



The State of New Hampshire  
**Department of Environmental Services**



**Thomas S. Burack, Commissioner**

February 12, 2015

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

**Re: House Bill 409, banning corn-based ethanol**

Dear Chairman Introne and Members of the Committee:

Thank you for the opportunity to comment on behalf of the Department of Environmental Services (DES) regarding House Bill 409, which seeks to ban the manufacture of corn-based ethanol for use in New Hampshire, and to ban the sale of gasoline containing corn-based ethanol in New Hampshire. DES 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.

The nation's fuel supply is regulated by the Federal 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"*

Because fuel providers would likely have to create a new blend of fuel to satisfy New Hampshire's requirements as envisioned by this bill, this bill appears to directly contravene this section of the CAA.

Motor vehicle fuel is also subject to the 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 was adopted in response to concerns related to the sustainability of crop-based fuels relative to greenhouse gas (GHG) emissions and food shortages. RFS2 made a significant change to the original standard in that it differentiated among categories of renewable fuel, including cellulosic and advanced biofuels, and set separate volumetric requirements for each. Through this mechanism, RFS2 created a limited market incentive for conventional corn ethanol and a significant market incentive for cellulosic and advanced biofuels. In the past year, manufacturing plants opened in Iowa and Kansas that, when at capacity, will produce 225 million gallons per year of cellulosic ethanol from non-edible agricultural waste.

The potential conflict of a NH corn-ethanol ban with federal CAA and RFS2 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.

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A ban on corn ethanol in New Hampshire could also 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 violating 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 that 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 409 would face similar challenges.

New Hampshire is not home to a major gasoline terminal, and has limited ability to impact the distribution of gasoline from out-of-state terminals. Almost all gasoline comes into the state from terminals located in other New England states, which supply those states as well. The volume of gasoline consumed in New Hampshire is small in comparison to that used by the other states combined. Therefore, the terminals would likely continue supporting distribution of ethanol blends to other New England states, or as required under federal regulation, rather than serve a very small NH special market. In addition, this bill bans corn ethanol only. The department is unaware of any test that would allow New Hampshire to determine the feedstock (corn, sugar beet, cellulosic) of any given ethanol supply, thus making this limitation impossible to enforce absent an extremely resource-intensive process for tracking the origin of the ethanol blended into every single gallon of gasoline delivered into the state. DES estimates such an effort would require at least one new full-time position within state government.

HB 409 attempts to address the issue of potential supply or price disruptions in New Hampshire due to the relatively low volume of fuel used here by including a contingency clause whereby the ban would only take effect if two other New England states were to also adopt similar legislation. DES is concerned with this contingency clause for two reasons. First, the contingency is triggered if two other New England states adopt "similar legislation banning corn-based ethanol", which presents two problems. Simply adopting legislation does not mean these states will be implementing a ban within a specific time frame, which could still put New Hampshire in a position of being the only state to have a ban in place. Second, if those other two states have low fuel consumption, such as Vermont and Rhode Island, then collectively the three states would only represent 21 percent of the region's fuel consumption, which may not be enough to ensure delivery of a compliant fuel supply, thus leading to shortages of fuel in the state.

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, Director, Air Resources Division (271-1088, [craig.wright@des.nh.gov](mailto:craig.wright@des.nh.gov)) or Felice Janelle, Mobile Sources Program Supervisor (271-4848, [felice.janelle@des.nh.gov](mailto:felice.janelle@des.nh.gov)).

Sincerely,



Thomas S. Burack  
Commissioner

cc: HB 409 sponsors