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January 3, 2011

Administrator Lisa Jackson
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Mail Code: 1101A
Washington, DC 20460

Subject: Comments on EPA's proposed E15 retail pump label, changes to the complex model and product transfer document regulations, commingling restrictions, and national retail fuel sampling and pump label survey
Docket EPA-HQ-OAR-2010-0448

Dear Administrator Jackson:

NPRA, the National Petrochemical and Refiners Association, is pleased to provide comments on the Agency's proposed E15 retail pump label, changes to the complex model and product transfer document regulations, commingling restrictions, and national retail fuel sampling and pump label survey (75 FR 68044; 11/4/10). NPRA represents high-tech American manufacturers, fueling and building America's future. NPRA members produce virtually all the refined petroleum products and petrochemicals manufactured in the United States, serving the American people responsibly and effectively. These manufacturers provide jobs directly and indirectly for 2 million Americans, economic and national security, and thousands of vital products to families and businesses throughout the United States.

NPRA opposes the Agency's decision to approve a partial waiver for E15. NPRA believes that EPA does not have authority under the Clean Air Act to approve a partial waiver that allows the use of E15 in some engines but not in others. In addition, EPA based its partial waiver decision on new data submitted to the public rulemaking docket on the day before the Agency announced the partial waiver, providing no time for the stakeholder review or meaningful public comment required under the Administrative Procedures Act.

Public safety is not guaranteed when a policy decision is based on inadequate engine test data that has not been made public or reviewed independently. The American people are the losers because EPA has violated President Obama's 2009 commitment to them to put science ahead of politics.

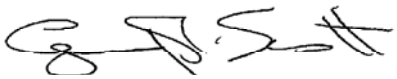
Our nation's domestic petroleum refiners are committed to manufacturing safe, reliable and clean gasoline, and we will continue to oppose any EPA actions that could endanger the safety of the American families, farmers and truckers we serve every day. We take the confidence Americans place in our products – demonstrated by the millions of times each day that consumers purchase gasoline and diesel fuel – very seriously.

NPRA is very concerned about misfueling and the potential consequences, including possible injuries to consumers and damage to engines. NPRA is disappointed that the Agency made a political decision to approve E15 with the need for a misfueling mitigation rule.

The one psi RVP waiver should apply to E15. NPRA opposes the proposed national retail fuel sampling and pump label survey.

Additional discussion of these and other issues is available in the attachment.

Sincerely,



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Attachment

cc: Docket EPA-HQ-OAR-2010-0448

COMMENTS OF THE NATIONAL PETROCHEMICAL AND REFINERS ASSOCIATION ON PROPOSED E15 RETAIL PUMP LABEL, CHANGES TO THE COMPLEX MODEL AND PRODUCT TRANSFER DOCUMENT REGULATIONS, COMMINGLING RESTRICTIONS, AND NATIONAL RETAIL FUEL SAMPLING AND PUMP LABEL SURVEY

EPA-HQ-OAR-2010-0448
75 FR 68044; 11/4/10

American families, farmers, truckers and businesses rely on NPRA members millions of times every day to provide affordable, reliable and safe fuels for use in their gasoline-powered on-road and non-road engines. EPA's partial waiver decision (75 FR 68094; 11/4/10) undermines this reliance. EPA's proposed misfueling rule is woefully inadequate to guard effectively against the potential harm that consumers will experience due to the E15 partial waiver. EPA has freely admitted that E15 is incompatible with most gasoline-powered engines in use by consumers today. Yet it is inevitable that if E15 is made available at retail, many consumers will misfuel – putting the wrong gasoline into the wrong engine. This misfueling may occur intentionally, due to price differential or a quality perception, or unintentionally, due to confusion or inattention. Such misfueling cannot be avoided simply with a dispenser label.

E15 will find its way into older vehicles, small engines and boats with potential consequences for personal safety, irreversible engine damage, consumer confusion, operational problems, a loss of a manufacturer's reputation, and warranty arguments. Studies conducted to date indicate the devastating range of personal injuries that may result as a consequence of using E-15 inappropriately. Given the gravity of the potential harm, a label is wholly insufficient protection. Consumers rely upon their government to ensure that the products offered are safe for the intended use. EPA's partial waiver decision ignores this responsibility and allows a product to be placed into the stream of commerce, based on EPA's assurances that the label is ample warning when prior history proves that a label alone is not enough.

The introduction of E15 is much more analogous to the lead phase-down for gasoline in the 1970s.[1] To accomplish the lead phase-down, EPA mandated physical barriers to prevent misfueling. Yet, despite these physical barriers, EPA's own data indicated that annual misfueling rates topped 20 percent. If that rate of misfueling is doubled for E15, without the

[1] In the proposal, EPA references the retail pump labeling used for the ultra low sulfur diesel (ULSD) phase-in. Reliance on the dispenser labels employed in the highway ULSD phase-in and the highway low sulfur diesel (LSD) phase-out is inappropriate given that ULSD was backwards compatible with existing diesel engines and no indication of potential physical harm to consumers was present.

physical barriers present during the lead phase-down, the damage to engines, injuries to consumers, and harm to the environment will be significant.

EPA has proposed the following retail pump label language:

CAUTION!
This fuel contains 15% ethanol maximum.
Use only in:
2007 and newer gasoline cars
2007 and newer light-duty trucks
Flex-fuel vehicles
This fuel might damage other vehicles.
Federal law ***prohibits*** its use in other vehicles and engines

This language does not provide adequate warning to the consumer and does not illustrate clearly enough the harm that could be caused. "This fuel might damage other vehicles" does not convey the extensive vehicle damage that could be caused. "Federal law prohibits its use in other vehicles and engines" does not communicate the significant physical injuries that may result from using E15 in small engines, such as lawn mowers, chain saws, and weed-eaters. These types of small engines are used extensively, often by teenagers and young adults who may not fully grasp the prohibition or may not even know to look for such labels at the pump dispenser. The potential risks demand more effective measures be employed to prevent the misuse of E15.

The "1 lb." Waiver of Reid Vapor Pressure Requirements Should Extend to E15.

NPRA supports a one-psi RVP waiver for E15. It does not make sense for Congress to allow a one-pound waiver for E10/conventional gasoline (in CAA section 211(h)(4)) and for EPA to not allow it for E15/conventional gasoline. If regular octane conventional gasoline/E10 with the waiver is blended with premium octane conventional gasoline/E15 without the waiver to produce a midgrade, then this conventional gasoline midgrade would not qualify for the waiver. This would be very disruptive and would have the practical impact of further balkanizing gasoline markets by creating a new boutique fuel.

Section 211(h)(4) of the Clean Air Act provides that gasoline-ethanol fuel blends containing 10% ethanol ("E10") are allowed a Reid Vapor Pressure ("RVP") limit of 1 pound per square inch ("1 psi") greater than RVP limitations that are otherwise applicable. Enacted as part of the 1990 Clean Air Act Amendments[2], this provision also allows certain entities in the fuel distribution chain to be deemed in full compliance upon a demonstration that the gasoline portion of the fuel blend complies with RVP requirements, the ethanol portion of the blend does not exceed a CAA section 211(f)(4) waiver and that no additional alcohol or other additive has been added to increase RVP. In the proposed rule, EPA has interpreted this provision of the

[2] 110 Stat. 540 (1990).

CAA as being limited to gasoline-ethanol blends that contain 10% ethanol. The Agency, however, has requested comment as to whether the provision could be interpreted to make E15 blends eligible for a 1 psi waiver and whether such an action would have any impact on the E15 waiver decision.

As an initial matter, it is clear that EPA has not interpreted the 1 psi waiver in CAA section 211(h)(4) to apply *solely* to E10. Regulations implementing this provision (40 CFR 80.27(d)(2)) provide that gasoline blends between 9% and 10% ethanol qualify for the 1 psi waiver. EPA has also stated that "interpreting this provision to provide a one psi allowance only if the blend contains exactly 10 percent ethanol would place a next to impossible burden on ethanol blenders."[3] Thus, EPA has always determined that the Agency has at least some discretion to interpret the literal meaning of CAA section 211(h)(4) in the context of "real world" conditions and the overall intent of Congress in creating a special exception for ethanol blends as opposed to other gasoline formulations.

This interpretation is also consistent with Agency practice prior to the enactment of CAA section 211(h). Utilizing other authority in CAA section 211, EPA provided a 1.0 psi RVP allowance "[F]or blends of gasoline with *about* 10 percent ethanol, or gasohol."[4] The Agency cited several rationales for action, but indicated that overall "Gasohol RVP is not totally unregulated. The 1.0 psi 'cap' avoids the potential 'loophole' of high-RVP gasoline (which cannot be sold during the summer under these regulations) being blended with gasohol; a 1.0 psi allowance assures that ethanol will usually be blended with gasoline which meets the gasoline standard."[5] Moreover, after enactment of CAA section 211(h), EPA did not necessarily view the statutory language as providing a cap on ethanol content, but a floor. In proposing regulations to implement the newly enacted CAA section 211(h), EPA stated that it, "interprets the statute as requiring *at least* 9 percent ethanol to be eligible for the allowance."[6]

In seeking to interpret CAA section 211(h)(4) EPA therefore can exercise discretion with respect to the application of a 1 psi waiver where the granting of this waiver would further the basic statutory purposes of this section. That is, EPA is not limited to extending a 1.0 psi waiver solely to gasoline-ethanol blends that precisely blend 10% ethanol into gasoline, but rather may reasonably extend the 1.0 psi waiver to other low to moderate gasoline-ethanol blends where there is no subversion of the statutory purpose of that section. EPA could therefore reasonably interpret CAA section 211(h)(4) to extend to E15 blends.

Assuredly, such discretion is not without limits given the use of precise figure "10 percent" in the statute. But any discretion can be viewed as against the context in which CAA section 211(h)(4) was enacted. That is, at the time that Congress approved CAA section

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[3] 56 Fed. Reg. at 24, 245.
[4] 55 Fed. Reg. 23,660 (June 11, 1990) (Emphasis added).
[5] Id. at 23,666.
[6] 56 Fed. Reg. at 64,708.

211(h)(4), a waiver of fuel standards under CAA section 211(f)(4) only existed for E10 blends.[7] EPA, in interpreting this section, did not propose to change the existing regulatory requirement based on this waiver that a blend contain between 9 and 10 percent ethanol in order to qualify for the 1 psi waiver.[8] Instead, EPA believed that Congress enacted CAA section 211(h)(4) with explicit reference to the existing waiver granted to E10 under CAA section 211(f)(4). Quoting again from the proposed rule, EPA stated that:

> Compliance with the conditions of a fuel waiver under section 211(f)(4) of the CAA requires that the ethanol portion of the blend cannot lawfully be any greater than 10 percent (by volume). *Congress was clearly aware of such waiver conditions, as they are referenced in section 211(h).*[9] (Emphasis added).

Thus, CAA section 211(h)(4) can reasonably be interpreted as providing statutory authority for a 1 psi waiver to apply to low to mid-level gasoline-ethanol blends that have received a waiver pursuant to CAA section 211(f)(4). Again, this interpretation is not without boundaries. EPA could not adopt an interpretation that defied common sense (e.g., to allow for similar treatment of E50 or E85 blends). But the issue for interpretation is whether in enacting this provision, Congress intended that CAA section 211(h)(4) apply forevermore only to E10 blends, or that a 1 psi waiver apply more broadly where EPA grants a waiver to gasoline blends somewhat higher than E10 which are viewed as serving the same overall role and purpose as E10 (e.g., downstream blending of ethanol into gasoline blendstock in order to serve various policy goals that Congress has adopted for the utilization of ethanol in the nation's fuel supply).

In this regard, section CAA section 211(h)(4) cross-references CAA section 211(f)(4) with respect to parties who may be deemed in compliance. Those in the fuel distribution chain can be deemed in full compliance where the RVP limitation is met and the ethanol portion of the fuel does not exceed "its waiver condition under subsection (f)(4)." As long as the gasoline portion of the gasoline-ethanol blend complies with RVP limits and those who distribute, blend or sell a gasoline-ethanol blend do not add additional alcohol or another additive to *increase* RVP, then those in fuel distribution chain will be deemed to be in compliance. Nothing in this provision ties the compliance of those in the fuel distribution chain directly to the amount of ethanol contained in the gasoline-ethanol blend (e.g., there is no direct reference to E10).

Reading this provision of CAA section 211(h)(4) as against the statutory language providing for a 1 psi waiver for 10 percent gasoline-ethanol blends leads to two conclusions. First, Congress clearly intended that fuel distributors, blenders and sellers would be considered in compliance with fuel regulations if the fuel distributed, blended or sold was in compliance with a CAA section 211(f)(4) waiver (and other conditions of CAA section 211(h)(4) were met)). Second, in a situation where a CAA section 211(f)(4) waiver has been granted and the

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[7] *See, e.g.*, EPA, *Fuels and Fuel Additives: Gasohol; Marketability*, 44 Fed. Reg. 20,777 (Apr. 6, 1979) (waiver for Gasohol, a fuel consisting of 90% unleaded gasoline and 10% ethyl alcohol, granted "by operation of the statute" due to Administrator's election not to grant or deny).

[8] 56 Fed. Reg. at 24,245

[9] Id.

RVP of a fuel subject to the waiver and the RVP of E10 were effectively the same, it would appear illogical for Congress to deem fuel distributors, blenders and sellers as being in compliance, but to not extend this same compliance status to fuel. The illogic is even more stark when it is considered that the fuel for which a CAA section 211(f)(4) waiver has been granted is legal to be delivered to the consumer. Thus it appears that the main limitation on authority to extend a 1 psi waiver under CAA section 211(h)(4) may be viewed as applying with reference to actions that would increase RVP, rather representing a hard percentage limit on ethanol content.

With respect to EPA's second request for comment on this issue – *i.e.*, whether interpreting CAA section 211(h)(4) in this fashion would have any impact on the Agency's E15 waiver decision – our answer is firmly "no." Indeed, the statutory construction of these sections is directly opposite such an interpretation. CAA section 211(h)(4) cross-references the existence of a waiver, but the opposite is not true. Whereas CAA section 211(h)(4) provides a legal safe harbor for those operating in conformance with a section1 211(f)(4) waiver, the waiver criteria of section 211(f)(4) is directed toward the "failure of any emission control device or system."

An EPA Retail Pump Label Requirement Should Be Harmonized With the FTC.

The FTC is aware of this process and has committed to reconsider requiring the proposed Mid-Level Ethanol blend pump label if EPA grants the E15 petition (see footnote 53 at 75 FR 12473). NPRA is concerned about consumer and retail station confusion if there are different EPA and FTC pump label rules because FTC's reconsideration may result in a requirement that is different than EPA's. Therefore, these rulemakings must be harmonized to minimize consumer and retail station confusion and the potential harm that may result.

EPA Should Recall the Genesis and Context for the Current National Retail Surveys.

Today, there are industry-funded national retail surveys for RFG and highway diesel conducted by an independent survey group. These were approved by EPA to meet industry requests for regulatory flexibility and were not created to require industry to fund enforcement. The practice of an industry-funded retail survey is not a precedent for an industry mandate to fund enforcement.

First, the Clean Air Act (see section 211(k)) requires a VOC emissions standard for RFG. However, it did not explicitly include a VOC emissions averaging program, as it did for benzene and oxygen content. Industry requested flexibility and the trade-off was a random retail sampling and testing program initiated in 1995 to show that every RFG area received product with average quality parameters.

Second, industry requested flexibility with RBOB and ethanol blending. In 2003, EPA permitted this program to show that RFG contained 10 vol% ethanol at retail and, therefore,

refiners producing RBOB for the addition of 10 vol% ethanol at terminals could include this 10 vol% ethanol addition when batch reports were completed.[10]

Third, this random retail sampling and testing program for RFG was extended to highway diesel[11] to provide flexibility to meet the highway ULSD regulation for branded refiners with an alternative defense provision.

In all cases, this industry-funded random retail sampling and testing program was an appropriate response to industry's request for regulatory flexibility. Industry was never forced to participate in any of these national retail surveys; it was always an option.

EPA Should Not Impose Ethanol Content Survey Requirements.

NPRA is concerned that the Agency proposes to rely on an industry-funded retail survey to enforce pump label and oxygen content regulations. It is inappropriate for EPA to issue new retail regulations and require that they be enforced by an industry-funded retail survey. Enforcement costs should not be funded by industry and there is no precedent for such a practice today.

Under the proposed regulatory text (40 CFR 80.1502), any gasoline refiner, gasoline importer, ethanol blender, ethanol producer or ethanol importer is given two options to comply with new survey requirements. Either the "responsible party" conducts four quarterly surveys concerning whether other parties are meeting EPA requirements each year – or the party joins in the funding of a consortium designed to conduct a survey program. Parties are prohibited from introducing E15 into commerce until the survey requirements are met and failure to comply with the requirements of the survey program are a prohibited act under CAA section 211(c) The grant of a partial waiver for E15 blends[12] is also conditioned on a requirement that responsible parties participate in the survey.

EPA cites as "precedent" for this requirement a direct final rule for implementation of the Ultra-Low Sulfur Diesel ("ULSD") program and requirements of the reformulated gasoline ("RFG") program. Both actions, however, do not support the creation of this requirement and may easily be distinguished from the program that EPA is proposing in this rulemaking. Moreover, EPA lacks statutory authority with the present proposed rulemaking to impose this requirement.

In the first instance, EPA's direct final rule amending ULSD requirements[13] creates only an option for obligated parties to use a survey program as an affirmative defense in the event a

[10] With enforcement discretion letters dated 12/3/03, 11/23/04, and 12/22/05 and a direct final rule published at 71 FR 31947 (6/2/06).
[11] With enforcement discretion letters dated 5/31/06, 12/6/08 and 12/29/09 and a rule published at 75 FR 26121 (5/11/10).
[12] 75 Fed. Reg. 68,094 (November 4, 2010).
[13] 75 Fed. Reg. 26,121 (May 11, 2010).

violation of ULSD standards is uncovered. The program only creates an "alternative means" of meeting the affirmative defense requirements contained in the ULSD program.[14]

In the proposed rule, however, EPA is seeking to make the survey program a mandatory condition of two different regulatory requirements. First, EPA is conditioning the granting of a partial E15 waiver on the requirement that petroleum refiners, ethanol blenders, ethanol producers and ethanol importers participate in the survey program.[15] Second, the survey program is a mandatory requirement of the introduction of E15. No responsible party can introduced E15 into commerce until the survey program is implemented.[16]

With reference to the RFG program, fuel content and other requirements of the program apply automatically under the CAA on the basis of the area in which fuel is sold (i.e., the RFG program applies only to "covered areas"). As defined in CAA section 211(k)(10)(D), a covered area is one of the 9 ozone nonattainment areas with a population over 250,000 and having the highest ozone design value. In addition, other areas may "opt in" the RFG program. In either event, the sale of gasoline in RFG areas must meet RFG requirements and such requirements apply to all gasoline "to be used" in the covered areas.

By contrast, a waiver of fuel requirements under CAA section 211(f)(4), such as that partially granted for E15, merely allows for the introduction into commerce of such fuel. Unlike the RFG program, fuel distributors and retail outlets are not required to sell fuel which has a specified content merely on the basis that a waiver has been granted. Under the partial E15 waiver, retail locations may choose to sell E15, they may choose not to sell E15 blends; they may continue to sell E10 blends or, where allowed, they can sell gasoline without oxygenates.

In the proposed rule, however, EPA has provided that no party may introduce E15 into commerce until the survey program requirements are satisfied. Thus, the proposed survey program requirements are neither an affirmative defense as structured under the ULSD program nor do they stem from mandatory gasoline content requirements mandated by Congress, as in the RFG program.

Instead, EPA is proposing to promulgate misfueling regulations under the authority provided in CAA section 211(c). This authority allows the Administrator to "control or prohibit the manufacture, introduction into commerce, offering for sale or sale of any fuel or fuel additive." In the case of E15, however, it is the EPA's grant of a partial waiver under the authority of CAA section 211(f)(4) that provides legal authority to introduce E15 into commerce in certain vehicles identified within the partial grant of a waiver promulgated by the Administrator.[17] While the Administrator is seeking to condition the grant of the CAA section 211(f)(4) waiver on the successful completion of this proposed rule, EPA cannot further bootstrap authority found within CAA section 211(c) to layer additional requirements onto the

[14] Id. at 26,123.
[15] 75 Fed. Reg. at 68,054.
[16] 40 CFR 80.1502 as proposed.
[17] See 75 Fed. Reg. 68,098-9.

waiver determination in CAA section 211(f)(4).[18] In effect, CAA section 211(f)(4) does not support the survey requirements proposed in this rule and CAA section 211(c) does not provide authority for EPA to add additional conditions onto waivers granted under CAA section 211(f)(4). EPA is not seeking to use CAA section 211(c) to provide controls or prohibitions with regard to E15 which otherwise apply to other fuels in the distribution system; instead the construction of the proposed rule makes it clear that the survey requirements are sought as condition precedent to the grant of the CAA section 211(f)(4) waiver.

The survey requirements that are proposed also effectively put fuel suppliers in the position of enforcement officials. They are to impose survey requirements on a representative sample of possible customers for the explicit purpose of uncovering violations. Apart from the disruption to normal business relationships that might occur from this requirement, EPA cannot utilize authority meant to prohibit or control the sale of fuel as authority to effectively "conscript" private sector enforcement personnel. While we do not question EPA's authority to impose rational and reasonable reporting and enforcement provisions, CAA section 211(c) cannot be stretched so far as to make this authority unrecognizable.

NPRA Opposes a National RVP Survey.

The Agency asked for comment on the inclusion of a national RVP survey as part of the national ethanol survey (75 FR 68061). NPRA opposes the inclusion of a national RVP survey because industry would be forced to inappropriately fund enforcement.

NPRA Does Have Some Suggestions on a National Retail Survey.

While NPRA does not support the requirement of an E15 retail sampling oversight program, if the EPA elects to pursue this option we have the following comments based on communications with the RFG Survey Association that should be considered.

Sampling Issues:

Product Selection

The NPRM suggests sampling all products at the selected retail site. To satisfy the sampling concerns listed in NPRM and to maximize the breadth of the survey and for statistical purposes, the following sampling protocol is suggested.

E15/E10 site – procure 2 samples - sample E15 product (certainty) and 1 additional sample based on prioritized representative state product mix.

[18] NPRA would emphasize again that its comments in this rulemaking proceeding do not explicitly or implicitly acknowledged that EPA has the authority within CAA section 211(f)(4) to grant a waiver or a partial waiver based on the request of Growth Energy in March 2009.

E15/E10/EXX site – procure 2 samples - sample E15 product (certainty) and 1 additional sample based on prioritized representative state product mix.

E15 only site – procure 2 samples of E15 products based on prioritized representative product mix.

E10 only site – procure 1 sample based on prioritized representative state product mix.

An augment sample process will be required (at the end of the each survey/quarter) to determine if any additional sampling is necessary to achieve the annual program sample requirement.

Transitioning E15

In lieu of a nationwide survey, EPA should consider survey plans that comprehend the phase-in of E15. In general, both gasoline and ethanol refiners, importers and blenders could have difficulty in pinpointing areas of E15 distribution. To mitigate this concern and ensure adequate survey coverage for potential E15 distribution, the most practical solution is the implementation of a full state survey based on refiner, importer and blender input. For example, if only a city within a state is expected to receive E15 distribution, the entire state would be surveyed. This approach is administratively efficient and creates sufficient buffer areas to ensure that potential E15 distribution would be covered by the survey.

Shipping

The NPRM requires overnight delivery of the samples to the lab. Overnight shipping is not possible under this program due to structural issues with the proposed sampling plan. The samplers or ICs (Independent Contractors) primarily sample later in the day (they have other full-time jobs) and in general sample multiple locations during a survey period. In addition, the shipping carrier requires advance notice for pickup (usually one day for the RFGSA programs) for the following day. Due to these issues, overnight shipping is not an option. Next day shipping, is an option BUT THIS WILL ADD AN ADDITIONAL EST. $450-475K ANNUALLY TO THE COST OF THE PROGRAM.

Beginning in 2006, the ULSD testing program required overnight shipping of the sample to the lab. In 2008, the RFG Survey Association proposed an alternative sampling/delivery approach based on program statistics and results. The Association was having difficulty with the delivery carrier getting reliable overnight/next day service (in general <75% of time) for the program. The program required significant resources (at lab/delivery carrier) for daily sample tracking maintain even this level of performance. In addition, the ULSD program data demonstrated low levels potential non-compliance rate (PNC) once transitioned (< 1 percent). We expect similar PNC results with the E15 transition.

The Association recommended that a more efficient and cost effective process could be employed. The Association proposed a modified ground delivery service with delivery consequences for PNC areas. The proposed delivery service included:
- Ground shipment service – in general 1-5 days from sampling to the lab.
- Optimized shipping management/procurement to avoid Friday delivery – allowed for weekend sampling/Monday shipment
- In the event of a PNC zip-code area failure (ethanol content violation) – the area would be required to ship next day delivery for the next 12 months.

In the 4th Qtr 2008, EPA agreed to this approach for the ULSD program. The NPRA recommends this shipment/delivery system for the E15 program as the most efficient and cost effective approach.

Testing:

The NPRM proposes samples be analyzed within 24 hours of sampling. Based on the shipping discussion above, this is not possible. To determine ethanol content under 80.46, D5599 (Ofid), D4052 (Density) are required. In addition, there may be a requirement for RVP during the summer season – June 1- Sept. 15.

D5599 will drive the sample analysis process. It takes 45 minutes to run the test. Based on the anticipated sample loads (50-75 samples per business day) for this program (and several best case scenarios in the lab – shipping issues, equipment uptime, process control issues) to receive, prep, split, insert QA/QC samples, run the test via auto samplers, review results, and rerun/confirm any PNCs, the best case scenario would be 72 hours (target). This is a target goal based on best-case scenarios. It is likely (based on experience) that there will be some issues with production sampling. The projected loads and process would also require dedicated equipment and personnel that were not included in the original cost scenario provided to the EPA. THE ADDITIONAL COST TO THE PROGRAM WOULD BE AN EST. $450K/YEAR. If EPA were interested in expedited analysis of the samples, the most realistic goal would be 4-5 days. This would still require the same resources/costs as discussed above ($450K), but would provide more realistic timeframe ensure proper sample handling and analysis.

NPRA recommends that EPA consider a more normal sampling-processing schedule (10-12 business days). There will still be some incremental costs vs. the original proposed process Est. at $50M/annually. As discussed above, once samples are analyzed and confirmed the results would be released and posted to the website on a daily basis.

Costs:

The original annual cost of the program ($2,050K) provided to EPA by the RFG Survey Association was based on 7,500 annual samples, ground shipment, and 30 day turn-around for the sample analysis (PNC would be handled on an expedited basis). The RFG Survey Association would initially recommend a sample size of 9,500 samples to ensure meeting the minimum sample requirement. The estimated annual cost of this program with ground shipping proposal and 10-12 business day turn-around, for sample analysis, is $2,400K.

The E15 Pump Label Should Include Medium-Duty Passenger Vehicles.

The proposed E15 pump label shown at 75 FR 68051 includes three vehicle categories[19]:
2007 and newer gasoline cars
2007 and newer light-duty trucks
Flex-fuel vehicles

A fourth category should be added: "2007 and newer medium-duty passenger vehicles." The "2007 and newer medium-duty passenger vehicles" category is listed in EPA's partial waiver approval for E15 at 75 FR 68094 and 68095 (and at 75 FR 68048 in the misfueling mitigation proposal). This should also be listed on the E15 pump label if it is expressed in a way that consumers will understand.

NPRA Suggests Other Changes for the Proposed E15 Retail Pump Label.

"E15" should be inserted at the top of the label to identify the type of gasoline.

EPA proposed "CAUTION!" and NPRA supports this provision.

The proposed label includes "This fuel may damage other vehicles." This should be replaced with "This fuel may cause damage in non-approved vehicles and engines." NPRA remains concerned that this could imply that E15 will not damage waivered vehicles under any circumstances. No one can really guarantee this and ongoing CRC testing may yet show waivered vehicles could have problems.

EPA proposed "Federal law ***prohibits*** its use in other vehicles and engines." NPRA recommends the following substitution: "Federal law prohibits its use in all other vehicles and nonroad engines and equipment."

The Toxics Model for RFG and Anti-dumping Should Be Revised.

NPRA believes that EPA has proposed changes to the complex model that are inadequate. The Agency proposes that only the RFG VOC equations should be changed. Furthermore, EPA sees no need to modify the toxics equations for small refiners because they are not currently producing RFG and they typically certify CG as E0 with oxygenate blended downstream (75 FR 68062).

The Agency inappropriately dismisses the opportunity for small refineries, not subject to MSAT2 in 2011-2014, to claim the oxygen dilution from blending conventional gasoline/E15 on

[19] Also see proposed regulation at 80.1501(a).

batch reports if they have terminal oversight. This potential activity is allowed in current regulations at 40 CFR 80.101. NPRA recommends that EPA revises the complex model for anti-dumping toxics to account for E15. E15 will have a different anti-dumping toxics value than E0-E10. It is not relevant whether or not small refineries are doing downstream oversight today for oxygen blending; the Agency cannot preclude this potential activity in the future.

Furthermore, EPA may revise the ozone NAAQS to make it more stringent. Some states with ozone nonattainment areas may choose RFG. The effective dates for RFG may be prior to January 1, 2015 when the small refinery relief from MSAT2 expires. Small refineries may want to produce RFG with 15 vol% ethanol or RBOB for terminal blending with 15 vol% ethanol prior to January 1, 2015 and will need a revised toxics model.

NPRA recommends that the Agency issues a supplemental proposal with revised toxics equations, and does not finalize this misfueling mitigation proposal until after it considers comments on its revised toxics equations proposal.

The Special Provision for Chicago/Milwaukee RFG Should Be Revised.

The Agency neglected to propose to change the special provision for the Adjusted VOC standard for Chicago and Milwaukee RFG. The language in 80.40(c)(1) is as follows:

> "Adjusted VOC gasoline" for purposes of the general requirements in §80.65(d)(2)(ii), and the certification procedures in this section is gasoline that contains 10 volume percent ethanol, or RBOB intended for blending with 10 volume percent ethanol, that is intended for use in the areas described at §80.70(f) and (i), and is designated by the refiner as adjusted VOC gasoline subject to less stringent VOC standards in §80.41(e) and (f). In order for "adjusted VOC gasoline" to qualify for the regulatory treatment specified in §80.41(e) and (f), reformulated gasoline must contain denatured, anhydrous ethanol. The concentration of the ethanol, excluding the required denaturing agent, must be at least 9% and no more than 10% (by volume) of the gasoline. The ethanol content of the gasoline shall be determined by use of one of the testing methodologies specified in §80.46(g).

This should be revised to extend the applicability of the concentration of ethanol to at least 9% and no more than 15% (by volume) of the gasoline.

The Requirement for a "Plan" Should Be Deleted As Part of the E15 Misfueling Mitigation Final Rule.

The Agency approved E15 partially and conditionally. The fourth condition was the requirement for fuel and fuel additive manufacturers to each submit a plan to EPA, for EPA's

approval, prior to the introduction of E15 into commerce (75 FR 68150; 11/4/10). This is reasonable in advance of the promulgation of the E15 misfueling mitigation rule. This condition for a plan should be deleted when the E15 misfueling mitigation rule is promulgated because it would then be unnecessary and could be inconsistent with the E15 misfueling mitigation final rule. For example, a condition includes language for the retail pump label and participation in the retail survey that could be revised in the E15 misfueling mitigation final rule.

The RVP Value Should Not Be Required on the PTD.

EPA proposes that "the RVP does not exceed [fill in the appropriate value]" must be included on PTDs downstream of the point of ethanol addition (75 FR 68053). NPRA objects to this proposed requirement. The petroleum industry has a long record of distributing summer gasoline with the correct RVP to an area without this regulation. E15 does not materially change this situation. The Agency's proposal is unnecessary. The petroleum industry can continue to distribute summer E0, E10 and E15 with the correct RVP to an area without this regulation.