

# **ATTACHMENT C**

## **EXECUTIVE ORDER 2001-02**

An order pertaining to reducing water contamination resulting from the use of Methyl tertiary Butyl Ether (MTBE) in Reformulated Gasoline

**WHEREAS**, MTBE has become a significant and rapidly increasing contamination threat to groundwater and surface water resources in the State of New Hampshire; and

**WHEREAS**, 16% of New Hampshire's public water supplies have some level of MTBE contamination; and

**WHEREAS**, 27% of the private well samples analyzed for MTBE by the Department of Environmental Services' laboratory in the year 2000 had some level of MTBE and 4% had MTBE concentration in excess of the State's drinking water standard of 13 ppb; and

**WHEREAS**, a study conducted by the Department of Environmental Services found MTBE in all gasoline across the state, at levels up to 12.4%, and that other oxygenates with similar characteristics to MTBE were found in all ten counties, with levels up to 5.5%; and

**WHEREAS**, MTBE is considered a potential human carcinogen at high doses by the U.S. Environmental Protection Agency; and

**WHEREAS**, due to its high solubility in water and its ability to move quickly through groundwater, MTBE from leaking storage tanks and spills tends to move further than other components of gasoline and is more difficult to remediate; and

**WHEREAS**, MTBE does not break down as rapidly as other gasoline constituents once released into the environment; and

**WHEREAS**, the State of New Hampshire and its citizens and businesses are incurring significant costs to deal with the increasing presence of MTBE contamination, namely in undertaking remedial steps to remove the threat of continuing contamination at individual sites, providing alternative drinking water supplies to homes affected by MTBE contamination, and substantially increasing staff time spent on MTBE contaminated sites and related issues; and

**WHEREAS**, the State of New Hampshire has aggressively pursued all available, legal options to reduce the concentration of MTBE in gasoline sold in the State and the threat posed by MTBE contamination in its water resources, including:

- Initiating exhaustive assessments of MTBE and a task force to seek a regional gasoline solution; working with dealers to promote cleaner marine engines; and helping to launch a national public education program regarding the proper handling and disposal of gasoline;
- Conducting one of the strongest underground storage tank replacement programs in the country, achieving a compliance rate of over 99 percent;
- Establishing a new safe drinking water standard for MTBE of 13 parts per billion, the most protective primary drinking water standard in the country; and
- Formally requesting relief from federal requirements; and

**WHEREAS**, MTBE was added to gasoline in the mid-1970s to help replace lead because it added octane and improved combustion in gasoline engines, resulting in cleaner emissions; and

**WHEREAS**, Title I of the federal Clean Air Act Amendments of 1990 (CAA) mandated significant emission reductions from New Hampshire's ozone nonattainment areas (i.e., Hillsborough, Merrimack, Rockingham, and Strafford counties), and in order to help satisfy these requirements, in 1991 New Hampshire decided – by opting in to the federal Reformulated Gasoline (RFG) program – to require cleaner-burning gasoline in these counties starting in 1995; and

**WHEREAS**, because the CAA expressly mandates the oxygen content of RFG, requiring that it have at least 2% oxygen by weight, RFG contains approximately 11% MTBE by volume – five to ten times the amount historically found in gasoline in the Northeast; and

**WHEREAS**, because the ability of states to regulate the properties and composition of gasoline – including its oxygen content – is expressly limited by the CAA, state action to ban MTBE is unlikely to withstand legal challenge; and

**WHEREAS**, even if MTBE were eliminated, the CAA oxygen mandate would still force New Hampshire to use other oxygenates – such as ethanol – that are not readily available, could lead to unacceptable price and supply impacts, and need to be analyzed to ensure that we understand public health and environmental issues associated with these alternatives; and

**WHEREAS**, despite these and other actions, the number of MTBE detections in the State's water resources continues to rise, and despite the State's vigorous efforts to advance federal legislation to eliminate the CAA oxygen mandate, neither Congress nor the U.S. Environmental Protection Agency appear likely to address this problem in the foreseeable future; and

**WHEREAS**, the only remaining option available to the State of New Hampshire is to opt out of the federal RFG program and to make up for the emission reductions that RFG provides by adopting other emission control measures; and

**WHEREAS**, the air quality benefits that have been achieved through the RFG program should be maintained, and diminishing or “backsliding” from these air quality benefits is unacceptable from the standpoint of public health; and

**WHEREAS**, protection of New Hampshire's economic well-being, natural environment, public health, and quality of life demands that the State's air and water quality be enhanced simultaneously, rather than treated as mutually exclusive goals;

**NOW, THEREFORE, I, JEANNE SHAHEEN, GOVERNOR** of the State of New Hampshire, by the authority vested in me pursuant to Part II, Article 41 of the New Hampshire Constitution, do hereby order and direct the Department of Environmental Services (DES) to prepare and submit to the U.S. Environmental Protection Agency the documentation necessary for New Hampshire to opt-out of the federal Reformulated Gasoline program immediately, pursuant to my request that the Administrator of the U.S. Environmental Protection Agency revise the Code of Federal Regulations Title 40, Part 80, Subpart D, Section 80.72(c) to allow for an accelerated opt-out of the federal Reformulated Gasoline program; and

**FURTHERMORE**, I order and direct DES to work with the New Hampshire General Court to adopt in this

legislative session any provision necessary to accomplish this goal, including control measures sufficient to replace the emission reduction benefits achieved by RFG, to provide adequate funding and statutory flexibility for remediation of MTBE-contaminated sites and water resources by extending the sunset date of the Oil Discharge and Cleanup Fund to January 1, 2010, and increasing the reimbursable limit of that fund from \$1 million to \$1.5 million for MTBE (and other petroleum) contaminated sites; and

**FURTHERMORE,** I order and direct DES to continue to promote and participate in efforts to develop acceptable regional or federal approaches to reduce the threat of MTBE contamination, including but not limited to elimination of the oxygen mandate, waivers from federal fuel requirements, cleaner reformulations of fuels, and other such measures; and

**FURTHERMORE,** I order and direct DES to analyze and transmit to my office and the General Court, the results of any state, regional or national studies on the environmental fate and transport of ethanol in air, surface water and groundwater, to ensure a full understanding of the potential environmental and public health consequences of ethanol as an alternative to MTBE; and

**FURTHERMORE,** I order and direct DES to analyze and transmit to my office the results of litigation concerning MTBE, and to recommend any actions which, based on the outcome of the litigation, may allow the State to better address the issue of MTBE contamination; and

**FURTHERMORE,** I order and direct DES to take all reasonable steps to encourage the federal government to appropriate adequate funding to states for the costs incurred to remediate MTBE-contaminated sites and water resources and to prevent future contamination.

Given at the Executive Chamber in Concord,  
this sixteenth day of April, two thousand  
one.

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GOVERNOR OF NEW HAMPSHIRE

April 16, 2001

The Honorable Christine Todd Whitman  
Administrator  
U.S. Environmental Protection Agency  
Ariel Rios Federal Building  
1200 Pennsylvania Avenue, NW  
Washington, DC 20460

Re: Intent to Opt Out of the Federal Reformulated Gasoline Program

Dear Administrator Whitman:

I write to make you aware of my decision that the State of New Hampshire must seek withdrawal from the federal Reformulated Gasoline (RFG) program immediately. Therefore, I ask the U.S. Environmental Protection Agency (EPA) to promptly address its procedures for states opting out of the RFG program (40 CFR 80.72) to allow a much sooner effective date than January 1, 2004. I am taking this action because it appears to represent the only rational, and legal, approach available to the State at this time to sharply reduce the levels of methyl tertiary-butyl ether (MTBE) in gasoline supplied to New Hampshire.

As you know, MTBE is a significant and rapidly increasing threat to New Hampshire's groundwater and surface water resources. MTBE is difficult and expensive to remediate because of its high solubility and its ability to move quickly through groundwater. Because MTBE travels farther in groundwater and does not break down rapidly, it can be difficult to pinpoint the source of the contamination. MTBE has been detected in public drinking water supplies and in private wells, and its remediation is consuming a disproportionately large percentage of the funds we have set aside for all petroleum contamination needs.

New Hampshire is particularly frustrated with existing federal barriers that prevent states from readily and effectively reducing or phasing-out the use of MTBE in gasoline. The federal Clean Air Act essentially prohibits states from controlling individual components of gasoline, and it expressly mandates the oxygen content of RFG. Refiners in the east blend MTBE in RFG – in concentrations 5-10 times greater than conventional gasoline – because it is the most cost-effective alternative for meeting this mandate. Because the federal Clean Air Act and its associated regulations provide states with virtually no authority to reduce MTBE in gasoline, states that use RFG are essentially compelled to contaminate their precious water resources. This is an unacceptable situation.

From the time we first recognized this problem, it has been clear that there are no simple solutions. As a result, on behalf of the New England Governors, I asked the Northeast States for Coordinated Air Use Management (NESCAUM) to thoroughly study the issues and options surrounding RFG and MTBE. Soon after, EPA's National Blue Ribbon Panel on MTBE was launched. The work products of both of these initiatives – NESCAUM's *RFG/MTBE Findings and Recommendations* and the *Blue Ribbon Panel Findings and Recommendations on the Use of Oxygenates in Gasoline* recommended elimination of the oxygenate mandate from the Clean Air Act. The MTBE problem requires a federal solution, but Congress has made little progress to date and no federal solution appears imminent.

As a result, the State of New Hampshire is forced to pursue the only legal, rational option that exists for reducing MTBE in gasoline: to opt out of the federal RFG program. I have thus directed the New Hampshire Department of Environmental Services (DES) to immediately inform EPA Region I of this action, to promptly consult with EPA's regional office to establish the requirements necessary to implement this action, and to expeditiously fulfill those requirements. Since I understand that a strict interpretation of the applicable federal regulations (i.e., 40 CFR 80) prevents New Hampshire from opting out of the RFG program prior to January 1, 2004, I further request that EPA address these regulations to provide for an earlier opt out date and/or such other relief as may prevent further MTBE contamination of New Hampshire's water resources between now and 2004.

As a former governor, I am sure you understand the economic and environmental importance of solving the problem of MTBE contamination. From your experience as Governor, you are also aware of the aggressive steps states have taken to replace underground fuel tanks and educate consumers regarding spill prevention and the proper handling of gasoline. Given the volume of gasoline distributed, however, it is ultimately unreasonable to expect that there will be no releases, even with the most diligent gasoline handling. The pollution prevention and source reduction approaches that the states have found to be extraordinarily effective advise us to reduce, and eventually eliminate, the use of MTBE as a gasoline additive in the first place.

I look forward to working with you so that New Hampshire can eliminate the risks posed to our groundwater resources by MtBE in the near future. Should you have any questions, please feel free to contact me or DES Commissioner Robert W. Varney at your convenience.

Very truly yours,

Jeanne Shaheen

cc: Ira Leighton, Acting Regional Administrator  
Robert W. Varney, DES Commissioner