From: Don Onwiler
To: l-r-committee@list.ncwm.net
Subject: FW: E15 Preemption
Date: Thursday, June 27, 2019 11:06:00 AM

L&R Committee,

One of our members has asked EPA for an opinion regarding federal preemption by the recent EPA ruling which led to the priority item on your agenda. The EPA responses are below. I was asked to forward these responses to the committee.

Thank you,

Don Onwiler
Executive Director

National Conference on Weights and Measures
1135 M Street, Suite 110 / Lincoln, Nebraska 68508
P. 402.434.4880 **D.** 402.434.4871 **F.** 402.434.4878
www.ncwm.net

Dallas asked that I reply to your question on preemption of [Your State's] current regulations that allow the 1.0 psi waiver E10 but do not currently allow the 1.0 psi waiver for E15. We understand that [Your State] regulations are based on fuel quality concerns and are not based on emissions control.

EPA's June 10, 2019 final rule (84 FR 26980) that extended the 1.0 psi waiver to E15 does not preempt state regulations such as [Your State] fuel quality regulation, which applies the 1.0 psi waiver to E10 but not E15. [Your State] regulation continues to apply in the State and E15 would not be eligible for the 1.0 psi waiver at this time. In the future, the State may decide to revise its regulations to extend the 1.0 psi waiver to E15.

If you have additional questions, let me know.

Rudy Kapichak
State Measures and Transportation Planning Center
Transportation and Climate Division
Office of Transportation and Air Quality
US Environmental Protection Agency

e-mail: kapichak.rudolph@epa.gov
Phone: 734-214-4574

From: Machiele, Paul [mailto:machiele.paul@epa.gov]
Sent: Wednesday, June 26, 2019 12:30 PM
Subject: [EXTERNAL] E15 Preemption

In response to your question as to whether our E15 rulemaking preempts state rules with respect to the RVP of E15, the short answer is no. The longer answer is contained on page 71-2 of the Response to Comments document published along with the final rule. I've copied the response below. Hopefully this satisfies your needs.

Paul

1.9.2 Preemption

Commenters that provided comment on this topic include but are not limited to: 0854, 0864, 0895, 0908, 0913.

Comment:

Commenters suggested that EPA should find that state regulations on RVP of E15 that differ from the regulations EPA is finalizing should be "presumptively preempted" as they are no longer identical to the federal standard.

Another commenter requested that EPA state that any state-mandated requirement for the labeling of E15 in addition to or different from those required by EPA would conflict with and/or undermine the effectiveness of the EPA E15 label.

Response:

In this action we are construing CAA sec. 211(h)(4) as specifying the minimum ethanol content that fuel blends containing ethanol and gasoline must contain to qualify for the 1-psi waiver. As explained in the final rule, under this construct the 1-psi waiver would be applicable to gasoline-ethanol blends the agency finds are sub sim under CAA sec. 211(f)(1) as well as those gasoline-ethanol blends that receive or have received a CAA sec. 211(f)(4) waiver. Currently, these are E10 and E15, based on EPA's prior issuance of partial waivers under CAA sec. 211(f)(4), and the finding in this rulemaking that E15 is sub sim to Tier 3 E10 certification fuel, under CAA sec. 211(f)(1), when used in MY2001 and newer light-duty motor vehicles. This construct, and the corresponding regulations to implement this construct, do not initiate any new preemption of state authority under CAA sec. 211(c)(4)(A) but rather extend the 1-psi waiver to gasoline-ethanol blends containing up to 15 percent ethanol.[53] Further, we believe that questions regarding preemption of specific state fuel controls and determinations should be addressed in the context of a specific SIP rulemaking. Through this process, we can consider specific circumstances

involved given that preemption tends to be a fact specific inquiry.

As a general matter, CAA sec. 211(c)(4)(A) prohibits states and political subdivisions from prescribing or attempting "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" if EPA has prescribed a control or prohibition applicable to such characteristic or component of the fuel or fuel additive under CAA sec. 211(c)(1). This prohibition does not apply to either controls or prohibitions that are identical to those adopted by EPA. CAA sec. 211(c)(4)(A)(ii). Also, this prohibition applies to all states except California. CAA sec. 211(c)(4)(B).

Given that CAA sec. 211(c)(4)(A) applies only to controls or prohibitions respecting any characteristics or components of fuels or fuel additives for use in motor vehicles or motor vehicle engines, i.e., on road or highway vehicles, a state control or prohibition respecting gasoline-ethanol blended fuels or fuel additives would be preempted only if it is "for purposes of motor vehicle emission control." Further, under CAA sec. 211(c)(4)(C)(i) states, other than California, may prescribe and enforce nonidentical measures if they seek and obtain EPA approval of SIP revisions containing such control measures.

With regard to pump labeling requirement, in 2011 we promulgated the MMR, which included pump labeling requirements, under CAA sec. 211(c)(1), and at the time, we explained that our action would result in an express preemption under CAA sec. 211(c)(4)(A) of nonidentical actions by states other than California that prescribe or enforce certain controls or prohibitions respecting ethanol content in gasoline if they were for purposes of controlling motor vehicle emissions. This action continues this explicit preemption, under CAA sec. 211(c)(4)(A), of state actions to prescribe or enforce differing controls. States other than California wishing to adopt nonidentical controls requirements for gasoline-ethanol blend into their SIPs continue to be preempted under CAA sec. 211(c)(4)(A) and will therefore need to obtain a waiver under the provisions described in CAA sec. 211(c)(4)(C)(i) and (v).

Finally, under the supremacy clause of the U.S. Constitution, state laws may not conflict with federal laws, including regulations. Thus, aside from the explicit preemption in CAA sec. 211(c)(4)(A), a court could also consider whether a state gasoline-ethanol blend control requirement 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 conflicts with federal law by preventing compliance with both federal and state requirements, or by standing as an obstacle to accomplishment of Congressional objectives. Therefore, notwithstanding a waiver of preemption under CAA sec. 211(c)(4)(C)(i), a court could consider whether a given state gasoline-ethanol blend control requirement is preempted if it either places such significant cost and investment burdens on refiners that refiners cannot meet both state

and
federal requirements at the same time, or if the state control would otherwise meet the criteria for
conflict preemption.

53 We explained in the "Boutique Fuels List under Section 1541(b) of the Energy Policy Act" that the listed fuel types were based on the "required specific fuel components, specifications, or limits of each fuel type (for example, 7.8 psi RVP)." See 71 FR 78194 (December 28, 2006). We did not list fuel types based on whether or not the state fuel rule provided the 1.0 psi waiver for E10 because the 1.0 psi RVP waiver is not a control or prohibition under CAA sec. 211(c)(4)(A) Id. at 78196.