

**ASSOCIATION OF TAXICAB OPERATORS, USA V. CITY OF
DALLAS: A POSSIBLE GREEN LIGHT AHEAD FOR “HEAD-
OF-THE-LINE” POLICIES FAVORING NATURAL GAS
VEHICLES**

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INTRODUCTION

In a move that almost seems borrowed from a board game, municipalities across the country are enacting rules that allow taxicabs equipped to run on natural gas to cut in line at airport queues ahead of their gasoline- and diesel-powered counterparts.¹ The justification is mainly grounded in environmental policy—natural gas vehicles (NGVs) are a lot cleaner than gasoline and diesel vehicles and thus improve air quality.² Others, however, also tout the national security and job-creation benefits to be gained from policies encouraging use of a domestic-fuel source like natural gas.³ In theory, it is a “win-win”: Citizens receive cleaner air, the country reduces its dependence on foreign oil, and the private sector (in this case, taxi companies) is incentivized to invest in cleaner vehicles. Not everyone sees it that way. In fact, these programs have some folks fuming mad.⁴

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1. See, e.g., Dallas, Tex., Ordinance 27831 (Mar. 10, 2010) [hereinafter Ordinance], available at www.ci.dallas.tx.us/cso/resolutions/2010/03-10-10/10-0729.PDF (establishing head-of-line privilege for taxis at Dallas Love Field Airport); *Chicago Launches CNG Airport Taxicab Fast Lane*, MEMBER NEWSL. (Nat. Gas Vehicles for Am., Washington, DC), Aug. 26, 2011 (discussing head-of-line privilege for taxis at Chicago-area airports); S.F. INT’L AIRPORT, FACT SHEET: SFO’S CLEAN VEHICLE POLICY: 10TH ANNIVERSARY 2000–2010, at 1 (2010), available at <http://www.flysfo.com/web/export/sites/default/download/about/news/pressres/fact-sheet/pdf/CleanVehiclePolicy.pdf> (discussing head-of-line privilege for taxis at San Francisco Airport); Roger Yu, *Airport Check-in: Dallas/Fort Worth and Green Taxis*, USA TODAY, Jan. 25, 2010, http://www.usatoday.com/travel/flights/2010-01-24-dallas-airport-green-taxis_N.htm (discussing head-of-line privilege for taxis at Dallas/Fort Worth International Airport); Press Release, Massachusetts Port Authority Along with the City of Boston Announce First Cab Incentive Program to Encourage the Use of Hybrid and Alternative Fuel Vehicles (Apr. 23, 2007), available at <http://www.massport.com/news-room/News/MassachusettsPortAuthorityAnnounceFirstCabIncentiveProgram.aspx> (discussing head-of-line privilege for taxis at Boston’s Logan Airport).

2. Ordinance, *supra* note 1, at 2.

3. See, e.g., *The Plan*, PICKENSPLAN, <http://www.pickensplan.com/theplan2/> (last visited Apr. 20, 2012) (advocating for energy independence from foreign oil sources).

4. See Wade Goodwyn, *Dallas Policy May Drive Some Taxis off the Road*, VT. PUB. RADIO (Feb. 3, 2011), <http://www.vpr.net/npr/133462224/> (describing the protest of 200 Dallas taxicab drivers due to the new front-of-line policy for cabs running on natural gas); Richard Abshire, *Cabbies Arrested After Protests over Rule Letting Natural-Gas Cabs to Cut in Line at Love Field*, DALLAS MORNING

For example, shortly after a so-called “head-of-the-line” ordinance was instituted at Dallas’s Love Field Airport, an association of taxicab drivers filed suit to enjoin its enforcement by asserting (somewhat ironically) that it was preempted by the Clean Air Act (CAA).⁵ More specifically, the plaintiff argues that the ordinance amounts to a “standard relating to the control of emissions” and is, therefore, subject to preemption under section 209(a) of the CAA.⁶ Plaintiff sought relief in the form of a declaratory judgment and an injunction.⁷

The case remains pending in the U.S. District Court for the Northern District of Texas, but preliminary rulings by the court, namely the denial of plaintiff’s request for preliminary injunction, suggest that state and local policies incentivizing the use of NGVs will survive a preemption challenge.⁸ As discussed *infra*, however, municipalities must still be wary of going too far and risk having the incentive construed as a mandate.

This Comment takes the position that at the state and local level, incentive-based programs favoring NGVs play an important role in tackling mobile-source air pollution as well as overall national energy policy. This is particularly true now, as the federal government seems hampered from taking a leadership role on the environment given concerns over the economy.⁹

NEWS, Jan. 31, 2011, <http://www.dallasnews.com/news/local-news/20110131-cabbies-arrested-after-protests-over-rule-letting-natural-gas-cabs-to-cut-in-line-at-love-field-.ece> (reporting eight cab drivers arrested in Dallas after protesting a local city ordinance giving order preference to natural-gas-powered cabs); Kassi Schmitt, *Dallas Cab Drivers Again Protest Rule Favoring Natural Gas Fueled Taxis*, DALLAS MORNING NEWS, Oct. 4, 2010, <http://www.dallasnews.com/news/community-news/dallas/head-lines/20101004-Dallas-cab-drivers-again-protest-Love-3246.ece> (discussing Dallas-area cab drivers’ negative reaction to giving preference to taxis powered by natural gas); Patrick Michels, *Fare Is Fare: Cab Drivers Cry Foul Over Special Privileges for Natural Gas Taxis at Love Field*, DALLAS OBSERVER BLOGS (Sept. 15, 2010, 11:32 AM), http://blogs.dallasobserver.com/unfairpark/2010/09/fare_is_fare_cab_drivers_cry_f.php (describing independent cab drivers’ distaste for the new front-of-line policy at Love Field Airport).

5. Verified Complaint at 1–2, *Ass’n of Taxicab Operators, USA v. City of Dallas*, 760 F. Supp. 2d 693 (N.D. Tex. 2010) (No. 3:10-cv-769-K).

6. *Id.* at 7–8 (quoting 42 U.S.C. § 7543(a) (2006)).

7. *Id.* at 9.

8. *See Ass’n of Taxicab Operators*, 760 F. Supp. 2d at 694–701 (denying a preliminary injunction due to a failure to demonstrate that the Ordinance was preempted by federal law). Since submitting this Comment for publication, the court took up a motion for final summary judgment filed by the defendant, City of Dallas. Noting how no new arguments were raised since the denial of plaintiff’s injunction, the court granted the defendant’s motion and separately entered judgment in defendant’s favor. *See Ass’n of Taxicab Operators, USA v. City of Dallas*, No. 3:10-cv-769-K, 2012 WL 1033511, at *1, *3 (N.D. Tex. Mar. 28, 2012) (“Because no genuine issue of material fact exists as to the lack of preemption of the Ordinance by the Clean Air Act, the City’s Motion for Final Summary Judgment is hereby GRANTED.”)

9. *See* Steve Hargreaves, *Obama Backs Off Tough Clean Air Regulation*, CNN MONEY (Sept. 2, 2011, 3:49 PM), <http://money.cnn.com/2011/09/02/news/economy/regulations/> (discussing Obama’s decision to cut back on environmental regulations for the economy’s benefit); Albert Hunt, *Saying*

I. A BRIEF OVERVIEW OF NGVs

A. The Technology

A bi-fueled Ford Transit Connect converted to run on CNG and gasoline. Photo courtesy of Kirk Energy Group, LLC.

Goodbye to the Dysfunctional Senate, N.Y. TIMES, Mar. 18, 2012, http://www.nytimes.com/2012/03/19/us/19ihtletter19.html?_r=1&scp=1&sq=dysfunctional%20congress&st=cse (discussing a retiring senator's view of the Senate as "dysfunctional" with no consensus on fiscal issues); Michael Shear, *Is Bipartisanship Back? Don't Count on It*, N.Y. TIMES: THE CAUCUS (Mar. 1, 2012, 7:38 AM), <http://thecaucus.blogs.nytimes.com/2012/03/01/is-bipartisanship-back-dont-count-on-it/> (discussing the frosty relationship between the White House and Republicans on Capitol Hill); Bryan Walsh, *Battle Brews Over EPA's Emissions Regulations*, TIME (Jan. 3, 2011), www.time.com/time/health/article/0,8599,2040485,00.html (discussing political reactions to new EPA regulations of greenhouse-gas emissions); Jonathan Weisman, *Candidates Run Against Regulation*, WALL ST. J., June 14, 2011, <http://online.wsj.com/article/SB10001424052702303848104576384391491555226.html> (highlighting the elimination of federal environmental regulations as a campaign issue in the 2012 Republican presidential debates).

Natural gas has been used as a transportation fuel for vehicles since the 1930s.¹⁰ While more prevalent in Europe and the Middle East, there are about 112,000 NGVs presently operating on U.S. highways.¹¹ Worldwide, the total approaches thirteen million.¹²

To be considered an NGV, a vehicle must be equipped to run on either compressed natural gas (CNG) or liquefied natural gas (LNG).¹³ CNG is a gaseous fuel stored typically in a tank at a pressure of 3,000 to 3,600 pounds per square inch.¹⁴ LNG is cryogenic fuel stored in special insulated tanks at a temperature of -260°F.¹⁵ When used as a vehicle fuel, natural gas is sold in units of gasoline- or diesel-gallon equivalents based on the energy content of a gallon of gasoline or diesel fuel.¹⁶ Both CNG and LNG are considered alternative fuels under the Energy Policy Act of 1992.¹⁷

In the case of light-duty vehicles, which are the scope of this Comment, the NGVs involve either a bi-fuel or dedicated system.¹⁸ A bi-fueled NGV can operate on either natural gas or gasoline.¹⁹ A dedicated NGV is one that operates solely on natural gas.²⁰

Nearly all light-duty NGVs rely upon the use of aftermarket-conversion systems.²¹ Aftermarket-conversion systems that are sold in the United States and are intended for use in on-road vehicles must be certified or approved by the Environmental Protection Agency (EPA) and the

10. ALT. VEHICLE FUEL INST., NATURAL GAS VEHICLES: THE DECISION STARTS HERE 10 (2010) [hereinafter DECISION STARTS HERE].

11. *Facts About Natural Gas Vehicles*, NAT. GAS VEHICLES FOR AM., http://www.ngvc.org/about_ngv/ (last visited Apr. 20, 2012).

12. *Id.*

13. See DEP'T OF ENERGY, NATURAL GAS BASICS 1 (2010) [hereinafter NATURAL GAS BASICS], available at <http://www.afdc.energy.gov/afdc/pdfs/48126.pdf> (explaining that because natural gas is a mix of gaseous hydrocarbons, it must be stored as CNG or LNG in a vehicle).

14. *Id.*

15. *Id.*

16. *Id.*

17. Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776.

18. NATURAL GAS BASICS, *supra* note 13, at 1.

19. *Id.* Bi-fueled vehicles are preferred in markets where access to natural-gas-filling infrastructure remains limited, thus giving the operator the flexibility to run on gasoline if needed. See NAT. GAS VEHICLES FOR AM., FACT SHEET: CONVERTING LIGHT-DUTY VEHICLES TO NATURAL GAS 2 (2011) [hereinafter CONVERTING LIGHT-DUTY VEHICLES], http://www.ngvc.org/pdfs/FAQs_Converting_to_NGVs.pdf (explaining that only about 500 CNG stations are open to the public).

20. NATURAL GAS BASICS, *supra* note 13, at 1.

21. See *id.* (discussing the option of aftermarket-conversion systems for light-duty vehicles because of the lack of original-equipment manufacturers (OEM) in the United States). The Civic GX offered by Honda is the only light-duty NGV available from a U.S. OEM. *Id.* Companies producing the conversion systems fall into the classification of Small Volume Original Equipment Manufacturers (SVMs). CONVERTING LIGHT-DUTY VEHICLES, *supra* note 19, at 4. Currently, there are about a dozen SVMs offering EPA-certified systems for approximately forty different vehicle models. *Id.*

California Air Resources Board (CARB).²² Both the EPA and CARB have adopted rules to make sure that the aftermarket-conversion systems do not increase emissions and also allow for certifying systems at very demanding emission levels.²³

Light-duty NGVs operate much like gasoline-powered vehicles with spark-ignited engines.²⁴ In brief, CNG is stored on board in high-pressure cylinders that release gas as needed by the engine.²⁵ In turn, the gas travels through the high-pressure fuel line and enters the engine compartment.²⁶ From there, the gas then enters the pressure regulator, which reduces the gas pressure used for storage (up to 3,600 psi) to the required vehicle fuel-injection system pressure.²⁷ A natural gas-solenoid valve then allows natural gas to pass from the regulator into the gas mixer or fuel injectors.²⁸ From there, natural gas mixed with air flows down through the carburetor or fuel-injection system and enters the engine combustion chambers, where it is burned to produce power in the exact same fashion as gasoline.²⁹

B. Cost of Conversion

The cost of converting a vehicle to run on natural gas varies based on a number of factors including: (a) the type of conversion system selected; (b) the type of vehicle to be converted; (c) the quantity of on-board fuel storage desired; (d) the type of on-board storage cylinders selected; and (e) local labor rates.³⁰ As might be expected, the cost is generally lower for passenger-class vehicles and increases as you move into medium- and heavy-duty engine classes.³¹

Using the Ford Transit Connect and Crown Victoria as examples—both popular models with taxi fleets—one could expect to pay approximately \$10,500 and \$12,990 respectively, for the CNG-conversion

22. *Alternative Fuel Conversion*, EPA, <http://www.epa.gov/otaq/consumer/fuels/altfuels/altfuels.htm> (last visited Apr. 20, 2012); *Emissions Standards Reference Guide Basic Information*, EPA, <http://www.epa.gov/otaq/standards/basicinfo.htm> (last visited Feb. 8, 2012) [hereinafter *EPA Emissions Standards*].

23. *EPA Emissions Standards*, *supra* note 22.

24. *Alternative Fuels and Advanced Vehicles Data Center*, DEP'T OF ENERGY, http://www.afdc.energy.gov/afdc/vehicles/natural_gas_what_is.html (last visited Apr. 20, 2012).

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. DECISION STARTS HERE, *supra* note 10, at 12.

31. NATURAL GAS BASICS, *supra* note 13, at 2.

systems.³² While this may seem significant to some, this incremental cost can often be recouped through government incentives as well as fuel-cost savings.³³ As relates to the latter point, the cost savings can be substantial. According to the July 2011 edition of the Alternative Fuel Price Report, the cost of CNG is running \$1.61 less than gasoline on a per-gasoline-gallon-equivalent basis and \$1.65 less than diesel on a per-diesel-gallon-equivalent basis.³⁴ These figures represent a national average, and there were noted regions of the country that achieved price performance substantially above the national average.³⁵

Average Retail Fuel Prices on an Energy Equivalent Basis³⁶

	<i>Nationwide Average Price in Gasoline Gallon Equivalents</i>	<i>Nationwide Average Price in Diesel Gallon Equivalents</i>
Gasoline	\$3.68	\$4.10
Diesel	\$3.54	\$3.95
CNG	\$2.07	\$2.30
Ethanol (E85)	\$4.60	\$5.14
Propane	\$4.26	\$4.76
Biodiesel (B20)	\$3.67	\$4.09
Biodiesel (B99-100)	\$4.13	\$4.60

C. The Environmental Benefits

“Compared with gasoline and diesel vehicles, NGVs can produce significantly lower carbon monoxide, nitrogen oxide, nonmethane hydrocarbon, particulate matter, and other toxic emissions, as well as greenhouse gas emissions.”³⁷ While actual emissions are subject to variation based on engine design, the EPA reports the following potential emissions reductions offered by CNG relative to conventional gasoline:

32. E-mail from James S. Ramsey III, Bus. Dev. Manager, Clean Energy Fuels, to author (Sept. 8, 2011) [hereinafter Ramsey] (on file with author).

33. NATURAL GAS BASICS, *supra* note 13, at 2.

34. DEP'T OF ENERGY, CLEAN CITIES ALTERNATIVE FUEL PRICE REPORT: JULY 2011, at 5–6 (2011) (emphasis added), available at http://www.afdc.energy.gov/afdc/pdfs/afpr_jul_11.pdf.

35. *Id.*

36. *Id.* at tbl. 2 (emphasis added).

37. NATURAL GAS BASICS, *supra* note 13, at 2.

- Reductions in carbon monoxide emissions of 90 to 97 percent
- [R]eductions in carbon dioxide emissions of 25 percent.
- Reductions in nitrogen oxide emissions of 35 to 60 percent.
- Potential reductions in nonmethane hydrocarbon emissions of 50 to 75 percent.³⁸

The EPA confirmed that CNG has fewer toxic and carcinogenic pollutants and no evaporative emissions in dedicated engines.³⁹ Additionally, there is little-to-no particulate matter produced from NGVs.⁴⁰

The Department of Energy has even conducted its own study specific to taxicab operations, comparing side-by-side costs and emissions of CNG- and gasoline-fueled taxicabs.⁴¹ The study found the fuel economy of the CNG and gasoline cabs to be identical, and operating costs for the CNG cabs to be 25% less than their gasoline-powered counterparts.⁴² Tailpipe-emissions testing further confirmed that CNG-exhaust emissions are significantly lower than those for the gasoline cabs involved in the study, particularly in the areas of non-methane hydrocarbons and carbon monoxide.⁴³

II. CASE ANALYSIS

A. The Love Field Airport Ordinance

Mobile-source emissions, including those from vehicles, represent a significant problem for the Dallas/Fort Worth area.⁴⁴ North Central Texas, which includes the Dallas/Fort Worth region, is designated as a non-attainment area under the CAA with regard to its failure to meet EPA standards for ground-level ozone.⁴⁵ As a nonattainment area, North Central

38. EPA, CLEAN ALTERNATIVE FUELS: COMPRESSED NATURAL GAS (2002), *available at* http://www.afdc.energy.gov/afdc/pdfs/epa_cng.pdf.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. Ass'n of Taxicab Operators, *USA v. City of Dallas*, 760 F. Supp. 2d 693, 695 (N.D. Tex. 2010).

45. *Id.*

Texas was required to file a State Implementation Plan (SIP) wherein it explained its strategy for getting the area in compliance with the standards.⁴⁶

The City of Dallas concluded that an incentive-based approach, whereby people would be encouraged to buy low-emission vehicles, could help advance the goals of the SIP.⁴⁷ Accordingly, on March 10, 2010, the Dallas City Council enacted Ordinance 27831 (Ordinance) to provide an incentive for dedicated CNG taxis operating at the Dallas Love Field Airport.⁴⁸ More specifically, the Ordinance provided:

(a) A taxicab authorized to operate at the airport will be eligible for “head-of-the-line” privileges in the taxicab holding and dispatch areas if the taxicab is verified as a dedicated compressed natural gas vehicle

(b) “Head-of-the-line” privileges allow an eligible taxicab to advance to the front of a taxicab holding or dispatch area, ahead of all ineligible taxicabs⁴⁹

As a basis for the Ordinance, the City Council made specific mention to its noncompliance with the National Ambient Air Quality Standards, as well as how the SIP included programs to remove older vehicles from the road and technologies to clean up vehicles already on the road.⁵⁰ The recitals within the Ordinance went on to note the environmental benefits of CNG vehicles, including the fact that they “contribute less to local and regional air pollution (including particulate matter) than traditional vehicles and assist in reducing problems such as smog, haze, and health issues.”⁵¹ The scope of the Ordinance was limited to the Dallas Love Field Airport and had no application to other areas within the City limits.⁵²

B. A Lawsuit Follows

Soon after the Ordinance was enacted, the Association of Taxicab Operators, USA (ATO), which claimed to have members aggrieved under the Ordinance, filed suit in the U.S. District Court for the Northern District

46. *Id.*

47. *Id.*

48. Ordinance, *supra* note 1, at 1, 7.

49. *Id.* at 6.

50. *Id.* at 1–2.

51. *Id.* at 2.

52. *Ass’n of Taxicab Operators*, 760 F. Supp. 2d at 695.

of Texas.⁵³ ATO's complaint alleged that the Ordinance amounts to a "standard relating to the control of emissions from new motor vehicles" and is thus preempted under section 209(a) of the CAA.⁵⁴

ATO sought a declaration from the court that the Ordinance was in fact preempted under the CAA.⁵⁵ They also requested preliminary and permanent injunctions providing that the City of Dallas be "restrained and enjoined from allowing taxicabs permitted at Dallas Love Field which utilize CNG powered engines to be given any 'head-of-the-line' privileges at Dallas Love Field."⁵⁶

C. Injunction Denied

Central to the ATO's request for injunctive relief was whether the Ordinance ran afoul of section 209(a) of the CAA. Section 209(a) provides: "No State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part."⁵⁷ The court first noted that Congress left regulating local businesses, such as the operation of taxicabs, largely to the states.⁵⁸ The court then went on to explain how the CAA maintains states' rights in implementing air-pollution-control measures, especially in the case of motor vehicles.⁵⁹

Section 209(d) preserves state and local authority over use and operations of vehicles. As the D.C. Circuit has observed, "the longstanding scheme of motor vehicle emissions control has always permitted the states to adopt in-use regulations—such as carpool lanes, restrictions on car use in downtown areas, and programs to control extended idling of vehicles—that are expressly intended to control emissions."

. . . .

This is consistent with the structure of the Clean Air Act as a whole, which largely preserves the traditional role of states in controlling air pollution.⁶⁰

53. *Id.*

54. *Id.* at 696.

55. Verified Complaint, *supra* note 5, at 8.

56. *Id.* at 9.

57. Clean Air Act, 42 U.S.C. § 7543(a) (2006).

58. *Ass'n of Taxicab Operators*, 760 F. Supp. 2d at 697.

59. *Id.* at 697–98.

60. *Id.* (citations omitted).

Turning then to the preemption language in section 209(a), the court analyzed whether the Ordinance constituted a “standard” within the context of the CAA.⁶¹ It held that it was not.⁶² Critical to the court’s holding was the fact that the regulation involved here amounted to a voluntary incentive program and thus neither dictated permissible pollutant levels nor mandated emission-control technology.⁶³

By their very nature, incentive programs lack the kind of enforceable requirements that are characteristic of standards. The Ordinance is no different. The Ordinance does not mandate quantitative emission levels, establish manufacturer requirements, establish purchase requirements, mandate emissions control technology, or establish a penalty or fee system, therefore the Ordinance is not a standard under Section 209(a) of the Clean Air Act.⁶⁴

Having failed to establish a likelihood of success on the merits, ATO’s request for preliminary injunction was denied.⁶⁵

While the court could have just as easily ended the analysis there, it went on to evaluate whether the Ordinance, even if construed as a standard, would trigger preemption under the second prong of the analysis, which asks whether the law “relat[es] to the control of emissions.”⁶⁶ The court intimated that it would not.⁶⁷

A mandate to purchase CNG taxicabs would require the use of a particular technology, but the use of this technology does not establish a standard relating to the control of emissions. Simply put, on the facts in this case, there is no evidence that CNG technology establishes an air emissions standard such that Clean Air Act preemption would apply.⁶⁸

61. *Id.* at 698.

62. *Id.* at 699.

63. *Id.*

64. *Id.*

65. *Id.* at 700. ATO appealed the order to the Fifth Circuit Court of Appeals. However, that appeal was subsequently dismissed. *Ass’n of Taxicab Operators, USA v. City of Dallas*, No. 10-11002 (5th Cir. Feb. 24, 2011). ATO also applied to the U.S. Supreme Court for relief, and the application was denied. *Ass’n of Taxicab Operators, USA v. City of Dallas*, No. 10A746 (U.S. Feb. 1, 2011), *denying cert. to application for injunction* No. 10-11002 (5th Cir. 2010).

66. *Ass’n of Taxicab Operators*, 760 F. Supp. 2d at 699.

67. *Id.*

68. *Id.*

Legal scholars, in analyzing analogous preemption clauses, also support the conclusion that policies promoting greater use of alternative-fuel vehicles were never intended to come within the preemptive scope of the CAA.⁶⁹

D. Metropolitan Taxicab Cases Distinguished

At first blush, the court's decision in *Association of Taxicab Drivers* might seem to be at odds with the *Metropolitan Taxicab* cases out of New York.⁷⁰ In *Metropolitan Taxicab I*, the court reviewed new lease rate rules for taxicabs devised by the City of New York, which were aimed at incentivizing the use of hybrid vehicles while at the same time discouraging the use of conventionally powered taxis.⁷¹

Under the City's new rules, if an owner purchases a taxicab with a hybrid or clean-diesel engine . . . the rate at which the vehicle can be leased to a driver for a 12-hour shift is increased by \$3. By contrast, if an owner leases out a non-hybrid, non-wheelchair accessible vehicle (i.e. a Crown Victoria), the maximum lease rate an owner may charge a driver is reduced by \$4 immediately, \$8 in May 2010, and \$12 in May 2011.⁷²

In response to the rules, a taxicab association filed suit and sought an injunction alleging that the new rules effectively forced them to buy hybrid vehicles and were, therefore, preempted by the Environmental Policy and Conservation Act (EPCA) and the CAA.⁷³ The court agreed.⁷⁴

69. Jonathan Skinner, *Who Killed the Hybrid Car? State and Local Green Incentive Programs After Metropolitan Taxicab Board of Trade v. City of New York in the Second Circuit*, 30 STAN. ENVTL. L.J. 311, 320, 324, 333–35 (2011) [hereinafter, *Who Killed the Hybrid Car?*] (discussing how the preemption clause within the Environmental Policy and Conservation Act (EPCA), which is similar to the CAA, was merely aimed at shielding the automotive industry from numerous differing manufacturing standards from state and local governments and was not intended to have broader application beyond that).

70. *Metro. Taxicab Bd. of Trade v. City of New York (Metro. Taxicab I)*, 633 F. Supp. 2d 83 (S.D.N.Y. 2009), *aff'd*, *Metro. Taxicab Bd. of Trade v. City of New York (Metro. Taxicab II)*, 615 F.3d 152, 158 (2d Cir. 2010), *cert. denied*, *City of New York v. Metro. Bd. of Trade*, 131 S. Ct. 1569 (2011).

71. *Metro. Taxicab I*, 633 F. Supp. 2d at 85, 99.

72. *Id.* at 85. This rule followed an earlier attempt by the City of New York to impose a minimum mile-per-gallon requirement on taxis (the so-called 25/30 MPG Rule). *Id.* at 88. That rule was held to be preempted by the EPCA and resulted in an injunction against the City. *Id.* The City responded by repealing the 25/30 MPG Rule and instituting the lease cap strategy by way of an alternative approach to greening New York City's taxi fleet. *Id.* at 88–89.

73. *Id.* at 91.

74. *Id.* at 105–06.

Focusing on the economic impact of the rules, namely testimony from plaintiff's experts, the court found that the new Lease Cap Rules would lower the profit margin by as much as 76% for those fleet operators who elected to forego buying the hybrid taxis and remain with the less efficient Crown Victoria model.⁷⁵ In the court's mind, this amounted to a mandate, as no reasonable taxicab owner when faced with such an economic consequence would refrain from buying the hybrid taxis.⁷⁶

The court next evaluated whether the rules "related to" fuel economy standards and the control of emissions.⁷⁷ Finding that the effect of the Rules was to essentially compel the use of taxis with a certain miles-per-gallon rating and cleaner emissions, the court found the Rules to be preempted under both the EPCA and the CAA.⁷⁸

Appeal was taken to the Second Circuit, which affirmed the district court's decision to enjoin the Lease Cap Rules.⁷⁹ Focusing exclusively on EPCA's preemption clause (presumably because it afforded an easier analysis over the CAA),⁸⁰ the court in *Metropolitan Taxicab II* considered whether the Lease Cap Rules "related to" a fuel economy standard. Finding it was "related," the court affirmed the district court's decision and deliberately failed to address the issue of preemption under the CAA.⁸¹

In challenging the Dallas Ordinance, ATO relied upon *Metropolitan Taxicab I* in arguing the Ordinance was likewise preempted.⁸² The court, however, rejected ATO's argument, even calling their reliance on the case "misplaced."⁸³ Of significance to the court was the fact that the Ordinance was operating as a pure incentive.⁸⁴ "An incentive, like the one in this case,

75. *Id.* at 99.

76. *Id.* at 99–100.

77. *Id.* at 102–03.

78. *Id.* at 103–05.

79. *Metro. Taxicab II*, 615 F.3d 152, 158 (2d Cir. 2010).

80. There is an important distinction between the EPCA and CAA preemption clauses. Notably, the preemption clause in the EPCA precludes state or local governments from adopting or enforcing "a[ny] law or regulation related to fuel economy standards." 49 U.S.C. § 32919(a) (2006) (emphasis added). By contrast, the preemption language in the CAA is arguably narrower and limits preemption to "any standard relating to the control of emissions." 42 U.S.C. § 7543(a) (2006) (emphasis added). Thus, by focusing exclusively on the EPCA, the Second Circuit was able to avoid the more complex analysis as to whether the Lease Cap Rules amounted to a "standard" under the CAA.

81. *See Metro. Taxicab II*, 615 F.3d at 158 ("Because preemption under the EPCA is sufficient to affirm the preliminary injunction, there is no need to reach the question of whether the preemption provision of the CAA would invalidate the City's new rules.").

82. *See* Application for Second Temporary Restraining Order and for Preliminary Injunction and Supporting Memorandum of Law at 16–17, *Ass'n of Taxicab Operators, USA v. City of Dallas*, 760 F. Supp. 2d 693 (N.D. Tex. 2010) (No. 3:10-cv-769-K), 2010 WL 5813515 (arguing that the "relating to" provision of the CAA preempted the Ordinance).

83. *Ass'n of Taxicab Operators*, 760 F. Supp. 2d at 699.

84. *Id.* at 700.

was never challenged in *Metro. Taxicab I*.⁸⁵ Accordingly, the court held, “any reliance on *Metro. Taxicab I* is not appropriate, because the present issue was not before the Southern District of New York or the Second Circuit.”⁸⁶

The court further distinguished the *Metropolitan Taxicab* cases based upon the scope of impact of the laws.⁸⁷ For example, whereas the regulation in *Metropolitan Taxicab* applied city-wide, the Ordinance here was limited to Dallas Love Field Airport.⁸⁸ This detail is important on the issue of whether the Ordinance, by its operation, amounted to a de facto mandate whereby taxi operators would be left with no viable choice but to buy CNG taxicabs.⁸⁹ The court found it was not.⁹⁰

Here, unlike in the *Metropolitan Taxicab* cases, the taxi companies were under no compulsion to buy CNG vehicles.⁹¹ Those disappointed with the head-of-the-line policy at Dallas Love Field Airport had an economically viable alternative, which was to operate their taxis elsewhere in the city.⁹² Accordingly, preemption, the court correctly held, does not apply in this circumstance.⁹³

An additional argument that the court in *Association of Taxicab Operators* might have advanced is that the EPCA preemption provision—arguably more expansive than the CAA⁹⁴—was not at issue in this case.⁹⁵

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *See Metro. Taxicab I*, 633 F. Supp. 2d 83, 93 (S.D.N.Y. 2009). “If the Lease Cap Rules present viable options to Fleet Owners to either purchase a Crown Victoria or a hybrid, then the Rules are not a mandate. A preemption analysis would then be irrelevant since the City is not forcing the Fleet Owners to take any new action—much less a potentially preempted action.” *Id.*

90. *See Ass’n of Taxicab Operators*, 760 F. Supp. 2d at 700 (inferring that the Ordinance was not a de facto mandate because it only applied to Love Field).

91. *Id.* at 699.

92. *Id.*; *cf. Metro. Taxicab I*, 633 F. Supp. 2d at 100 (finding that a New York City lease cap regulation left taxi operators with no economically viable option and effectively operated as a mandate to switch to hybrid vehicles).

93. *See Metro. Taxicab I*, 633 F. Supp. 2d at 95–96 (“[A] local law is not preempted when it only indirectly regulates parties within a preempted field and presents regulated parties with viable, non-preempted options, as held in *Travelers Insurance and Dillingham Construction*.”); *Green Alliance Taxi Cab Ass’n v. King County*, No. C08-1048RAJ, 2010 WL 2643369, at *4 (W.D. Wash. June 29, 2010) (“[A] rule incentivizing the purchase or use of hybrid vehicles is legitimate as long as it does not compel or bind parties to a particular choice.”).

94. *See supra* note 80 and accompanying text.

95. The reason why preemption under the EPCA was not asserted in the *Ass’n of Taxicab Operators* case likely has to do with the fact that the Ordinance cannot be construed to “relat[e] to fuel economy standards.” 49 U.S.C. § 32919(a) (2006). This is because NGVs running on CNG achieve roughly the same fuel economy (i.e., miles per gallon) as conventional fuel vehicles. *CNG and LNG*:

Because the Second Circuit in *Metropolitan Taxicab II* intentionally omitted any analysis of whether the Lease Cap Rules qualified for preemption under the CAA, the court left room for continued debate. This also leaves room for differing results on whether a state or local law amounts to a “standard” under the CAA or is simply operating as an incentive. As should be clear from the *Association of Taxicab Operators* case, as well as a plain reading of the CAA, only the former would be preempted under the CAA.⁹⁶ However, the standard must be shown to “relat[e] to the control of emissions,”⁹⁷ which at least in the case of NGVs is an aspect of the preemption clause that has yet to be tested outside of the *Association of Taxicab Operators* case.

III. STATE AND LOCAL GOVERNMENTS LEAD BY EXAMPLE WITH NGV POLICIES

The *Metropolitan Taxicab I* and *II* cases certainly put some tough constraints on state and local governments as relates to programs aimed at promoting the use of alternative-fuel vehicles. This Author would not be the first to assert that those cases botched the preemption analysis and disregarded the historic police powers of the states.⁹⁸ Thankfully, the *Association of Taxicab Operators* case at least offers up some hope for state and local green initiatives. Further, it would seem that policies specifically promoting NGVs (as opposed to other alternative-fuel vehicles) have the added advantage of being immune from a preemption attack under the EPCA.⁹⁹ But even then, state and local governments may remain wary of instituting any form of motor vehicle policy out of fear of crossing that fine line of preemption.¹⁰⁰

In spite of these limitations, state and local initiatives for NGVs must be pursued if this country is going to get serious about achieving meaningful reductions in mobile air pollution and foreign oil imports.

Alternative Fuels, DEP’T OF ENERGY, http://www.afdc.energy.gov/afdc/fuels/natural_gas_cng_lng.html (last visited Apr. 20, 2012).

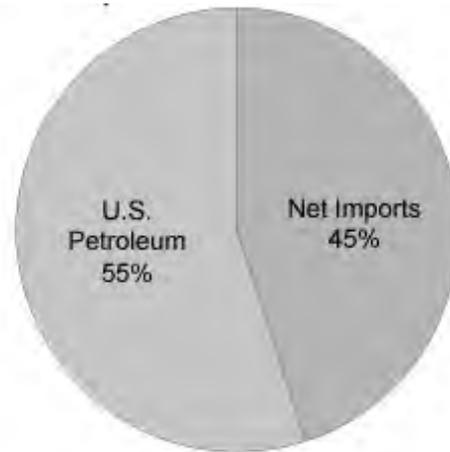
96. 42 U.S.C. § 7543(a) (2006); *Ass’n of Taxicab Operators*, 760 F. Supp. 2d at 698.

97. 42 U.S.C. § 7543(a).

98. *E.g.*, Skinner, *supra* note 69, at 312–13.

99. *See supra* notes 80, 95 and accompanying text.

100. Skinner, *supra* note 69, at 339.

Net Imports and Domestic Petroleum As Shares of U.S. Demand, 2011¹⁰¹*A. Decades of Federal Policy Failure*

In 1975, Congress enacted the EPCA with the objective of reducing dependence on foreign oil (specifically OPEC) imports.¹⁰² Much like now, turmoil in the Middle East was causing a spike in fuel prices, which ultimately led to a national energy crisis.¹⁰³

Some forty years later, America is not much better off. In 2011, the United States consumed 18.8 million barrels per day of petroleum, making the United States the world's largest petroleum consumer (20% of the global total).¹⁰⁴ Nearly half of the U.S.-consumed petroleum came from foreign countries.¹⁰⁵

Our dependence on OPEC countries, which includes Iran, has not shown much improvement since the 1970s.¹⁰⁶ For example, in 2011, about 52% of America's net petroleum came from OPEC countries, a mere 18% reduction from levels in 1977.¹⁰⁷

101. *Oil Imports & Exports*, U.S. ENERGY INFO. ADMIN., http://www.eia.gov/energyexplained/index.cfm?page=oil_imports (last visited Apr. 20, 2012) [hereinafter *Oil Imports & Exports*].

102. Skinner, *supra* note 69, at 317.

103. *See id.*

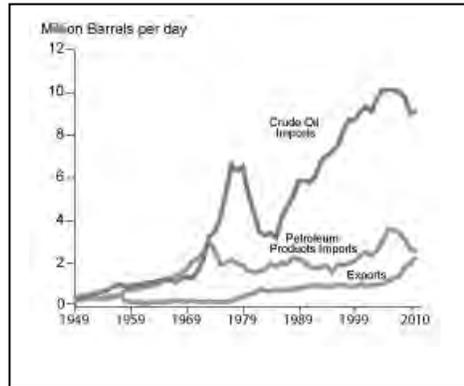
104. *Oil Imports & Exports*, *supra* note 101.

105. *Id.*

106. *Id.*

107. *Id.*

U.S. Petroleum Trade¹⁰⁸



By any measure, these numbers represent a disappointing result on the federal government's efforts to reign in foreign oil imports. Equally disappointing is the federal government's failure to promote domestic energy sources, such as natural gas, which can be used to displace the U.S. demand for gasoline and diesel.

There is no disputing that America has more than enough natural gas to meet transportation-energy needs.¹⁰⁹ In 2009, the Potential Gas Committee, the authority on gas supplies, revised total domestic natural gas reserves to include 2,074 trillion cubic feet.¹¹⁰ This was up over 35% from the previous estimate (issued three years earlier) and represented the largest ever increase in the forty-four-year history of reports from the committee.¹¹¹ So what has the federal government done to promote this fuel for America's vehicles? The short answer is: Not much.

In April 2011, Representatives John Sullivan, Dan Boren, John Larson, and Kevin Brady, introduced the New Alternative Transportation to Give Americans Solutions Act of 2011 (commonly known as the Nat Gas Act of 2011).¹¹² This bill provides a number of incentives for NGVs and well as NGV-fueling infrastructure, mostly in the form of tax credits.¹¹³ In spite of

108. U.S. Energy Info. Admin., *U.S. Petroleum Trade*, MONTHLY ENERGY REV., Mar. 2011.

109. See Jad Mouawad, *Estimate Places Natural Gas Reserves 35% Higher*, N.Y. TIMES, June 18, 2009, <http://www.nytimes.com/2009/06/18/business/energy-environment/18gas.html> (citing an optimistic natural gas supply for the future with a 35% surge in 2009).

110. *Id.*

111. *Id.*

112. Nat Gas Act of 2011, H.R. 1380, 112th Cong. (2011) [hereinafter Nat Gas Act of 2011], available at <http://thomas.loc.gov/cgi-bin/query/z?c112:H.R.1380>; see also NAT. GAS VEHICLES FOR AM., HR 1380 NAT GAS ACT OF 2011, at 1 (2011) [hereinafter *HR 1380 Explained*], available at www.ngvc.org/pdfs/HR1380_One_page_description_472011.pdf (last visited Apr. 6, 2012).

113. Nat Gas Act §§ 101–04, 201, 301–02.

having 181 co-sponsors, Congress has yet to enact the legislation.¹¹⁴ Furthermore, they let a previous tax credit for alternative-fuel vehicles lapse, which included NGVs.¹¹⁵

Given the political climate in Washington, it seems unlikely that the federal government, and particularly Congress, will be able to offer up much by way of domestic energy policy—let alone climate change initiatives.¹¹⁶ Accordingly, state and local governments should at least be given more latitude in crafting policies that promote alternative-fuel vehicles, especially where they can demonstrate meaningful reduction in foreign oil imports and greenhouse-gas emissions.¹¹⁷

B. Dallas Love Field Airport: A Local-Level Success Story

Dallas Love Field Airport began its “head-of-the-line” policy in April 2010.¹¹⁸ Since that time, and in spite of all the legal wrangling, there are now more than 100 CNG taxis operating at Dallas Love Field Airport.¹¹⁹

Considering that an average taxi consumes approximately 5,000 gallons per year, and that CNG offers a gallon-for-gallon displacement to gasoline, this equates to 500,000 gallons of gasoline being removed from domestic consumption.¹²⁰ And that is just year one! While this certainly bodes well for the environment and domestic energy policy, the Ordinance has also proven to benefit those that perhaps initially resented its application—the local cab drivers.¹²¹

114. *Bill Summary & Status 112th Congress (2011–2012) H.R. 1380 Cosponsors*, LIBRARY OF CONG., <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:HR01380:@@P> (last visited May 4, 2012). Since submitting this Comment for publication, U.S. Senators Robert Menendez (D-NJ), Richard Burr (R-NC), Saxby Chambliss (R-GA), and Senate Majority Leader Harry Reid (D-NV) introduced companion legislation for the Nat Gas Act in the U.S. Senate. *Bill Summary & Status 112th Congress (2011–2012) S. 1863*, LIBRARY OF CONG., <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:s.01863>: (last visited May 4, 2012). That bill was thereafter offered as an amendment to the Transportation Bill (Amendment #1782), but the measure failed to obtain the requisite number of votes. *See* NAT. GAS VEHICLES FOR AM., SENATE FAILS TO PASS NAT GAS ACT 1 (2012).

115. The Energy Policy Act of 2005 provided for an income tax credit for the purchase of a new, dedicated alternative-fuel vehicle at 50% of the incremental cost of the vehicle, plus an additional 30% if the vehicle meets certain tighter emission standards. Energy Policy Act of 2005, Pub. L. No. 109-58 § 1341, 119 Stat. 594, 1038, 1045. The credits ranged from \$2,500 to \$32,000 depending on the vehicle class. *Id.* at 1045. However, all credits expired on December 31, 2010 due to Congress’s failure to act in extending them. *HR 1380 Explained*, *supra* note 112, at 1.

116. *See supra* note 9.

117. If it does nothing else, Congress should amend the preemption clauses of the EPCA and CAA to expressly exclude state and local laws promoting the use of alternative-fuel vehicles.

118. Ordinance, *supra* note 1, at 7.

119. *See Ramsey*, *supra* note 32.

120. *Id.*

121. *Id.*

As discussed *supra*, CNG typically offers significant cost savings over conventional fuels.¹²² The experience at Love Field Airport has proven to be no different.¹²³ In Dallas, for example, gasoline is conservatively averaging \$3.60 per gallon.¹²⁴ Cab drivers using CNG, however, are paying around \$2.40 per gallon, roughly a dollar per gallon less.¹²⁵ Again using an assumed average of 5,000 gallons per year, this translates into a savings of around \$5,000 per cab per year. All combined, this means the Ordinance has already saved CNG cab operators over \$500,000 in fuel costs.¹²⁶ But the economic benefits do not end there.

Each of the CNG taxis deployed at Love Field Airport required the use of an aftermarket-conversion system.¹²⁷ They also needed CNG filling stations.¹²⁸ In turn, this generated business for other companies in the state, providing these types of products and services, such as: Clean Fuels Conversions (Austin) and BAF (Dallas), which provide conversion systems, and Clean Energy Fuels (Houston), which builds and operates natural gas fueling stations.¹²⁹

In short, with this one Ordinance, the City of Dallas has been able to achieve demonstrated success in the reduction of: foreign oil imports, harmful air pollutants, and greenhouse-gas emissions. However unintended, the law also promoted the state and local economy through fuel-cost savings and new jobs in the emerging alternative-energy sector.

CONCLUSION

It is an interesting time in this country. While the economy remains a pressing concern to many Americans, exciting progress is being made in the advancement of alternative fuels for vehicles, including natural gas. The “head-of-the-line” privilege at Dallas Love Field Airport is but one example of how state and local governments can achieve meaningful improvements in air quality through incentive-based policies promoting the use of NGVs. While these rules will no doubt come under continued legal attack, the *Association of Taxicab Operators* case gives hope that such policies will survive a preemption challenge under the CAA so long as they remain purely incentive-based. Policies specifically favoring NGVs also appear to

122. *See supra* Part I.B.

123. Ramsey, *supra* note 32.

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

have the added benefit of remaining immune from challenge under the more onerous preemption clause within the EPCA.

Given the lingering budget crisis in Washington, one thing remains certain—state and local governments looking to promote alternative-fuel vehicles must do so on their own. Congress would be wise to at least support their efforts by amending the CAA and the EPCA to expressly exclude alternative-fuel-vehicle policies from their preemptive scope. Until that time, the *Association of Taxicab Operators* case will likely give municipalities some clarity on how far they can go.