result in supply disruption and/or price volatility in the state.

Motor vehicle fuel is subject to federal regulatory requirements of the Renewable Fuels Standard (RFS), established by the 2005 Energy Policy Act and modified (RFS2) by the 2007 Energy Independence and Security Act (EISA). The RFS mandated inclusion of a certain annual volume of renewable fuel in gasoline. RFS2, adopted in response to concerns related to the sustainability of crop-based fuels including greenhouse gas (GHG) emissions and food shortages, made two very significant changes to the original standard. First, it differentiated between categories of renewable fuel, including cellulosic and advanced biofuels, and set separate volume requirements for each. RFS2 also required EPA to apply lifecycle GHG performance threshold standards to ensure that each category of renewable fuel emits fewer greenhouse gases than the petroleum fuel it replaces. The lifecycle analysis is inclusive of energy and emissions inputs for fuel and feedstock production, indirect land use impacts, distribution and use. It also includes results of economic modeling that predicts changes in agricultural markets. Through this mechanism RFS2 creates a limited market incentive for conventional corn ethanol and a significant market incentive for cellulosic and advanced biofuels.

The nation's fuel supply is also regulated under the Clean Air Act Amendments of 1990 (CAA) which, in Section 211(c)(4), place certain limitations on a state's legal authority to control the composition of fuel offered for sale in a state. Specifically, Section 211(c)(4) states:

“Except as otherwise provided in subparagraph (B) or (C), no State (or political subdivision thereof) may prescribe or attempt to enforce, for purposes of motor vehicle emission control, any control or prohibition respecting any characteristic or component of a fuel or fuel additive in a motor vehicle or motor vehicle engine”

The potential conflict of a NH corn-ethanol ban with federal CAA requirements could put NH petroleum suppliers in a difficult position, forcing them to choose between complying with federal law or with state law. In addition to fuel supply disruptions and price volatility, this could also result in costly and protracted litigation brought by either the industry or the federal government, or both, to resolve the conflict.

A ban on corn ethanol in New Hampshire would also likely result in litigation on another front. California’s efforts to implement a regulation that would discourage use of some sources of corn-based ethanol were met with a vigorous lawsuit from mid-west farming interests. A December 2011 Federal District Court issued an injunction against implementation of the rule while the courts determine whether the program violates the US Constitution’s Commerce Clause by seeking to control conduct beyond the boundary of the state and thus violated the Commerce Clause’s “strict scrutiny” test because it “directly regulates or discriminates against” interstate commerce. While the injunction was stayed in April 2012 a final ruling has not yet been issued. It is anticipated this case will be appealed all the way to the U.S. Supreme Court, and it can be assumed that a targeted ban such as that proposed by HB 362 would face similar challenges.

In past testimony on similar bills the department has noted the potential for supply or price disruptions to New Hampshire motorists from a ban on corn ethanol due to lack of a gasoline terminal in the state and the relatively low volume of fuel used here. HB 362 seeks to address this issue by including a contingency clause whereby the ban would only take effect if two other New England states were to also adopt similar legislation. Given the above noted court ruling it appears very unlikely that such a contingency would be met until such time as there has been a final ruling by the U.S. Supreme Court, an action that is probably several years in the future.

Thank you for the opportunity to provide testimony on this bill. Should you have further questions or need additional information please feel free to contact Craig Wright, Acting Director, Air Resources Division (271-1088, craig.wright@des.nh.gov) or Rebecca Ohler, Transportation and Energy Programs Manager (271-6749, rebecca.ohler@des.nh.gov).

Sincerely,


Thomas S. Burack
Commissioner

cc: HB 362 sponsors