Ohio Department of Agriculture

Administrative Rules Public Hearing Summary Report

Hearing Date:	Tuesday, January 2, 2018
Today's Date:	Friday, January 05, 2018
Division:	Weights and Measures
Rules:	OAC 901:6-5-(01-02)

☐There were no comments at the hearing.

☒There were comments before, during, or after the hearing.

List of Organizations or Individuals who provided comments:

1. Ohio Ethanol Producers Association – Written Comments
2. American Petroleum Institute, Ohio – Written Comments

Consolidated review of comments received:

On December 26, 2017, the Ohio Ethanol Producers Association provided written comments on this rule package to the Department. Specifically, the Association stated, "The Ohio Ethanol Producers Association writes in support of the Ohio Department of Agriculture's proposal to update the regulations for the sale of fuel." The Association went on to state, "The simple, and very effective, adoption of Federal Trade Commission retail labeling requirements, as listed in 16 CFR 306 ensures three things: familiarity of motor fuel labeling for consumers, common labeling throughout the state and common labeling with border states. In 2014, the Federal Trade Commission updated the Automotive Fuel Ratings, Certifications and Posting requirements for ethanol flex fuels and E85. The Ohio proposed update for retail fuel stations maintains agreement with the national fuel labeling requirements. Finally, we believe Ohio should reject any proposed modification for ethanol flex fuel labeling that includes any reference to the Environmental Protection Agency. FTC is the **only** federal agency that has labeling regulations for ethanol flex fuels."

On January 2, 2018, the American Petroleum Institute of Ohio provided written comments on the rule package to the Department. API Ohio stated that they have significant concerns relating to ethanol labeling. Specifically, they stated that the draft rule provisions do not adopt both the FTC regulations found in 16 CFR 306 and the US EPAs regulations in 40 CFR 80. API Ohio believes that if the proposed changes fail to reference US EPA's regulations than E15 could potentially be relabeled as flex-fuel circumventing the Clean Air Act Reid Vapor Pressure limits. API Ohio believes that referencing both sets of regulations will provide the necessary clarity for Ohio retailers and help avoid confusion in the marketplace.

Incorporated comments into the rule:

The Department will not be incorporating any changes into the rules. Clarity and consumer confidence are of the utmost important to the Department. The proposed rules ensure that consumers will readably recognize and understand the fuels that they are filling their tanks with. Adopting both the US EPA and the FTC standards would create conflict in the rules which would make it impossible for motor fuel retailers to be in compliance with the law. Further, 16 CFR 306.10(a) creates an exemption for automotive fuel rating posting should the face of the dispenser be labeled in accordance with 40 CFR 80.1501. The US EPA standards do not create a reverse exemption for FTC standards. Due to all of the above, the Department believes that the proposed rules meets our statutory responsibility of providing consumers with accurate, honest information and provides regulatory flexibility for retailers.

December 26, 2017

The Ohio Department of Agriculture
ATTENTION: Fran Elson-Houston
8995 East Main Street
Reynoldsburg, Ohio 43068

RE: Comments to the Ohio Department of Agriculture on Chapter 901: 6-5 Retail Sales of Motor Fuels

Ms. Elson-Houston and the Ohio Department of Agriculture,

Please accept these written comments for the public hearing on rule 901:6-5 that has been filed with JCARR.

The Ohio Ethanol Producers Association writes in support of the Ohio Department of Agriculture's proposal to update the regulations for the sale of fuel. Ohio's ethanol plants are extremely busy producing renewable fuel and feed, and we thank the Ohio Department of Agriculture for crafting policies that support biofuels such as ethanol.

As for updating Chapter 901, we support the proposed language from the Department as filed and oppose any alterations, especially to language related to the sale of ethanol flex fuels and E85.

The simple, and very effective, adoption of Federal Trade Commission retail labeling requirements, as listed in 16CFR306 ensures three things: familiarity of motor fuel labeling for consumers, common labeling throughout the state and common labeling with border states.

In 2014, the Federal Trade Commission updated the Automotive Fuel Ratings, Certifications and Posting requirements for ethanol flex fuels and E85. The Ohio proposed update for retail fuel stations maintains agreement with the national fuel labeling requirements.

Finally, we believe Ohio should reject any proposed modification for ethanol flex fuel labeling that includes any reference to the Environmental Protection Agency. FTC is the **only** federal agency that has labeling regulations for ethanol flex fuels.

Thank you,



Rick Fox
President, Ohio Ethanol Producers Association
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energy API | AMERICAN PETROLEUM INSTITUTE Ohio

January 2, 2018

Ohio Department of Agriculture
c/o Legal Section
8995 East Main Street
Reynoldsburg, OH 43068

Re: Written comments on proposed Retail Sale of Motor Fuels Regulations, OAC 901:6-5-01 and OAC 901: 6-5-02

To Whom It May Concern:

The American Petroleum Institute Ohio (API Ohio) is a state affiliate office of the American Petroleum Institute (API). The API is a national trade association representing more than 625 member companies involved in all aspects of the oil and natural gas industry. API's members include producers, refiners, suppliers, retail marketers, pipeline operators, and marine transporters, as well as service and supply companies and contractors that support all segments of the industry. The API and its members, including those in Ohio, are dedicated to protecting the environment while economically developing and supplying energy resources for consumers.

API Ohio's member companies appreciate the opportunity to provide written comments on the proposed Retail Sale of Motor Fuels Regulations, OAC 901:6:5-01 and OAC 901:6-5-02, filed with the JCARR last month. Our organization has been engaged in this proposal since the initial review of the draft regulation in October of 2015. While the agency has accepted some minor changes sought by our members – including modifications to the definition of "Liquefied Natural Gas" and general spelling errors – significant concerns remain that we believe could have a severe impact on Ohio retailers, specifically as it relates to ethanol labeling. In summary, the draft rule provisions do not incorporate by reference the requirements of both the Federal Trade Commission (FTC) regulations 16 CFR Part 306 and the US EPA regulations at 40 CFR 80 – only the former. Primarily, if the proposed changes to Ohio's Administrative Code fail to reference US EPA regulation 40 CFR 80, then E15 could potentially be relabeled as flex-fuel during the summer months, circumventing the Clean Air Act Reid Vapor Pressure (RVP) limits. API believes that referencing both the FTC and US EPA regulations will provide the necessary clarity for Ohio retailers and help to avoid confusion in the marketplace.

Attached are two letters from the American Fuel & Petrochemical Manufacturers (AFPM) and the API to the US EPA that further explain our concerns.

We appreciate the opportunity to submit API Ohio's comments on proposed OAC 901:6-5-01 and OAC 901: 6-5-02 for the record, and look forward to the Department's response.

Sincerely,

Christian Zeigler
Executive Director
API Ohio

April 3, 2015

Sent by e-mail

Ms. Gina McCarthy
Administrator
United States Environmental Protection Agency
1200 Pennsylvania Avenue, Northwest
Washington, DC 20460

Dear Ms. McCarthy:

The American Fuel & Petrochemical Manufacturers (AFPM)[1] and the American Petroleum Institute (API)[2] are concerned about confusion in the market regarding E15 labeling and RVP requirements. We are submitting this letter to request that EPA issue an Enforcement Alert clarifying the regulations and prohibiting the sale of E15[3] as flex-fuel. Several retailers have engaged in the practice of relabeling E15 as flex-fuel during the summer months to circumvent the Clean Air Act (CAA or the Act) Reid Vapor Pressure (RVP) limits[4]. As a result of EPA's CAA section 211(f) substantially similar waiver for E15, E15 is classified as gasoline under EPA's regulations (not sometimes gasoline and sometimes flex-fuel) and is subject to EPA's summer RVP and pump label regulations. Some ethanol groups have actively endorsed the

[1] The American Fuel & Petrochemical Manufacturers is a national trade association representing virtually all U.S. refiners and petrochemical manufacturers. AFPM's refinery members operate 122 U.S. refineries comprising approximately 98% of U.S. refining capacity. AFPM members are obligated parties under the RFS.

[2] API is the only national trade association representing all facets of the oil and natural gas industry, which supports 9.8 million U.S. jobs and 8 percent of the U.S. economy. API's more than 625 members include large integrated companies, as well as exploration and production, refining, marketing, pipeline, and marine businesses, and service and supply firms. They provide most of the nation's energy and are backed by a growing grassroots movement of more than 25 million Americans.

[3] 80.1500 says E15 means a gasoline-ethanol blend that contains greater than 10 volume percent ethanol and not more than 15 volume percent ethanol.

[4] Jessen, Holly. "E15 Supporters Speak Up." *Ethanol Producer Magazine* August 5, 2013 http://ethanolproducer.com/blog/article/2013/08/e15-supporters-speak-up (accessed March 31, 2015)

practice of relabeling E15 as flex-fuel to circumvent the RVP controls, potentially creating both environmental degradation and confusion in the marketplace.[5]

Both the EPA regulations and the CAA could not be clearer. As EPA has consistently recognized, E15 does not qualify for the one pound waiver and must meet the summertime RVP requirements to be legally sold. The attempt to label and sell E15 as "flex-fuel" is an unlawful attempt to bypass the existing RVP regulatory requirements. If this labeling is allowed, then theoretically, the same logic could apply to virtually any blend of ethanol and gasoline such as E10.

AFPM and API believe that clarity as to the illegality of this practice of relabeling E15 as flex-fuel is needed immediately in light of the impending summertime gasoline season.

In short,

- The CAA, its implementing regulations (at 40 CFR 80.27) and State Implementation Plans set RVP requirements for motor fuels. Congress granted a one pound waiver from those RVP requirements for E10 blends. The statute is clear that the one-pound RVP waiver does not extend to E15 blends and EPA has explicitly rejected granting RVP waivers to E15 blends.
- Allowing retailers to sell E15 as flex-fuel is contrary to law and undermines EPA policy.
- The marketing of E15 is subject to the misfueling mitigation rule, a rule that sets forth a number of different requirements regarding sampling, labeling, and practices designed to prevent misfueling. Retailers offering E15 must either participate in an independent survey consortium plan (e.g., the RFG Survey Association) or have their own survey plan approved by EPA.
- Allowing retailers to sell E15 as flex-fuel creates the very consumer confusion that the misfueling mitigation rule was intended to prevent.
- EPA should clarify that the sale of E15 as flex-fuel is illegal under the CAA.

Additional background information on this issue is attached.

We would be happy to discuss this in greater detail and we look forward to your taking action on this important environmental issue in advance of the June 1 effective date at retail for summer gasoline standards.

If you have any questions concerning this request, please contact the undersigned at (202) 552-8474 for Rich Moskowitz at AFPM or (202) 682-8192 for Patrick Kelly at API.

[5] WNAX 570 Yankton, SD ACE Says Outdated Rule Pushing E15 Aside During the Summer http://wnax.com/news/180081-ace-says-outdated-rule-pushing-e-15-aside-during-the-summer/

Sincerely,





Richard Moskowitz
General Counsel
AFPM

Patrick Kelly
Senior Policy Advisor
Downstream
American Petroleum Institute

c: Janet McCabe
Phil Brooks
Chris Grundler

BACKGROUND INFORMATION

Reid Vapor Pressure Issues

Section 211(h)(1) of the CAA restricts the RVP of summer gasoline sold in the United States:

> Not later than 6 months after November 15, 1990, the Administrator shall promulgate regulations making it unlawful for any person during the high ozone season (as defined by the Administrator) to sell, offer for sale, dispense, supply, offer for supply, transport, or introduce into commerce gasoline with a Reid Vapor Pressure in excess of 9.0 pounds per square inch (psi).[6]

The Act further grants a one pound waiver to E10 blends:

> For fuel blends containing gasoline and 10 percent denatured anhydrous ethanol, the Reid vapor pressure limitation under this subsection shall be one pound per square inch (psi) greater than the applicable Reid vapor pressure limitations established under paragraph (1).[7]

EPA began its consideration of the RVP waiver issue a year before the 1990 Amendments. Beginning in 1989, EPA regulated RVP and set an interim RVP level that was 1 psi higher "for gasoline-ethanol blends commonly known as gasohol." 54 FR 11868, 11879. EPA promulgated RVP regulations in 1990 that again granted a 1.0 psi allowance for E10. 55 FR 23658, 23660. It revisited the issue again in 1991, when it modified its RVP regulations the following year and clarified that the one pound waiver was limited to ethanol blends between nine and ten percent. 56 FR 64704, 64708.

More recently, in the context of the E15 partial waiver decisions and the misfueling mitigation rule, EPA again reviewed the policies underlying the one pound RVP waiver and determined that it should not be extended to E15. In granting the partial waiver for E15 in 2010, EPA explicitly based its evaporative emissions analysis on the fact that E15 would NOT receive the one pound waiver that E10 does. EPA reached the same conclusion in 2011 when it extended the partial waiver to cover 2001 and newer light duty motor vehicles. 76 Fed. Reg. 4662, 4663.

In the Federal Register notice for the misfueling mitigation rule, EPA again reviewed the comprehensive history of the one pound waiver and concluded again that it should only apply to fuel blends containing up to ten percent ethanol.

> EPA views these three provisions—the 1 psi waiver and the deemed to comply provision in section 211(h)(4), and the State relief provision in section 211(h)(5)—as related provisions that should be interpreted together in a way that harmonizes them and provides significance and a balanced meaning to each of them. EPA believes that this is reasonably done by viewing the 1 psi waiver provision in section 211(h)(4) as applying to blends of 9–10% ethanol; by viewing the deemed to comply provision as applying to the

[6] 42 U.S.C. § 7545(h)(1).
[7] 42 U.S.C. § 7545(h)(4).

> same subset of 9–10% ethanol blends, and not applying to blends above or below the range of 9–10%; and by viewing the provision for relief to States in section 211(h)(5) as applying to the same subset of 9–10% ethanol blends.…This interpretation…reasonably balances the various interests Congress was addressing in these provisions—controlling the RVP of gasoline and ethanol blends in a way that facilitates the practical downstream blending of ethanol while also preserving the ability of States to address the increased emissions associated with a relaxed RVP limit for ethanol blends.[8]

EPA and Congress could not be clearer. E15 does not qualify for the one pound waiver and must meet the summertime RVP requirements to be legally sold. The attempt to label and sell E15 as "flex-fuel" is an unlawful attempt to bypass the existing RVP regulatory requirements. If this labeling is allowed, then theoretically, the same logic could apply to virtually any blend of ethanol and gasoline such as E10.

Misfueling Mitigation Rule and Consumer Confusion

The sale of E15 as flex-fuel also runs counter to the misfueling mitigation rule and creates the exact consumer confusion that the rule was intended to prevent. Last summer, several news sources noted the practice of selling E15 as flex-fuel. Some noted statements by the American Coalition for Ethanol that "EPA is misinterpreting a rule put in 24 years ago that … effectively limits the sale of E15 to only flex-fuel vehicle owners from June 1 to September 15."[9] An article in Ethanol Producer Magazine noted: "Retailers can still sell E15 blended with conventional gasoline for general use between October and May, and year-round for flex-fuel vehicles."[10] This is an incorrect statement of the law and causes both the circumvention of the RVP regulations discussed above and consumer confusion.

As one owner of a service station in Iowa noted, the relabeling of E15 as flex-fuel created consumer confusion: "'It's confusing the public, because they are saying "Can't we use that gas anymore?"[11] This is a situation that EPA must work to avoid.

EPA's misfueling mitigation rule sets up a regulatory regime to prevent this exact kind of consumer confusion. It includes requirements for labeling, a quality control/sampling system, and misfueling mitigation plans. These are set up to educate consumers about E15 and prevent misfueling. The EPA spent a great deal of resources and energy working with the Federal Trade Commission to establish a label with a number of requirements enumerated in 40 CFR Part 80.1501.

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[8] 76 Fed. Reg. 44406, 44435.

[9] ACE Says Outdated Rule Pushing E15 Aside During the Summer http://wnax.com/news/180081-ace-says-outdated-rule-pushing-e-15-aside-during-the-summer/. See Also Summer Means No E15, http://domesticfuel.com/2014/06/06/summer-means-no-e15/ "By unnecessarily limiting the sale to only flex-fuel vehicle owners from June 1 to September 15 in areas where most gasoline is used…."

[10] E15: Cracking the RVP Nut, October 18, 2011, http://www.ethanolproducer.com/articles/8222/e15-cracking-the-rvp-nut

[11] EPA regulations complicate things for E15 consumers, retailers, Ethanol Producer Magazine, June 6, 2014.



Figure 1.

EPA regulations require the above label (Figure 1) to be used when all E15 is sold. 40 CFR 80.1501.

Set forth below are three photos from a station offering E15 as flex-fuel last summer.



Photo 1.



Photo 2.



Photo 3.

The E15 pump depicted in photos 1 through 3 contains several labels with conflicting information. The label on the selection button contains the correct E15 label approved by EPA and notes that the fuel can be used in 2001 and newer passenger vehicles along with flex-fuel vehicles. The two other labels on the same pump state that it should only be used in flex-fuel vehicles. One sticker placed above the E-85 and E-15 pumps states that the products are not gasoline. The RVP of a sample of E15 from this dispenser tested at 9.8 psi – higher than the summer 9.0 psi regulatory limit. This example creates exactly the consumer confusion that the misfueling mitigation rule was meant to address.

Section 80.1501(b)(5) of 40 CFR only allows alternative labels if pre-approved by EPA. They must contain all of the informational elements specified in paragraph (a) of 80.1501. This means that "2001 and newer passenger vehicles" cannot be removed from the label.

Sale as flex-fuel circumvents these requirements. By allowing retailers to bypass these requirements by simply labeling the fuel as flex-fuel, EPA ignores the clear intention of the regulation and the policies that the regulation was intended to promote.

August 18, 2017

Mr. Ross Ruske and Mr. Jeff Kodish
Office of Enforcement and Compliance Assurance
U.S. Environmental Protection Agency
Sent by email: Ruske.Ross@epa.gov, Kodish.Jeff@epa.gov

Subject: E15 and Ethanol Flex Fuel Labeling

Dear Messrs. Ruske and Kodish:

The American Petroleum Institute and the American Fuel & Petrochemical Manufacturers would like to share our observations regarding the confusion over labeling of E15 gasoline and ethanol flex fuel retail dispensers during the summertime months. The overlap in EPA and FTC labeling requirements for fuels that contain more than 10 v% and a maximum of 15 v% ethanol is inconsistent and has resulted in different and conflicting labeling to the consumer during the VOC-control summer months. This difference in Federal rules is causing confusion at retail sites selling E15 and at the National Conference on Weights and Measures (NCWM) where debate is ongoing as to which requirements should be included in their model fuel and method of sale regulations. To that end, we encourage the EPA to clarify its labeling requirements prior to the first regional meetings of the NCWM in late September and early October when the debate over this topic will once again be considered.

A work item is currently before the NCWM that includes language addressing the labeling requirements for gasoline-oxygenate blends and for ethanol flex fuel (EFF). A conflict has arisen between the two definitions and the associated labeling requirements, due to the fact that the FTC definition of ethanol flex fuel overlaps with the EPA definition of E15 fuel. Specifically the EPA states that E15 is more than 10 v% and a maximum of 15 v% ethanol[1] and the FTC states that EFF is between 10 v% and 83 v% ethanol.[2] Because of this overlap some are suggesting that during the VOC-control summer months – June 1 to September 15 – it is acceptable to label an ethanol blended fuel based on how that fuel will be marketed instead of how it is formulated. That is, that one can relabel a fuel with 15 v% ethanol as

[1] "E15 means a gasoline-ethanol blend that contains greater than 10.0 volume percent ethanol and not more than 15.0 volume percent ethanol." **40 CFR § 80.1500**

[2] "Ethanol flex fuel means a mixture of gasoline and ethanol containing more than 10 percent but not greater than 83 percent ethanol volume." **16 CFR 306.0(o)**

ethanol flex fuel, if it is marketed as such, during the summer months without regard to the EPA requirements or the fact that the 1-psi vapor pressure (RVP) waiver in the Clean Air Act cannot be used for fuels with more than 10 v% ethanol.

On July 17, Mr. Tim Elliott, Washington State Department of Agriculture, Motor Fuel Quality & Enforcement, Weights and Measures Program, sent an email to the EPA Office of Enforcement and Compliance Assurance asking for clarification about E15 being sold under the FTC EFF label during the summer. Mr. Ruske responded that:

> The EPA's latest guidance on the issue of using Flex-Fuel labeling to sell E15 was published in the Federal Register within the preamble to the proposed rule update for [the Renewables Enhancement and Growth Support Rule][3].
>
> The statement is,
>
> > "As a result of the difficulty blenders face in locating sub-RVP blendstocks for use in making E15 that is compliant with the gasoline RVP requirements in areas where the 1 psi waiver for E10 applies, the EPA received requests for clarification about whether relabeling E15 as for use only in FFVs would exempt E15 from gasoline RVP requirements from June 1 through September 15. All gasoline, including E15, is subject to all of the requirements applicable to gasoline because of its formulation, not because of its end use. These requirements cannot be circumvented by relabeling." See 81 FR 80863, November 16, 2016.
>
> In addition, there are multiple documents stating EPA's guidance on E15 Misfueling Mitigation Plans here: https://www.epa.gov/fuels-registration-reporting-and-compliance-help/documents-related-e15-misfueling-mitigation-plans

While this email was helpful in the first instance, it does not indicate that while the EPA's label meets all of the FTC labeling requirements as pointed out in 16 CFR 306.10, the FTC label does not meet the EPA requirements. Further, some have expressed the opinion that there is not an issue with relabeling E15 regardless of the RVP limitations because they are marketing it as ethanol flex fuel.

As an example, Ohio recently proposed a rule for the method of sale that would require that "Ethanol flex fuel shall be identified as "Ethanol Flex Fuel or EXX Flex Fuel" and shall be labeled in accordance with 16 C.F.R. Part 306 (2016)." If this proposal were to be finalized without modification one might observe that by only citing the FTC label, it does not address the EPA's labeling rules and the associated RVP limitations.

It would be very informative if the EPA were to clarify and express its position on this issue on EPA letterhead addressed to the NCWM and to the marketer associations. Additionally, we would encourage

[3] The proposed rule is published here: https://www.federalregister.gov/documents/2016/11/16/2016-25292/renewables-enhancement-and-growth-support-rule

you, or a representative of OECA, to participate in the NCWM Western Region and/or Southern Region meeting(s) to address the questions that will surely be raised. The Western Region meeting is September 24 to 28 in Scottsdale, Arizona and the Southern region meeting on October 8-11, in Little Rock, Arkansas. More information regarding these regional meetings can be found at: http://www.ncwm.net/meetings/regions. If EPA representatives are not available during either of these times, then the interim NCWM meeting is being held on January 21 to 24 in St. Pete Beach, Florida.

Attached are both an API/AFPM letter sent in April 3, 2015 that provides additional details of some of the labeling issues as well as a Power Point presentation that identifies the concerns that API expressed to the NCWM at its annual meeting in July.

We strongly encourage the EPA to provide the clarity that is needed to prevent the NCWM from creating a model rule that could conflict with the Clean Air Act requirements. If you have any questions, please contact either Prentiss Searles or Tim Hogan.

Sincerely,

[Electronic signature]

Prentiss Searles
Marketing Issues Manager
American Petroleum Institute
1220 L Street, NW
Washington, DC 20005
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202-682-8227 office

[Electronic signature]

Tim Hogan
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