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Alexander B. Grannis
Commissioner

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Federal Trade Commission
Office of the Secretary
Room H-135 (Annex M)
600 Pennsylvania Avenue N.W.
Washington, D.C. 20580

Comments on the Fuel Rating Rule Review, R811005


Dear Docket Administrator:

The New York State Department of Environmental Conservation (Department) thanks the Federal Trade Commission (FTC or Commission) for the opportunity to comment on its proposed rulemaking, "Automotive Fuel Ratings, Certification and Posting" published March 16, 2010 (*75 Federal Register* pp. 12470-12483). As mid-level ethanol blends are commercialized as motor fuel for Flexible-Fuel Vehicles (FFVs), and as the Environmental Protection Agency (EPA) moves forward with decisions that may allow some mid-level ethanol blends (likely up to 15 volume percent ethanol) to be used as gasoline for some (but not all) existing gasoline powered vehicles and engines, it is important to address the certification and labeling of these fuels. Indeed, we understand that EPA is planning its own, separate, mid-level ethanol blend labeling proposal.

Ideally, a single suite of labels should be developed that satisfies both the FTC's consumer protection mission, and EPA's environmental protection mission. The labels should provide sufficient information for consumers to avoid fuels not legal for their application. Labels should also convey enough information about products so consumers can make rational judgments about which product to purchase. The Department urges the FTC to consult with EPA before finalizing changes to its fuel rating and labeling rules. The proposal should be adjusted as necessary to provide appropriate information to consumers as efficiently as possible. Confusing, or worse conflicting, separate EPA and FTC labels would not serve either agency. Nor would they serve the public or the retail motor fuel industry.

Detailed comments on the Fuel Rating Rule and related topics are found in Enclosure A. If you have any questions, please contact James Hyde of the Bureau of Mobile Sources and Technology Development at (518) 402-8292.

Sincerely,


David J. Shaw
Director, Division of Air Resources

Enclosure

Enclosure A
Comments on the Federal Trade Commission Proposed Rulemaking
Fuel Rating Rule Review, R811005

1. Labels should Satisfy Both FTC and EPA Requirements:

Of particular concern to the Department is the labeling of fuels whose ethanol content is on the border between gasoline and mid-level ethanol blends which are suitable only for use in Flexible Fuel Vehicles (FFVs). Currently this border is at a maximum of 10 volume percent ethanol (E10). This border is determined by U.S. Environmental Protection Agency (EPA) and the Clean Air Act. The EPA is currently considering a request to allow blending of greater than 10% ethanol in gasoline. The Commission's regulations need to be able to accommodate such changes. Failure to do so could result in vehicle misfueling, which could lead to vehicle or engine damage, decreased vehicle/engine lifetimes and increased pollution

The Department is also concerned that blends greater than 10% may be entirely unsuitable alternative fuels for older vehicles and non-road engines. Therefore, the distinctions among E10, E15 and E20 would be critical to both proper vehicle/engine operation and compliance with the Clean Air Act. Any labeling system must be able to correctly distinguish among fuels. In the cases of E10 and E15, the legal constraint must be the **maximum** volume percent of chemical ethanol. In addition EPA requires the actual measurement of the ethanol concentration by methods of sampling and analysis (as opposed to estimation by formulation).

Suggested labels could be:

"Gasoline, 10 Volume Percent Ethanol or Less. Suitable for all Vehicles & Engines"

"Gasoline, More than 10 but Less than 15 Volume Percent Ethanol. Suitable for _____ Vehicles & _____ Engines" [Blanks to be determined by EPA]

"E20, Between 16 and ___ Volume Percent Ethanol. Suitable ONLY for Flex Fuel Vehicles" [Upper limit of about 23%]

The Department recommends that E15 labels be on the orange (alternative fuel) background unless E15 is allowed for use in all gasoline powered engines and vehicles. The Department also recommends that the octane rating and ethanol blend should be identified on the same label. The posting of a separate octane label and blend labels on mid-level blend dispensers (whether required or voluntary) by the EPA would likely lead to confusion among consumers resulting in misfueling of vehicles or engines and the consequent problems previously identified.

As one of several options, the FTC proposes to allow labels that encompass the whole range of possible mid-level blend ethanol contents (10% - 70%). The Department believes that such a label would provide consumers with insufficient

information. Labels with ranges are not appropriate for E10 and E15 (if granted a waiver by EPA) unless 10 or 15 is the stated (and actual) maximum. Blends above the gasoline waiver maximum should be in no greater than 10 volume percent increments, e.g., E20, E30, E40 with the actual ethanol concentration being within plus-or-minus 3 volume percent of the posted value.

Use of the designation "E85" when it does not mean 85 volume percent ethanol is misleading and inconsistent. If E10 means 10 volume percent ethanol and E30 means 30 volume percent ethanol, it stands to reason that E85 would mean 85 volume percent ethanol. In reality, however fuel currently marked as E85 is formulated to be in the range of 70 to 83 volume percent ethanol. The actual ethanol concentration of "E85" should be subject to the same posting requirements as mid-level blends.

2. Separate Octane Labels on Mid-Level Ethanol Blends Could Mislead Consumers:

Consumers have learned that they need, or prefer, gasoline with a certain octane rating, and have been guided by pump labels to select the desired octane number without particular regard for the octane grade "name". With the presence of mid-level ethanol blends possessing octane ratings similar to those they have chosen in the past, and with no fuel having a name they are accustomed to, they may select the octane they desire without regard to the fuel description and its suitability for the certification class of their vehicle. Each blend level must include a label, identifying the ethanol blend, octane rating and any appropriate limitation on use of the fuel in order to prevent misfueling.

3. Posted Ethanol Values Must Conform to EPA Regulatory Values:

In development of these regulations FTC should guard against creating confusion by creating conflicting federal regulatory interpretations. Under some interpretations, such as for tax purposes, ethanol is defined in such a way that it includes co-produced alcohols other than ethanol, hydrocarbons and water as well as all materials added as denaturants up to a certain limit. Commercial "fuel ethanol" frequently contains as little as 92 volume percent ethanol and as much as 1 volume percent water. Denaturing with up to 5 volume percent "natural gasoline" is quite common. EPA regulations which limit the concentration of ethanol in gasoline are based on the volume percent of chemical ethanol as opposed to "fuel ethanol"; and are determined by chemical analysis of the mixture.

Retailers should be required to post ethanol concentrations which are the same as used in EPA regulations. If this is not done, the ability to select a Clean Air Act compliant fuel is greatly impaired.

4. The FTC Must Set Clear Standards and Enforce These Standards:

Measured compliance with ASTM Designation D 5798 in actual retail samples to

date has been extremely poor. A recent survey¹ of retail "E85" found that the ethanol concentrations ranged from 9.37 to 93.88 volume percent. The 9.37 volume percent sample is clearly mislabeled gasoline and not "E85". The many samples with ethanol between 55.46 and 70 volume percent, or above 83 volume percent, indicate that the product in commerce being called "E85" does not have well-defined ethanol levels. The report also states: "Class 1 samples were collected in the summer of 2008. Results showed almost 90 percent of the samples were off-specification for ethanol content and 50 percent of the samples were below the minimum vapor pressure." Clearly, it is not reasonable to rely on the ASTM specification alone as a control for ethanol concentration in blends. The FTC must set numerical limits for ethanol blends, establish reliable and reputable measurement methods, and enforce those standards.

5. FTC's Proposed Posted Warning for "E85" is Not Adequate:

The proposed language for fuel rating disclosures in Sec. 306.10 Automotive fuel rating posting provides an "illustration of compliance with this part" which reads in part:

"E-85/Minimum ___% Ethanol/May harm some vehicles. Check owner's manual"

This label is unsatisfactory for the following reasons: (1) the **maximum** volume percent of ethanol should be stated not the **minimum**. Harm to a vehicle is unlikely to occur due to failure to meet a minimum standard. Vehicles for which this fuel is intended can be operated on any fuel blend with ethanol not exceeding 85 volume percent. Blends with ethanol over 85 volume percent are the danger, and there is no federal law limiting the ethanol content of "E85"; (2) the warning "May harm some vehicles Check owner's manual" provides little useful information to a consumer. Some small engine owner's manuals do not even mention ethanol.

The label should state that the use of the fuel in vehicles which are not FFVs is a violation of federal law (the Clean Air Act).

6. Gasoline Should be Labeled as "Gasoline":

The common practice at retail fueling stations currently is to label dispensers for gasoline with only the grade names and octane labels. The word "gasoline" does not appear on the dispenser or anywhere at the facility. It is suggested that dispensers use the words "gasoline" for a fuel which EPA allows to be used in a gasoline-only vehicle. Blends with greater amounts of ethanol than allowed for these vehicles should be marked in a distinctly different fashion with some term such as "FFV fuel". This would aid the motorist in avoiding inadvertent misfueling and discourage deliberate misfueling. In either case, this misfueling could lead to damage to the vehicle, decreased life of the vehicle and increased pollution from the vehicle. Station owners could also have liability for misfueling when they do not take reasonable measures to prevent it.

¹ Alleman, Teresa L.; Ken Wright and Dan Hogan, *National Survey of E85 Quality*, Coordinating Research Council Report No. E-85, November 2009.

http://www.crao.com/reports/recentstudies2009/E-85/E-85%20Final%20Report%20_120609_.pdf