

November 30, 2009

DECISION AND ORDER
OFFICE OF HEARINGS AND APPEALS

Appeal

Case Name: Commonwealth of Massachusetts

Date of Filing: September 25, 2009

Case Number: TEA-0012

This Decision and Order considers an Appeal filed by the Commonwealth of Massachusetts (“Massachusetts” or “the Commonwealth”) from a determination issued on September 3, 2009, on behalf of the Assistant Secretary for Energy Efficiency and Renewable Energy (EE) of the Department of Energy (DOE), under the provisions of 10 C.F.R. Part 490 (Alternative Fuel Transportation Program). In its determination, EE denied a request filed by Massachusetts for 37 exemptions, in addition to 88 already granted, from the firm’s Model Year (MY) 2008 alternative fuel vehicle (AFV) purchase requirements under the Part 490 program. If the present Appeal were granted, Massachusetts would receive the additional 37 exemptions it requested. As set forth in this Decision and Order, we have concluded that the Commonwealth’s Appeal should be denied.

I. Background

A. Alternative Fuel Transportation Program

The regulatory provisions of the Alternative Fuel Transportation Program, 10 C.F.R. Part 490, were promulgated by DOE effective April 15, 1996, 61 Fed. Reg. 10621 (March 14, 1996), in order to effectuate certain policy initiatives mandated by Congress under the Energy Policy Act of 1992 (EPACT), Pub. L. 102-486. In enacting EPACT, Congress established a comprehensive national energy policy for strengthening U.S. energy security by reducing dependence on foreign oil, promoting conservation and encouraging more efficient use of energy resources. Title V of EPACT specifies statutory requirements aimed at displacing substantial quantities of petroleum products consumed by motor vehicles with alternative fuels. The DOE’s action in adopting 10 C.F.R. Part 490 implements Sections 501 and 507(o) of EPACT in which Congress imposed on certain alternative fuel providers and most State governments the requirement to include AFVs in their light duty vehicle fleet acquisitions.

Thus, covered alternative fuel providers and State governments are required under the Part 490 Program to meet a schedule of annual AFV purchases with respect to their total light duty vehicle fleet acquisitions. The regulations generally require State governments to include at least 75 percent AFVs in their fleet acquisitions each model year (defined as September 1 of the previous year to

August 31). 10 C.F.R. § 490.201.

In implementing Part 490, the DOE sets forth regulatory definitions to facilitate compliance by affected entities, as well as procedures for acquiring interpretations, exemptions and other administrative remedies. An exemption from the Part 490 acquisition requirements may generally be obtained where a State is able to demonstrate that either: “(1) Alternative fuels that meet the normal requirements and practices of the principal business of the State fleet are not available” or “(2) Alternative fueled vehicles that meet the normal requirements and practices of the principal business of the State fleet are not available for purchase or lease commercially on reasonable terms and conditions” or (3) “The application of such requirements would pose an unreasonable financial hardship.” 10 C.F.R. § 490.204(b).

The regulations further provide that a State may satisfy up to 50 percent of its AFV acquisition requirements through the purchase of biodiesel fuel. 10 C.F.R. § 490.705(b). Under these provisions, a State can receive credit for the purchase of one AFV for each “qualifying volume”¹ of biodiesel fuel purchased. 10 C.F.R. § 490.705(a). In addition, the regulations provide for a program of marketable credits to reward those who voluntarily acquire AFVs in excess of mandated levels, allowing the purchase of such credits by other fleets or covered persons to demonstrate compliance. 10 C.F.R. Part 490, Subpart F.

B. The Present Proceeding

In a letter to EE dated December 5, 2008, Massachusetts stated that it purchased 234 vehicles in MY 2008, and thus was required under EPACT to purchase 176 AFVs that year, or 75% of its total light duty vehicle fleet acquisitions. The Commonwealth reported that it had purchased 51 AFVs during the relevant period, explaining that it did not purchase the required number of AFVs due to an unavailability of “suitable” AFVs and kits to convert existing conventional vehicles to AFVs, and also because of a lack of alternative fuel stations in the Northeast U.S. Thus, Massachusetts requested 125 exemptions from the Part 490 acquisition requirements for MY 2008. Letter from Daniel G. Bowen, Fleet Administrator, Massachusetts, to Linda Bluestein, Regulatory Manager, Office of Freedom Car and Vehicle Technologies, EE (December 5, 2008).

On February 25, 2009, EE granted 88 of the 125 exemptions requested by Massachusetts, citing “[s]ufficient business needs” for 88 vehicles purchased by the Commonwealth for which there was a lack of available alternative fuel. However, EE stated it was not granting the other 37 requested exemptions because Massachusetts “did not address its failure to exhaust the other compliance options available to the fleet as directed by DOE in letters dated April 23, 2008, and March 14, 2007, such as the use of B20 [20% biodiesel blend] or B100 [biodiesel] in medium- and heavy-duty

¹ The regulations define “qualifying volume” as “450 gallons” or “[i]f DOE determines by rule that the average annual alternative fuel use in light duty vehicles by fleets and covered persons exceeds 450 gallons or gallon equivalents, the amount of such average annual alternative fuel use.” 10 C.F.R. § 490.702. As DOE has not issued such a rule, the definition of “qualifying volume” for purposes of the present case is 450 gallons. Email from Dana V. O’Hara, Regulatory Manager, Vehicle Technologies Program, EE, to Steven Goering, OHA Staff Attorney (November 24, 2009).

vehicles.” Letter from Dana V. O’Hara, Regulatory Manager, Vehicle Technologies Program, EE, to Daniel Bowen, Massachusetts (February 25, 2009).

In a March 20, 2009 letter to DOE, Massachusetts reiterated its earlier statements as to the lack of available AFVs and alternative fuels, and further stated that it was unable to pursue the compliance option of using B20 or B100 biodiesel in its medium- and heavy-duty vehicles. It stated that biodiesel blends “greater than B5 tend to gel and coagulate in the colder New England weather and as a result the NO_x properties are compromised due to the need to use petroleum thinners such as kerosene.” Massachusetts also contended that blends of B20 or greater “can lead to the erosion of neoprene lines and hoses in older model vehicles.” Finally, it stated that “engine manufacturers have indicated that medium- and heavy-duty vehicles which are run on bio-blends greater than B5 will nullify any associated warranties.” Letter from Daniel G. Bowen, Massachusetts, to Office of Hearings and Appeals (March 20, 2009) (“March 20 Letter”).²

On April 23, 2009, EE requested from Massachusetts additional information related to the use of biodiesel. Specifically, EE asked for information regarding its medium- and heavy-duty on-road diesel vehicles, including their location, how and where they are refueled, and their average monthly use of diesel fuel. EE also requested that Massachusetts submit documentation of the statements in its March 20 letter, in the form of correspondence from its biodiesel suppliers and the manufacturers of the engines used in its vehicles. Letter from Dana V. O’Hara, EE, to Daniel G. Brown, Massachusetts (April 23, 2009). Massachusetts provided the requested information on June 5, 2009. Letter from Daniel G. Brown, Massachusetts, to Dana V. O’Hara, EE (June 5, 2009).

EE issued a final determination on September 3, 2009, again denying the Commonwealth’s request for 37 exemptions beyond the 88 already granted in EE’s February 25, 2009, determination. EE cited an August 11, 2006, memorandum from the Secretary of Massachusetts’s Executive Office for Administration and Finance to Massachusetts cabinet secretaries, which was included among the documentation provided in the Commonwealth’s June 5 submission. This memorandum established minimum requirements for the use of biodiesel in state vehicles, specifically that biodiesel must constitute at least 5% of total diesel fuel purchased by all state agencies beginning in fiscal year Fiscal Year 2008, and at least 15% of total diesel fuel purchased beginning in Fiscal Year 2010.

The memorandum stated that these minimum requirements could

be met through the use of B5 and/or B20 blends, or any other blend, as long as a minimum of 5% by FY08 and 15% by FY2010 of total diesel fuel used is equivalent to 100% biodiesel. It is anticipated that a B20 biodiesel blend can be used for up to 8 months of the year and a B5 biodiesel blend used during the winter season, as currently offered through the state contract. All biodiesel blends available on state

² Massachusetts’s March 20, 2009, letter was addressed to the Office of Hearings and Appeals (OHA) as an Appeal of EE’s February 25, 2009, determination. However, because the March 20 letter contained new information, specifically that pertaining to the use of B20 or B100 biodiesel, EE treated the letter as a request for reconsideration of its February 25 determination. Letter from Dana V. O’Hara, EE, to Daniel G. Brown, Massachusetts (April 23, 2009).

contract meet recommended ASTM standards.

Memorandum from Thomas Trimarco, Secretary, Executive Office for Administration and Finance, Massachusetts, to Cabinet Secretaries (August 11, 2006) (“Administrative Bulletin #13”) at 2. EE also cited the Commonwealth’s statement in its June 5 letter that its supplier of biodiesel “could supply a B20 blend if requested.” Letter from Daniel G. Brown, Massachusetts, to Dana V. O’Hara, EE (June 5, 2009) at 1. Finally, EE found that Massachusetts “failed to provide any documentation indicating that the use of B20 meeting appropriate ASTM standards would have caused significant problems to the fleet’s operations.” Letter from Dana V. O’Hara, EE, to Daniel G. Brown, Massachusetts (September 3, 2009). EE concluded that Massachusetts had “failed to demonstrate that it was unable to meet up to 50% of its AFV acquisition requirements through the purchase and use of biodiesel.” Thus, EE declined to grant Massachusetts more than 88 exemptions, or 50% of its MY 2008 acquisition requirement of 176 AFVs.

Massachusetts filed the present Appeal on September 25, 2009, again requesting that it be granted 37 exemptions from its MY 2008 acquisition requirement. We have carefully considered the Appeal and have concluded, for the reasons set forth below, that the relief sought by the Commonwealth must be denied. Specifically, we agree with EE that Massachusetts has not demonstrated that it could not take advantage of the option of meeting its AFV-acquisition requirement through the purchase and use of biodiesel. Therefore, as explained below, Massachusetts is not entitled to further exemption relief beyond that already granted.

II. Analysis

A. The Option of Compliance Through the Biodiesel Fuel Use Credit

Regarding the option of compliance with the Part 490 requirement through the biodiesel fuel use credit, Massachusetts first notes that the “Office of Vehicle Management for the Commonwealth of MA oversees the entire inventory of the Commonwealth, but only has direct control of its Light Duty fleet. Heavy Duty vehicles and equipment, where the majority of the biodiesel is consumed, are managed by the individual Agencies.” Appeal at 1. Nonetheless, the fact remains that the government of the Commonwealth, as a whole, controls the use of its entire inventory of vehicles, and has the power to mandate the purchase of biodiesel by all state agencies, as illustrated by Administrative Bulletin #13, discussed above. Thus, Massachusetts was clearly capable of purchasing biodiesel as a alternative method of compliance with the AFV-acquisition requirements of its light-duty fleet.³

³ Massachusetts also argues that the “use of B20 biodiesel is not mandated at the Federal level nor is it mandated by the State of Massachusetts.” Appeal at 1. However, the question before us is not whether Massachusetts is *required* to purchase B20 biodiesel, but rather whether Massachusetts is *able* to meet its AFV-acquisition requirements through the purchase and use of biodiesel.

Massachusetts also cites in its appeal, as it did in previous submissions to EE, “the fact that blends greater than B5 tend to gel and coagulate in the colder New England weather and as a result the NO_x properties are compromised due to the need to use petroleum thinners such as kerosene.” *Id.* at 2. However, regardless of whether blends higher than B5 can practically be used in colder months, Administrative Bulletin #13 clearly states “[i]t is anticipated that a B20 biodiesel can be used for up to 8 months of the year” Administrative Bulletin #13 at 2.

The Commonwealth further contends, as it has previously, that “B20, and greater blends, can lead to the erosion of neoprene lines and hoses in older model vehicles, which comprise a large portion of the Commonwealth's Heavy Duty fleet.” Appeal at 2. Massachusetts does not state in its appeal what portion of its fleet this could affect, but did state in its June 5 letter that 69% of its “Fleet of Medium and Heavy Duty vehicles/equipment was manufactured during or before MY2002 and many engine components are not compatible with a B20 Biodiesel blend.” Letter from Daniel G. Brown, Massachusetts, to Dana V. O’Hara, EE (June 5, 2009) at 1. Again, however, the relevant question is not whether there were some vehicles in the Commonwealth’s fleet for which use of B20 biodiesel would not have been practical, but whether there were sufficient vehicles in the fleet which, together, could have used the quantity of biodiesel that would have qualified Massachusetts for the 37 additional AFV credits it needed to meet its MY 2008 acquisition requirement.

In this regard, we note that Massachusetts would have had to purchase 83,250 gallons of B20 biodiesel (i.e., the equivalent of 16,650 gallons of pure biodiesel) in order to qualify for 37 biodiesel fuel use credits (37 times 450 gallons = 16,650 gallons). In its June 5, 2009 submission to EE, Massachusetts provided data on its Fiscal Year 2008 on-road usage of B5 biodiesel, indicating total purchases of 470,229.4 gallons for the year. Assuming that the Commonwealth purchased two-thirds of this total, or approximately 313,486 gallons, during the eight months when B20 biodiesel could have been used instead of B5 biodiesel, Massachusetts could have earned sufficient AFV credits by substituting the purchase of B20 biodiesel for B5 biodiesel in less than 27 percent of these purchases over eight months. The Commonwealth has not shown that such limited use of B20 biodiesel would have been impractical.

Finally, as it did in its March 20 and June 5, 2009 submissions to EE, Massachusetts raises the issue of whether manufacturers of engines for medium- and heavy-duty vehicles would honor the warranties on vehicles which use B20 biodiesel. In its March 20 letter, the Commonwealth contended that “engine manufacturers have indicated that medium- and heavy-duty vehicles which are run on bio-blends greater than B5 will nullify any associated warranties.” March 20 Letter at 1. Subsequently, in its June 5 letter, Massachusetts stated that “[i]t seems as though the manufacturers’ position has changed and now they acknowledge, based on the documentation recently provided by some manufacturers, that their warranties do accept the use of a B20 blend.” Letter from Daniel G. Brown, Massachusetts, to Dana V. O’Hara, EE (June 5, 2009) at 1.

Nonetheless, the Commonwealth argues in its Appeal that the manufacturers’ warranties on heavy-duty vehicles “are not very reassuring” with respect to the use of biodiesel “and include numerous caveats” Appeal at 2.

It seems that all engine warranties clearly define and document the American Society of Testing Materials (ASTM) standard for Biodiesel usage but unfortunately for the end-users the quality of the Biodiesel is difficult to measure. It is my understanding that unlike gasoline, Biodiesel blending is not strictly regulated and its consistency is not assured. The biodiesel products currently available are blended by local distributors and do not provide the same type of product confidence that can be provided by an Exxon, Gulf or Shell.

Id. First, we note that Administrative Bulletin #13 specifically states that “[a]ll biodiesel blends available on state contract meet recommended ASTM standards.” Administrative Bulletin #13 at 2. Moreover, the published product and performance specifications for biodiesel purchased under that contract provide, in pertinent part, that the Commonwealth reserves the right to

[t]ake samples of diesel fuel for analysis, either at the shipping point or delivery point in order to verify the quality of the product being supplied. If tests show that diesel fuel is substandard, then deliveries will be suspended until appropriate standards are met. Any damages or losses incurred by the Commonwealth will be charged to awarded bidder.⁴

As such, we are not persuaded by the Commonwealth that it cannot have sufficient confidence in the quality of the biodiesel supplied under state contract.

B. Other Claimed Bases for Exemption Request

Massachusetts reiterates in its Appeal its previous arguments as to the unavailability of AFVs, conversion kits, and refueling stations. However, EE has already granted Massachusetts 88 exemptions, half of its MY 2008 AFV-acquisition requirement, based on lack of available alternative fuel. Massachusetts had the option to meet the remainder of its requirement through biodiesel fuel use credits, yet has not demonstrated that it could not have purchased and used sufficient biodiesel fuel to qualify for the additional 33 credits for which it now seeks exemptions. Thus, Massachusetts has already received the maximum number of exemptions to which it is entitled under the Part 490 regulations, and we therefore need not address the Commonwealth’s other claimed bases for exemptions.

Accordingly, we have concluded that Massachusetts’s Appeal must be denied. As directed by EE, the Commonwealth must pursue the purchase of credits under the Alternative Fueled Vehicle Credit Program, 10 C.F.R. Part 490, Subpart F, in order to satisfy its MY 2008 AFV-acquisition requirements.

⁴ “CATEGORY 3: BIO-DIESEL, PRODUCT AND PERFORMANCE SPECIFICATIONS,” https://www.ebidsourcing.com/viewDoc?doValidateToken=false&docPath=%2FPublic%2FContracts%2F107116%2F00018%2FTerms%2FBiodiesel_Contract_Specs.doc.

It Is Therefore Ordered That:

- (1) The Appeal filed by the Commonwealth of Massachusetts on September 25, 2009, from the determination issued on September 3, 2009, on behalf of the Assistant Secretary for Energy Efficiency and Renewable Energy of the Department of Energy, is hereby denied.
- (2) This is a final Order of the Department of Energy from which the Commonwealth of Massachusetts may seek judicial review.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: November 30, 2009